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## Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism

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# RACE, EQUALITY AND THE RULE OF LAW: CRITICAL RACE THEORY'S ATTACK ON THE PROMISES OF LIBERALISM

## INTRODUCTION

In recent years, critical race theory ("CRT") has come to occupy a conspicuous place in American law schools.<sup>1</sup> The theory holds that despite the great victories of the civil rights movement, liberal legal thought<sup>2</sup> has consistently failed African Americans and other minori-

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<sup>1</sup> See generally Stephanie B. Goldberg, *The Law, a New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A23 (describing critical race theory as having had "an undeniable impact on legal education"); Neil A. Lewis, *For Black Scholars Wedded to Prism of Race, New and Separate Goals*, N.Y. TIMES, May 5, 1997, at A14 (noting that critical race theorists "are on the faculty at almost every major law school"); Jeffrey Rosen, *The Bloods and the Crips: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27 (book review) (observing that critical race theory "has gained increasing currency in the legal academy").

<sup>2</sup> It is not possible to explain adequately the liberal tradition in American legal thought within the bounds of this short essay. In brief, my argument assumes that the "consensus school" of American political thought is correct: agreement on certain liberal principles lies at the core of American politics, and all political disputes, (including those over race, class, gender and sexual orientation), take place in the context of that broad consensus. See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955); SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (20th anniv. ed. 1962) (1944); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Richard D. Heffner ed., Mentor 1956); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (Norton 1972) (1969). But see ROGERS SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997) (rejecting consensus school, arguing instead that America contains "multiple traditions" of liberalism and bigotry); Rogers Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 558-563 (1993) (further disputing consensus school). Liberal principles are so ingrained in political and legal discourse in the United States that they are hardly mentioned anymore, but they have structured and moderated political and legal debate for more than two centuries and are likely to do so long into the future. See generally HARTZ, *supra*. They include government with the consent of the governed; representative democracy; guaranteed liberties and equal citizenship; separated institutions checking and balancing each other until consensus is reached, and multiple "sovereignities," including those of states, local governments and individuals. See HUNTINGTON, *supra*, at 14. These basic principles (and there are more) are embodied in the higher law of constitutions, which are enforced (some of the time) by reasonably independent judges (chosen through political processes) under a system that aspires to the rule "of laws, and not of men." See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Judges make their decisions case-by-case, justifying their choices according to a system of precedent and reasoning by analogy, but with some freedom to reshape the law incrementally, and even to overrule precedents on occasion. See generally EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* (1948). Adherence to these general principles is nearly universal in the United States, and defines people as being "American" more accurately

ties.<sup>3</sup> Critical race theorists attack the very foundations of the liberal legal order, including equality theory,<sup>4</sup> legal reasoning,<sup>5</sup> Enlightenment rationalism<sup>6</sup> and neutral principles of constitutional law.<sup>7</sup> These liberal values, they allege, have no enduring basis in principle, but are mere social constructs calculated to legitimate white supremacy.<sup>8</sup> The rule of law, according to critical race theorists, is a false promise of principled government, and they have lost patience with false promises.<sup>9</sup> For them, the practice of law is just another front in the fight to achieve racial "liberation."<sup>10</sup>

The "race-crits," as they call themselves,<sup>11</sup> identify less with the egalitarian integrationists who led the non-violent civil rights movement than with the black nationalists of the late 1960s who demanded "black power."<sup>12</sup> While critical race theorists purport to share the liberals' goal of racial and social justice, they view that endeavor not as a matter of principle, but as a matter of simple group interest to be

than characteristics such as national origin, ethnicity or religion. See HUNTINGTON, *supra*, at 18, 30. My criticism of critical race theory proceeds from these basic principles. See *infra* notes 205-346 and accompanying text.

<sup>3</sup> See *infra* notes 82-147 and accompanying text.

<sup>4</sup> See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 377 (1992) [hereinafter Bell, *Realism*] (arguing that "a commitment to racial equality merely perpetuates [blacks'] disempowerment").

<sup>5</sup> See *id.* at 376 (arguing that "[p]recedent, rights theory, and objectivity merely are formal rules that serve a covert purpose," i.e., legitimating racism).

<sup>6</sup> See RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* 142-145 (1995) [hereinafter *RODRIGO CHRONICLES*] (arguing that Enlightenment philosophy "is the very means by which [minorities] are kept down").

<sup>7</sup> See MARI MATSUDA ET. AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 6 (1993) [hereinafter *WORDS THAT WOUND*] ("Critical race theory expresses skepticism toward dominant legal claims of neutrality . . .").

<sup>8</sup> See *id.* (stating that critical race theory investigates how "traditional interests implicated in the status quo" serve as "vessels of racial subordination").

<sup>9</sup> See RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 45 (1996) [hereinafter *RACE WAR*] (stating that "the rule of law in all its majesty never holds for [minorities], but always for [their] adversaries or for empowered groups"); MARI MATSUDA, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63, 63 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *KEY WRITINGS*] (arguing that "black people" understand that any "claim to neutral application of legal principles is false").

<sup>10</sup> See Charles Lawrence, *The Word and the River: Pedagogy as Scholarship as Struggle*, in *KEY WRITINGS*, *supra* note 9, at 336, 340 [hereinafter Lawrence, *Word & River*].

<sup>11</sup> See Angela Harris, *Foreword, The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 742 (1994).

<sup>12</sup> See generally STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION* (1967); see also *WORDS THAT WOUND*, *supra* note 7, at 6 (critical race theory "borrows from . . . nationalism"); Gary Peller, *Race-Consciousness*, in *KEY WRITINGS*, *supra* note 9, at 127, 150 (critical race theorist asserts that black nationalism is a useful guide for race reform).

achieved "by any means necessary."<sup>13</sup> They have no qualms arguing for jury nullification on the basis of racial affinity,<sup>14</sup> hate-speech codes which criminalize bigoted expression<sup>15</sup> or group rights doctrines which would allow victims of historic racism to sue whites as a group for reparations.<sup>16</sup> The harmful precedents such measures would establish is of little concern to the race-crits—their goal is minority advancement at all costs.<sup>17</sup>

This Note criticizes CRT as an unprincipled, divisive and ultimately unhelpful attack on the liberal tradition in America.<sup>18</sup> First, race-crits fail to offer replacements for liberalism's core values.<sup>19</sup> Rather, their postmodern rejection of all principles leaves them entirely "critical," while their narrow, interested stance renders them mere advocates within the liberal legal system, not theorists who might offer better alternatives.<sup>20</sup> Second, despite their undeniable energy, the race-crits are remarkably unhelpful as legal and political advocates within the liberal system. Their wholesale rejection of the rule of law limits

<sup>13</sup> See Malcolm X, *At the Audubon*, in *MALCOLM X SPEAKS* 116 (George Breitman ed., Grove Weidenfeld Evergreen 1990) (1966).

<sup>14</sup> See generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) [hereinafter Butler, *Black Power*] (arguing that black jurors should acquit black defendants charged with certain crimes, such as drug-dealing, on the basis of racial affinity, regardless of the evidence, because there are too many black men in jail).

<sup>15</sup> See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997) [hereinafter *MUST WE DEFEND NAZIS?*] (arguing for more "realist" First Amendment that would allow censorship of hate speech).

<sup>16</sup> See Matsuda, *supra* note 9, at 67–79.

<sup>17</sup> See Alan Freeman, *Derrick Bell—Race and Class: The Dilemma of Liberal Reform*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 458–59 (Richard Delgado ed., 1995) [hereinafter *CUTTING EDGE*] (stating that Derrick Bell judges legal doctrine by its "results" alone); Lawrence, *Word & River*, *supra* note 10, at 340 (arguing that critical race theorists evaluate "work product," such as "judicial opinions, legislation, organizing tactics, ideas, theory, [and] poetry" according to "the degree to which the effort serves the cause of liberation").

<sup>18</sup> See *infra* notes 205–346 and accompanying text. Other writers have criticized CRT from different angles. See, e.g., DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (criticizing "radical multiculturalists," including critical race theorists, for abandoning objectivity, reason and truth in legal discourse); Steven C. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996) (criticizing CRT's advocacy of suppressing hate speech); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (stating that critical race theorists have not proven their claims of racism in the legal academy); Alex Kozinski, *Bending the Law*, N.Y. TIMES BOOK REV., Nov. 2, 1997, at 46 (book review) (stating that critical race theorists' use of narrative rather than objective analysis makes enlightening dialogue with them impossible); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (criticizing CRT for having "succumbed completely to postmodernist absurdity"); Rosen, *supra* note 1, at 27 (describing CRT as "a stark challenge to the liberal ideal of the rule of law").

<sup>19</sup> See *infra* notes 262–99 and accompanying text.

<sup>20</sup> See *infra* notes 262–99 and accompanying text.

their persuasiveness as legal advocates, while their dismissal of America's guiding principles makes them politically ineffective.<sup>21</sup> In the process, the race-crits' racist, blame-game rhetoric does much to alienate potentially helpful whites.<sup>22</sup>

My disagreement with the race-crits has less to do with their long-term goals than with their diagnoses and solutions. Disadvantage in the United States continues to fall too heavily on racial minorities.<sup>23</sup> Inequities in criminal justice,<sup>24</sup> immigration law<sup>25</sup> and welfare "reform" remain rampant,<sup>26</sup> but are due to much more than simple bigotry.<sup>27</sup> The most important political problem today is to prepare all persons to survive and prosper in a service-oriented, information-driven economy.<sup>28</sup> Inequalities in wealth are growing because low-skilled jobs are leaving for third-world shores, while better paying jobs increasingly require advanced education.<sup>29</sup>

Addressing these problems is a tall order, and will not be advanced very far by academic demands for race-based benefits. Indeed, the very idea of race-based measures as a remedy for economic disadvantage is collapsing as Americans come to think less in terms of black and white and more in terms of a diverse rainbow of colors, with many hues in between.<sup>30</sup> So long as race was a reasonable proxy for disadvantage, as

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<sup>21</sup> See *infra* notes 300-41 and accompanying text.

<sup>22</sup> See *infra* notes 323-30 and accompanying text.

<sup>23</sup> See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 27-48 (1997).

<sup>24</sup> See *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 99-129 (Steven R. Donziger ed., 1996) [hereinafter *THE REAL WAR ON CRIME*] (describing unequal incarceration of black Americans).

<sup>25</sup> See Anthony DePalma, *New Rules at U.S. Borders Provoke Criticism*, N.Y. TIMES, Nov. 14, 1997, at A1; Anthony Lewis, *The Quality of Mercy*, N.Y. TIMES, Feb. 27, 1999, at A31 (describing Draconian and largely random deportations that take place under 1996 immigration law).

<sup>26</sup> See Jason DeParle, *As Welfare Rolls Shrink, Load on Relatives Grows*, N.Y. TIMES, Feb. 21, 1999, at A1 (reporting that recent welfare overhaul has increasingly forced relatives of young children, especially grandmothers, to care for them).

<sup>27</sup> See generally THOMAS BYRNE EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1991) (describing complicated reasons for rightward shift in American politics between 1960s and 1980s); PATTERSON, *supra* note 23 (arguing that while minorities in U.S. have made great progress over last several decades, inequalities remain due to complicated mix of economic, political and cultural factors); Jeffrey J. Pyle, *Crime, Punishment, and the Rise of Retributive Justice in the United States, 1965-1997* (1997) (unpublished B.A. thesis, Trinity College, Hartford, Conn.) (on file with the Trinity College library) (arguing that rise of retributive criminal justice policies in recent decades is partly due to changing, race-based stereotypes about criminals).

<sup>28</sup> See PATTERSON, *supra* note 23, at 186.

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., STEPHAN THIERNSTROM & ABIGAIL THIERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 541-43 (1997) (noting important differences within racial groups);

it was in the wake of de jure segregation, identity-group remedies like race-based affirmative action made a great deal of sense.<sup>31</sup> But, as the black middle class has grown and Americans have come to recognize wide economic and cultural differences within (and not just between) ethnic groups, such claims have lost some of their force.<sup>32</sup> Thus, when critical race theorists treat civil rights law as a species of interest-group politics, they surrender the moral high ground of constitutional principle and risk being seen as just another group clamoring for benefits.<sup>33</sup> Such advocacy does nothing for disadvantaged minorities in America.

## I. BACKGROUND

No single manifesto defines critical race theory. Attempts at synthesizing its variations are rare, and ultimately prove more elusive than enlightening.<sup>34</sup> This section will attempt to evaluate the movement's most common assertions.<sup>35</sup>

### A. Descriptive Elements

Critical race theory purports to (1) describe race and racism in America<sup>36</sup> and (2) show how the liberal legal system reflects and perpetuates "racial subordination."<sup>37</sup>

WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 144 (2d ed. 1980) (stating that economic changes make it "increasingly difficult to speak of a single or uniform black experience").

<sup>31</sup> Much of the early advocacy for affirmative action rested on the fact that black Americans were overwhelmingly poor. See, e.g., Lyndon Baines Johnson, To Fulfill These Rights: Commencement Address at Howard University, in *AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION?* 56, 59 (Francis J. Beckwith & Todd E. Jones eds., 1997) (stating that "Negroes are trapped . . . in inherited, gateless poverty").

<sup>32</sup> See THIERNSTROM & THIERNSTROM, *supra* note 30, at 541-43.

<sup>33</sup> See, e.g., Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, in *KEY WRITINGS*, *supra* note 9, at 20 [hereinafter Bell, *Interest-Convergence*]; Kimberlé Crenshaw, *Race, Reform, and Retrenchment*, in *KEY WRITINGS*, *supra* note 9, at 103, 117 [hereinafter Crenshaw, *Race, Reform*].

<sup>34</sup> See generally Anthony V. Alfieri, *Black and White*, 10 LA RAZA L.J. 561 (1998) (book review); Harris, *supra* note 11. See also *KEY WRITINGS*, *supra* note 9, at xiii-xxxii; *WORDS THAT WOUND*, *supra* note 7, at 1-15. Two representative compilations of critical race theory exist. See CUTTING EDGE, *supra* note 17; *KEY WRITINGS*, *supra* note 9.

<sup>35</sup> This Note necessarily groups many critical race theorists together in an effort at synthesis. Not all race-crits necessarily subscribe to every assertion put forth in this summary, which attempts merely to outline the major themes addressed by CRT's leading lights. See *infra* notes 36-204 and accompanying text.

<sup>36</sup> See *infra* notes 38-81 and accompanying text.

<sup>37</sup> See *infra* notes 82-147 and accompanying text.

## 1. Race and Racism in America

All CRT writers believe, in varying degrees, that "racism is endemic to American life."<sup>38</sup> While mainstream civil rights reformers assume that racism is a product of ignorance and can be overcome by education, critical race theorists insist that racism is pervasive and immutable, and "lies at the very heart of American—and western—culture."<sup>39</sup> To critical race theorists, white racism is a "defect in the collective unconscious,"<sup>40</sup> a cultural phenomenon that automatically "reproduces hierarchy" even in the absence of conscious discrimination.<sup>41</sup> In a racist society, everyone is either an "outsider" or an "insider,"<sup>42</sup> a "victim" or a "perpetrator."<sup>43</sup> Much as Marx described human history as a permanent conflict between the bourgeoisie and the proletariat,<sup>44</sup> the race-crits view American society as a zero-sum conflict between powerful white males and powerless minorities that cannot be mitigated by other affinities or commonalities.<sup>45</sup>

Race-crits do not arrive at this conclusion empirically; nor do they acknowledge alternative explanations for disadvantage, such as low wages, job insecurity, limited inheritances, absence of health benefits, poor labor markets or access to quality education.<sup>46</sup> Inconvenient facts do not long detain them because they value ammunition more than nuance or complexity.<sup>47</sup> They are also part of the postmodernist left, an academic movement that insists that all knowledge is "socially constructed,"<sup>48</sup> and therefore inherently subjective, contingent and immune to

<sup>38</sup> See WORDS THAT WOUND, *supra* note 7, at 6.

<sup>39</sup> Harris, *supra* note 11, at 749.

<sup>40</sup> *Id.* at 771; see also Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in KEY WRITINGS, *supra* note 9, at 235, 237 [hereinafter Lawrence, *Id, Ego*] (arguing that "we are all racists. At the same time, most of us are unaware of our racism.").

<sup>41</sup> See RACE WAR, *supra* note 9, at 14–19.

<sup>42</sup> See generally KEY WRITINGS, *supra* note 9.

<sup>43</sup> See Matsuda, *supra* note 9, at 70.

<sup>44</sup> See KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 79 (Samuel Moore trans., Penguin Books 1985) (1848).

<sup>45</sup> See RACE WAR, *supra* note 9, at 120 (predicting that America will soon see a war between blacks and whites); Bell, *Interest-Convergence*, *supra* note 33, at 22 (arguing that whites only support racial equality when it serves their "interests" to do so).

<sup>46</sup> See, e.g., WILSON, *supra* note 30; WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

<sup>47</sup> Cf. Charles Abernathy, *Advocacy Scholarship and Affirmative Action*, 86 GEO. L.J. 377, 384–93 (1997) (book review) (characterizing Matsuda and Lawrence's work as "advocacy scholarship" which "overstates the case, dehumanizes the opposition, and turns off as many readers as it may convert"); see also *supra* note 17.

<sup>48</sup> See Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 674 (1993).

objective evaluation.<sup>49</sup> For example, Derrick Bell, a pre-eminent race-crit, insists that "abstraction, put forth as 'rational' or 'objective' truth, smuggles the privileged choice of the privileged [i.e., whites] to depersonalify their claims and then pass them off as the universal authority and the universal good."<sup>50</sup> In other words, mainstream truths dominate legal discourse not because they are better than other truths, but because groups in power espouse them.<sup>51</sup> Charles Lawrence urges "outsiders" (i.e., minorities) to free themselves from the "mystification" produced by the "ideology" of objective truth: "We must learn to trust our own senses, feelings, and experiences, and to give them authority, even (or especially) in the face of dominant accounts of social reality that claim universality."<sup>52</sup> According to the race-crits, knowledge is not universal;<sup>53</sup> it is autobiographical and group-based.<sup>54</sup>

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<sup>49</sup> See Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, HARV. C.R.-C.L. L. REV. 57, 59-61 (1995) (describing CRT's postmodernist stance); see also WORDS THAT WOUND, *supra* note 7, at 3 ("Critical race theorists embrace subjectivity of perspective and are avowedly political."). Angela Harris defines postmodernism as the belief that "knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world . . ." Harris, *supra* note 11, at 748. A less sympathetic observer has defined it:

Postmodernism is the degenerate egalitarianism of the intelligentsia. It launches a non sequitur from a truism. The truism is that because our knowledge of facts is conditioned in complex ways by the contexts in which facts are encountered, the acquisition of knowledge is not simple, immediate and infallible. The non sequitur: therefore all assertions are equally indeterminate—and equally respectable. All ascriptions of truth are arbitrary, so there are no standards of intellectual conscientiousness. So whoever has power shall decree the truth.

George F. Will, *Toricelli's Larger Point*, NEWSWEEK, Sept. 1, 1997, at 78.

The race-crits' adherence to postmodernism may be merely opportunistic. Richard Delgado, for example, announces the end of "linear thought" in one article, yet as the editor of a CRT compilation he included a survey of empirical studies of white juror bias against black defendants. Compare Richard Delgado, *Rodrigo's Chronicle*, in CUTTING EDGE, *supra* note 17, at 346, with Cheri Lynn Johnson, *Black Innocence and the White Jury*, in CUTTING EDGE, *supra* note 17, at 180.

<sup>50</sup> Derrick Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 901 [hereinafter Bell, *Who's Afraid?*]. This assertion mirrors the claims of radical, or "third-wave," feminists that "objective reality is a myth," imposed by males to legitimate their domination of women. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1378 (1986).

<sup>51</sup> See Bell, *Who's Afraid?*, *supra* note 50, at 901.

<sup>52</sup> Lawrence, *Word & River*, *supra* note 10, at 338.

<sup>53</sup> See KEY WRITINGS, *supra* note 9, at xiii (claiming that critical race theory rejects objectivity and seeks to "create new, oppositionist accounts of race").

<sup>54</sup> See FARBER & SHERRY, *supra* note 18, at 80-81 (showing how critical race theory judges scholarship based on how it represents "the distinctive experience" of minority groups and on its capacity for "community building" within that group); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 540-43 (1991) (arguing that black scholars have a particular need to justify their beliefs based on anecdote and autobiography, because "[w]ho we are matters as much as what we are and what we think"). Many critical race theorists adhere to the idea of a distinctive "voice of color" that is



By discarding the processes of objectivity and rational empiricism, race-crits clear the ground for their idea that a person's position on the racial totem pole controls his or her fate to the exclusion of all else. Under this worldview, minorities today are faring little better than they were before segregation was declared unconstitutional.<sup>55</sup> According to Bell, many black people are "more deeply mired in poverty and despair than they were during the 'Separate but Equal' era."<sup>56</sup> Indeed, he claims, the lives of some people of color are "little less circumscribed than were those of their slave forbears."<sup>57</sup> Bell further argues that even those blacks in the middle class have "seen their progress halted and many are sliding back toward the low income status they worked so hard to escape."<sup>58</sup> Richard Delgado, one of the most prolific critical race theorists, asserts that those blacks who make it to the middle class are worse off than those who live in low-income, all-black communities because they are more likely to come in contact with whites, and therefore, racism.<sup>59</sup> And Regina Austin argues that the "ideology of individual black advancement" is "but a veneer, unraveling in the face of collective lower-class decline."<sup>60</sup>

Because evidence plays little role in the race-crits' description of black disadvantage, they feel no need to explain the economic and political progress of black Americans during the last thirty years.<sup>61</sup> Postmodern subjectivism allows race-crits to dismiss inconvenient facts

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supposedly representative of the minority community. See FARBER & SHERRY, *supra* note 18, at 80-81. As Alex Johnson puts it, the "Voice of Color is about illuminating the unique insights that come from the duality inherent in the existence of any person of color who resides in the United States." Alex Johnson, *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, 845 (1994) (emphasis added). This "voice of color" seems unable to speak about anything but racial issues. See *id.* at 835-37. It is also apparently a left-wing voice. John O. Calmore contends that blacks who join the "ideological right wing" are "prone to suffer a race-image anxiety," implying that "authentic" intellectuals of color cannot be conservative. 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 9, at 326. Minorities who dare question the alleged opinions of their group are condemned as traitors to their race. See FARBER & SHERRY, *supra* note 18, at 80 (discussing harsh reaction to black scholar Randall Kennedy's critique of CRT). Not all race-crits adhere to the "voice of color" argument, however. Paul Butler, for example, argues that "[r]ace is a troubling and usually inaccurate proxy for perspective." Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 852 (1997) [hereinafter Butler, *Affirmative Action*].

<sup>55</sup> See Bell, *Realism*, *supra* note 4, at 374.

<sup>56</sup> *Id.* This sweeping claim is undocumented.

<sup>57</sup> DERRICK BELL, *AND WE ARE NOT SAVED* 4 (1987).

<sup>58</sup> Bell, *Who's Afraid?*, *supra* note 50, at 903.

<sup>59</sup> See RACE WAR, *supra* note 9, at 31 n.98.

<sup>60</sup> Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, in CUTTING EDGE, *supra* note 17, at 293, 295.

<sup>61</sup> See, e.g., PATTERSON, *supra* note 23, at 17-27.

as suspect if they appear to support the "dominant" perspective.<sup>62</sup> Thus, Derrick Bell dismisses all criticism of CRT by whites as "a pathetically poor effort to regain a position of dominance."<sup>63</sup> He encourages race-crits, when criticized, to "consider the source. As to a response, a sad smile of sympathy may suffice."<sup>64</sup> Black scholars like Randall Kennedy, who dare dispute CRT's assertions, are tarred with an academic version of the "Uncle Tom" epithet.<sup>65</sup> For example, Paul Butler dismissed criticism of his call for race-based jury nullification with the insulting allegation that his critic (Kennedy) simply wanted to be an "honorary white."<sup>66</sup>

Instead of civil discourse, race-crits substitute subjective, personal and even fictitious "narratives" as evidence of the permanence and prevalence of racism.<sup>67</sup> Public discourse, to race-crits, is just a clash of different "stories."<sup>68</sup> Indeed, "'rationalism' is itself just a particular kind of story"<sup>69</sup> which can be contradicted with non-rational "counterstories."<sup>70</sup> Unlike empirical research, however, the meaning, accuracy or representativeness of a personal story cannot be questioned without attacking the storyteller's identity, thereby confirming the critic's hostility to the victims of racism.<sup>71</sup> Questioning the race-crits' grip on reality, then, is not just disrespectful, it is oppressive.<sup>72</sup>

<sup>62</sup> See FARBER & SHERRY, *supra* note 18, at 137; see also Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2421 (1989) [hereinafter Delgado, *Plea*] (describing all denials of racism as "stock stories" that "justify the world as it is").

<sup>63</sup> Bell, *Who's Afraid?*, *supra* note 50, at 910.

<sup>64</sup> *Id.*

<sup>65</sup> See Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1873-74 (1990) (implying that Randall Kennedy, in criticizing CRT claims of racism in the legal academy, simply sought to help "the empowered remain empowered" and "[render] the disempowered . . . even more so").

<sup>66</sup> See Paul Butler, *(Color) Blind Faith: The Tragedy of RACE, CRIME, AND THE LAW*, 111 HARV. L. REV. 1270, 1287 (1998) (book review).

<sup>67</sup> See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 44-51 (1991) (telling autobiographical story of being turned away from a Benetton store by a sales clerk, probably out of racial bigotry, and subsequent hostility of legal academicians to her telling the story in a law review). See generally Delgado, *Plea*, *supra* note 62 (advocating legal storytelling in place of doctrinal analysis).

<sup>68</sup> See Delgado, *Plea*, *supra* note 62, at 2412 (describing debate over faculty hiring at law school as a clash of "dominant group" and "outgroup" stories).

<sup>69</sup> Harris, *supra* note 11, at 757.

<sup>70</sup> See Delgado, *Plea*, *supra* note 62, at 2414-15.

<sup>71</sup> See, e.g., FARBER & SHERRY, *supra* note 18, at 90-94 (describing ethnic rancor between two scholars, Gary Peller and Mark Tushnet, in interpreting a story by Patricia Williams).

<sup>72</sup> Even friendly critiques of CRT narratives are subject to ad hominem attack. See, e.g., Richard Delgado, *Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95, 107 (1996) (accusing Professor Anne Coughlin, who interpreted CRT narratives, of "replicating the sin of the slave master" who wrote "ruthlessly reductive" accounts of his slaves).

Critical race narratives cover a range of different scenarios. Some record fictional conversations between blacks who share the CRT perspective.<sup>73</sup> Others propound hypotheticals that reflect the race-crits' pessimism about race in the United States.<sup>74</sup> For example, in Derrick Bell's influential narrative "The Space Traders,"<sup>75</sup> space aliens land in New Jersey in the year 2000 and offer to trade gold, technology and other untold treasure in return for all the nation's black citizens, who are to be taken away in the visitors' spaceships.<sup>76</sup> According to Bell's fiction, white America overwhelmingly accepts the deal,<sup>77</sup> the Supreme Court finds it constitutional<sup>78</sup> and the country's African Americans are taken away in chains, "as their forbears had arrived."<sup>79</sup>

In sum, the race-crits' conception of race relations in America is profoundly pessimistic.<sup>80</sup> Because the race-crits paint such a bleak picture, they rarely suggest strategies for overcoming white racial bigotry. Racism, to race-crits, is all-pervasive and all-controlling; nothing can be done. Accordingly, Derrick Bell has no difficulty making the sweeping claim that

[b]lack people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies.<sup>81</sup>

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<sup>73</sup> See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 15-31 (1992) [hereinafter *FACES*] (fictional conversation between black professor and black taxi driver who views emancipation, integration and the Martin Luther King, Jr. holiday as nothing more than "symbols" which "the Man" uses to pacify minorities). See generally RODRIGO CHRONICLES, *supra* note 6 (collection of fictional conversations between radical black student and "professor" espousing race-crit arguments).

<sup>74</sup> See, e.g., RACE WAR, *supra* note 9, at 120 (describing conservative attacks on welfare and affirmative action as deliberate efforts to increase minority misery in hopes of provoking a race war, which could then be used to justify still more coercive measures); Derrick Bell, *The Space Traders*, in *FACES*, *supra* note 73, at 158-94 [hereinafter Bell, *Space Traders*].

<sup>75</sup> See Bell, *Space Traders*, *supra* note 74, at 158-94.

<sup>76</sup> See *id.* at 159.

<sup>77</sup> See *id.* at 192.

<sup>78</sup> See *id.* at 191.

<sup>79</sup> *Id.* at 194.

<sup>80</sup> See *supra* notes 36-79 and accompanying text.

<sup>81</sup> See Bell, *Realism*, *supra* note 4, at 373.

## 2. Racism and the Rule of Law

After asserting the ubiquity of racial "subordination" in American society, race-crits assert that law is not the solution—it is part of the problem.<sup>82</sup> The American legal system, they argue, is structurally incapable of achieving racial equality because law is essentially politics,<sup>83</sup> and politics is white supremacy.<sup>84</sup> Neither laws nor judicial decisions can rest, as Herbert Wechsler said they must, "on reasons quite transcending the immediate result that is achieved,"<sup>85</sup> because white law-makers cannot transcend their subconscious racism.<sup>86</sup> To the race-crits, the hard-won protections of civil rights law, so dear to integrationists like Thurgood Marshall,<sup>87</sup> serve primarily to deflect calls for more radical change, thereby preserving the racial status quo.<sup>88</sup> As a result, "abstract principles," such as racial equality, can only "lead to legal results that harm blacks and perpetuate their inferior status."<sup>89</sup>

Race-crits sometimes refer to this as a "realist" interpretation of law, in the tradition of American legal realism.<sup>90</sup> The legal realism movement, prominent in law schools between the late 1920s and early 1950s, attacked the formalistic notion that legal rules, if applied faith-

<sup>82</sup> See KEY WRITINGS, *supra* note 9, at xxv (stating that the law "constructed race" and reproduces "the structures and practices of racial domination").

<sup>83</sup> See Harris, *supra* note 11, at 747. Much worthwhile legal scholarship, of course, is devoted to "debunking" the notion that the law is entirely separate from politics. For many historians and political scientists, a case like *Marbury v. Madison* is more interesting for what it illuminates about the politics of judicial decisionmaking than for the doctrine it produced. 5 U.S. (1 Cranch) 137 (1803). To them, it is sufficient to know that *Marbury* was a game of legal chicken in which Chief Justice Marshall blinked first, but with brilliance, allowing Jefferson to win the battle over *Marbury*'s commission but winning total victory for American courts in the war for judicial review. See, e.g., ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* 25–28 (2d. ed. 1994). Marshall behaved badly, failing to consider the Court's jurisdiction before proceeding to the merits of the case, sitting when he should have recused himself, twisting the law of contracts to find that *Marbury*'s right had vested the moment the wax dried on his commission, then willfully misreading the Judiciary Act to find it in conflict with the Constitution. See William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 6–10. The debunkers are right, of course—judicial review did have a bastard birth. See *id.* But that does not discredit the doctrine, without which constitutional government as we know it would not have been possible. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (calling judicial review a "permanent and indispensable feature of our constitutional system").

<sup>84</sup> See *supra* notes 36–79 and accompanying text.

<sup>85</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

<sup>86</sup> See RODRIGO CHRONICLES, *supra* note 6, at 63.

<sup>87</sup> See generally JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998).

<sup>88</sup> See RODRIGO CHRONICLES, *supra* note 6, at 67.

<sup>89</sup> Bell, *Realism*, *supra* note 4, at 369.

<sup>90</sup> See *id.* at 364–68 (drawing comparison between legal realism and his own form of "racial realism"); Butler, *Affirmative Action*, *supra* note 54, at 876 (describing himself as "legal realist").

fully, would produce predictable outcomes in most situations.<sup>91</sup> Critical race theory's links to this body of scholarship, however, are superficial—the only real similarity between CRT and legal realism is that both theories are hostile to rigid formalism.<sup>92</sup> Unlike race-crits, the legal realists did not “deconstruct” law and leave nothing in the void. Some used empirical research about social conditions to inform legal rules,<sup>93</sup> while others focused their efforts on making legal scholarship more reflective of legal reality.<sup>94</sup>

Critical race theory more properly traces its lineage to the black liberationist movement of the 1960s<sup>95</sup> and the Critical Legal Studies (“CLS”) movement of the 1970s and 1980s.<sup>96</sup> Critical legal scholars, whose ranks included a number of neo-Marxist intellectuals, former New Left activists and ex-counter-culturalists,<sup>97</sup> insisted that law is not only politically and culturally contingent, as the realists demonstrated, but is an instrument of power whose chief function and effect is to reinforce societal disadvantage.<sup>98</sup> According to Duncan Kennedy,<sup>99</sup> methods of legal reasoning “are *only* argumentative techniques,” not ways of determining which legal outcomes are more legitimate than others.<sup>100</sup> Law is “indeterminate,”<sup>101</sup> and there is “never a ‘correct legal

<sup>91</sup> See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930). For a good history of the movement, see generally LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (1986); see also FARBER & SHERRY, *supra* note 18, at 17–19.

<sup>92</sup> The same could be said of liberalism. See *infra* notes 309–15 and accompanying text.

<sup>93</sup> See KALMAN, *supra* note 91, at 45. Some legal realists of this bent became functionaries in the New Deal. See *id.* at 130–44.

<sup>94</sup> See *id.* at 26.

<sup>95</sup> See, e.g., RACE WAR, *supra* note 9, at 47 (suggesting minorities should view law as Black Panthers did); Gary Peller, *Race Consciousness*, in KEY WRITINGS, *supra* note 9, at 127 (arguing that black nationalism is a useful guide for civil rights reform).

<sup>96</sup> See, e.g., CRITICAL LEGAL STUDIES (James Boyle ed., 1992); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) [hereinafter *REPRODUCTION OF HIERARCHY*]; ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986). For good criticism of the movement, see generally ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); David Andrew Price, *Taking Rights Cynically: A Review of Critical Legal Studies*, 48 CAMBRIDGE L.J. 271 (1989).

<sup>97</sup> See KEY WRITINGS, *supra* note 9, at xvii.

<sup>98</sup> See, e.g., David Kairys, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 7* (rev. ed. 1992) [hereinafter *POLITICS OF LAW*] (stating that law “is a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes”).

<sup>99</sup> Not to be confused with Randall Kennedy, an African-American liberal and CRT critic.

<sup>100</sup> See *REPRODUCTION OF HIERARCHY*, *supra* note 96, at 20 (emphasis in original).

<sup>101</sup> See generally Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (defending CLS “indeterminacy thesis”).

solution' that is other than the correct ethical and political solution to [a] legal problem."<sup>102</sup> Or, as Elizabeth Mensch put it, "law is politics."<sup>103</sup>

Despite their expressed affinity for the disadvantaged, critical legal scholars focused most of their criticism against liberal legal theories, not conservative political or legal thought.<sup>104</sup> In particular, they attacked liberalism's devotion to individual rights for preventing the cultivation of group rights.<sup>105</sup> Roberto Unger, for example, objected to traditional property rights because they protect social hierarchy at the expense of "communal life."<sup>106</sup> Similarly, Duncan Kennedy asserted that "the 'freedom' of individualism is negative, alienated, and arbitrary. . . . We can achieve real freedom only collectively, through *group* self-determination," which, he admits, "implies the use of force against the individual."<sup>107</sup> In short, as CLS critic David Price explains, the movement's platform was one of "imposed community," a concept antithetical to the liberal goal of ordered liberty.<sup>108</sup>

A number of nascent critical race theorists, frustrated with liberalism and sympathetic to CLS's group-rights orientation, joined the movement in the early 1980s, only to split off in 1989 because that predominately white movement did not address racism to their satisfaction.<sup>109</sup> The newly-organized splinter group insisted that race was the real cause of disadvantage in society, and charged that the critical legal studies movement, for all its debunking of liberalism, did little to

<sup>102</sup> REPRODUCTION OF HIERARCHY, *supra* note 96, at 20.

<sup>103</sup> Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *POLITICS OF LAW*, *supra* note 98, at 13, 33.

<sup>104</sup> See generally *POLITICS OF LAW*, *supra* note 98.

<sup>105</sup> See, e.g., Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984).

<sup>106</sup> See UNGER, *supra* note 96, at 36.

<sup>107</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774 (1976) (emphasis in original). Similarly, Roberto Unger has expressed sympathy for some of the most savage elements of the Chinese Cultural Revolution, including Maoist "criticism and self-criticism" sessions. See William Ewald, *Unger's Philosophy: A Critical Legal Study*, 97 YALE L.J. 665, 743-44, 746 (1988) (stating that in Unger's view, "[t]he trouble with the Cultural Revolution is not that it was a moral and economic disaster . . . but that it was 'truncated,' that it challenged too little of the 'established structure of social life'—not that it went too far, but that it did not go far enough").

<sup>108</sup> See Price, *supra* note 96, at 300-01.

<sup>109</sup> See KEY WRITINGS, *supra* note 9, at xxii-xxvii; Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 721 (1992). In 1987, the Harvard Civil Rights-Civil Liberties Law Review dedicated an entire issue to the grievances of minority scholars with critical legal studies. See *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) [hereinafter *Minority Critiques*]. In August, 1989, thirty such scholars met at a conference in Madison, Wisconsin, where they inaugurated "critical race theory." See Harris, *supra* note 11, at 741.

address the problems of minorities.<sup>110</sup> The "critical race theorists," however, retained the critical legal scholars' belief in legal indeterminacy and remained indebted to their combination of legal realism, postmodernism and group-rights theory.<sup>111</sup>

The race-crits continued CLS's attack on the liberal faith in neutral principles of law, not because neutrality is an impossible dream, but because neutral principles were allegedly used by conservatives to cut back on benefits that white Democrats had doled out in more liberal times.<sup>112</sup> To the race-crits' dismay, the sword of equal protection, once used to strike down discrimination and disadvantage, was suddenly being wielded against black university applicants,<sup>113</sup> black members of Congress,<sup>114</sup> and black would-be government contractors.<sup>115</sup> Liberals also objected to some of these developments, and worked to develop theories that would exempt benign racial classification from strict Fourteenth Amendment scrutiny.<sup>116</sup> But the race-crits went further. As soon as allegedly neutral principles of civil rights were asserted on behalf of whites, the race-crits attacked the very idea that law could, or should, be racially or ethnically neutral.<sup>117</sup>

Part of this effort included revisionist legal history. Derrick Bell, in an early article, claimed that the civil rights victories in *Brown v. Board of Education*,<sup>118</sup> *Cooper v. Aaron*<sup>119</sup> and *Swann v. Charlotte-Mecklenburg*<sup>120</sup> were not decided on principles of equality, but because whites (who are all alike) had a political and economic "interest" in striking down de jure segregation.<sup>121</sup> This interest included a better ability to fight the Cold War, pacification of radical blacks like Paul Robeson,

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<sup>110</sup> See generally Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) [hereinafter Delgado, *Ethereal Scholar*].

<sup>111</sup> See Harris, *supra* note 11, at 745-50.

<sup>112</sup> See KEY WRITINGS, *supra* note 9, at xxviii (stating that current U.S. Supreme Court "has effectively conscripted liberal theories of race and racism to wage a conservative attack on governmental efforts to address the persistence of societal-wide discrimination").

<sup>113</sup> See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>114</sup> See *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>115</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

<sup>116</sup> See, e.g., Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87 (1979).

<sup>117</sup> See KEY WRITINGS, *supra* note 9, at xiii ("Critical Race Theory . . . rejects the prevailing orthodoxy that scholarship should be or could be 'neutral' and 'objective.'").

<sup>118</sup> 347 U.S. 483 (1954).

<sup>119</sup> 358 U.S. 1 (1958).

<sup>120</sup> 402 U.S. 1 (1976).

<sup>121</sup> See Bell, *Interest-Convergence*, *supra* note 33, at 22-23.

and encouragement of economic development in the South.<sup>122</sup> The Supreme Court decisions of the late 1970s and 1980s that restricted affirmative action, Bell said, proved that this racial interest had ended,<sup>123</sup> not, as is commonly believed, that conservative Republicans had won the power to appoint conservative judges. Therefore, the only "neutral principle" that Bell saw in civil rights law was that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."<sup>124</sup> Articles by other race-crits have sought to refine and support this "interest-convergence thesis."<sup>125</sup>

Critical race theorists also attacked mainstream legal scholarship for its alleged racial bias.<sup>126</sup> In 1984, Richard Delgado castigated the most prominent white civil rights scholars, including John Hart Ely, Owen Fiss, Kent Greenawalt and Laurence Tribe for "only infrequently cit[ing] a minority scholar."<sup>127</sup> This amounted to "imperial scholarship," he said, by academic whites who wish to "remain in control" of civil rights law.<sup>128</sup> These white scholars, Delgado claimed, are not principled thinkers, but defenders of a racial status quo who stress procedure over substance in order to assure that whatever change occurs does not happen "too fast."<sup>129</sup> The whites' tendency to defend affirmative action as a socially useful mechanism for aiding the disadvantaged rather than as a racial reparations program, Delgado said, only con-

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<sup>122</sup> See *id.* at 23.

<sup>123</sup> See *id.* at 23-24.

<sup>124</sup> *Id.* at 22. This argument is a carbon copy of Stokely Carmichael's dismissal of coalition-building between whites and blacks. See CARMICHAEL & HAMILTON, *supra* note 12, at 75 ("We . . . believe that political relations are based on self-interest: benefits to be gained and losses to be avoided.").

<sup>125</sup> See, e.g., Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in CUTTING EDGE, *supra* note 17, at 110-21.

<sup>126</sup> See, e.g., Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 41 ("Legal scholarship remains one of the last vestiges of white supremacy in civilized intellectual circles."); Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1096-97 (1992) (alleging that an article by Judge Richard Posner defending neutral, objective standards of judging scholarship exemplifies "white supremacy" because it serves "white majority" interests in legal academia). See generally Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, in KEY WRITINGS, *supra* note 9, at 46 [hereinafter Delgado, *Imperial Scholar*] (criticizing white civil rights scholars for failing to cite minority scholars).

<sup>127</sup> See Delgado, *Imperial Scholar*, *supra* note 126, at 47; see also Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992) (complaining that critical race theory and radical feminism are not taken seriously in legal academia).

<sup>128</sup> See Delgado, *Imperial Scholar*, *supra* note 126, at 51, 52.

<sup>129</sup> See *id.* at 52-53.



firms the scholars' racial bias.<sup>130</sup> Civil rights litigation and writing, Delgado proclaimed, should be the exclusive domain of minority attorneys and scholars.<sup>131</sup> "The time has come for white liberal authors who write in the field of civil rights to redirect their efforts . . . ."<sup>132</sup> "The day of the minstrel show is, indeed, over."<sup>133</sup>

Race-crits also examine "how traditional [legal] interests and values serve as vessels of racial subordination."<sup>134</sup> According to the race-crits, one such "vessel" is the liberal theory of the First Amendment, which, by protecting what Justice Holmes called "freedom for the thought that we hate,"<sup>135</sup> only protects racists.<sup>136</sup> The expression of racially hateful ideas, in their view, is not speech, but "conduct" which "constructs the social reality that constrains the liberty of non-whites because of their race."<sup>137</sup> First Amendment law, which once shielded civil rights activists against Southern racists,<sup>138</sup> is now a "deeply mistaken" example of "neutrality-based jurisprudence" which "assure[s] that life's victors continue winning."<sup>139</sup> Hate speech, the race-crits insist, should not be constitutionally protected because it is "a central weapon in the struggle by the empowered to maintain [white privilege] in the face of formerly subjugated groups . . . ."<sup>140</sup>

Another frequent target of the race-crits is the concept of "merit," which many conservatives have invoked in attacking affirmative action programs in higher education.<sup>141</sup> Grades and scores on standardized tests, the race-crits say, are not objective, neutral measuring rods of

<sup>130</sup> See *id.* at 50.

<sup>131</sup> See *id.* at 52-53.

<sup>132</sup> *Id.* at 53.

<sup>133</sup> Delgado, *Imperial Scholar*, *supra* note 126, at 53.

<sup>134</sup> WORDS THAT WOUND, *supra* note 7, at 6.

<sup>135</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>136</sup> See, e.g., MUST WE DEFEND NAZIS?, *supra* note 15; WORDS THAT WOUND, *supra* note 7; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Tort Action*]. Repression of right-wing speech is not a new idea among academic leftists. See, e.g., Herbert Marcuse, *Repressive Tolerance*, in ROBERT PAUL WOLFF ET AL., *A CRITIQUE OF PURE TOLERANCE* 81 (1965).

<sup>137</sup> Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in WORDS THAT WOUND, *supra* note 7, at 53, 62 [hereinafter Lawrence, *Regulating Racist Speech*].

<sup>138</sup> See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Cox v. Louisiana*, 379 U.S. 556 (1965); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>139</sup> RACE WAR, *supra* note 9, at 67.

<sup>140</sup> MUST WE DEFEND NAZIS?, *supra* note 15, at 161.

<sup>141</sup> See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 24-58 (1991); THERNSTROM & THERNSTROM, *supra* note 30, at 348-85; Dinesh D'Souza, *Sins of Admission*, in *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* 230-36 (Nicolas Mills ed., 1994).

talent and ability, but just another culturally- and racially-contingent means by which whites replicate their own hegemony.<sup>142</sup> According to Delgado, attempts to select applicants according to their academic skills or accomplishments amount to nothing more than "affirmative action for whites."<sup>143</sup> To argue otherwise is not just wrong, but "deeply racist."<sup>144</sup> Similarly, Paul Butler insists that the concepts of "demerit" which underlie the criminal law are arbitrary and racist, as evidenced by the disproportionate numbers of black men in prison.<sup>145</sup>

In sum, the dominant descriptive theme of CRT is that American society and law are controlled by an overarching, all-controlling white racism that ensures the continued oppression of racial minorities, even as the law officially rejects racial classifications.<sup>146</sup> Thus, some race-crits suggest radical measures to mitigate the harms of America's allegedly ubiquitous caste system.<sup>147</sup>

### B. Normative Elements

The avowed goal of CRT is to "eliminat[e] racial oppression" and to achieve "fundamental social transformation."<sup>148</sup> This is to be done, says Charles Lawrence, by evaluating "work product (judicial opinions, legislation, organizing tactics, ideas, theory, poetry) according to the degree to which the effort serves the cause of liberation."<sup>149</sup> Evenhandedness is unimportant—law is only a tool to be "manipulated" on behalf of minorities.<sup>150</sup> What best serves the cause of "liberation" is not always clear, but most CRT proposals fall into one of three categories: result-oriented modification of legal doctrine,<sup>151</sup> substitution of group rights for individual rights<sup>152</sup> and outsider "resistance."<sup>153</sup>

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<sup>142</sup> See RODRIGO CHRONICLES, *supra* note 6, at 72; see also Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 10 LA RAZA L.J. 363 (1998).

<sup>143</sup> See RODRIGO CHRONICLES, *supra* note 6, at 72.

<sup>144</sup> See RACE WAR, *supra* note 9, at 95.

<sup>145</sup> See Butler, *Affirmative Action*, *supra* note 54, at 868.

<sup>146</sup> See *supra* notes 36–145 and accompanying text.

<sup>147</sup> See *infra* notes 148–204 and accompanying text.

<sup>148</sup> See WORDS THAT WOUND, *supra* note 7, at 6–7.

<sup>149</sup> Lawrence, *Word & River*, *supra* note 10, at 340.

<sup>150</sup> See Freeman, *supra* note 17, at 458–59.

<sup>151</sup> See *infra* notes 154–77 and accompanying text.

<sup>152</sup> See *infra* notes 178–85 and accompanying text.

<sup>153</sup> See *infra* notes 186–204 and accompanying text.

## 1. Result-Oriented Legal Change

Some race-crits advocate result-oriented modification of established legal doctrine to improve the plight of minorities.<sup>154</sup> The race crits' deconstruction of neutral principles, stare decisis and neutrality makes this effort uncomplicated—they simply demand better "results"<sup>155</sup> for those "at the bottom,"<sup>156</sup> period. This command basically means that certain issues and parties should be exempted from the ordinary application of the laws.<sup>157</sup>

For example, many race-crits argue that "hate speech" should not be protected by the First Amendment.<sup>158</sup> Like the radical feminists Catherine MacKinnon and Andrea Dworkin,<sup>159</sup> some race-crits believe that the Fourteenth Amendment's guarantee of equality should override the First Amendment's guarantee of free speech to allow the censorship of bigoted expression.<sup>160</sup> Others would treat the utterance of a racial epithet as an intentional tort,<sup>161</sup> or as low value speech easily outweighed by the government's interest in protecting minority sensibilities.<sup>162</sup> The race-crits, however, would not censor all hate-mongers equally.<sup>163</sup> Mari Matsuda believes that "[h]ateful verbal attacks upon dominant-group members by victims,"<sup>164</sup> though "condemnable both politically and personally,"<sup>165</sup> should be legally "permissible"<sup>166</sup> because

<sup>154</sup> See generally WORDS THAT WOUND, *supra* note 7.

<sup>155</sup> See Freeman, *supra* note 17, at 458-59 (stating that Derrick Bell judges legal doctrine by its "results" alone).

<sup>156</sup> Cf. Matsuda, *supra* note 9, at 63 (arguing that victims of discrimination in United States should be source of normative legal discourse).

<sup>157</sup> See, e.g., Butler, *Affirmative Action*, *supra* note 54, at 844 (proposing that black people never be sentenced to death for killing whites); Mari Matsuda, *Public Response to Racist Speech*, in WORDS THAT WOUND, *supra* note 7, at 17-51 [hereinafter Matsuda, *Public Response*] (arguing that hate speech against oppressed minorities should not be protected under First Amendment).

<sup>158</sup> See generally WORDS THAT WOUND, *supra* note 7. For good criticism of the CRT hate speech argument, see Henry Louis Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20, 1993, at 37; Gey, *supra* note 18, at 193; Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585 (1983).

<sup>159</sup> See generally IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine MacKinnon & Andrea Dworkin eds., 1997) (testimony of radical feminists before various legislatures advocating censorship of pornography); CATHARINE MACKINNON, ONLY WORDS 71-110 (1993) (arguing that First Amendment protection of pornography and hate speech is inconsistent with equality under the Fourteenth Amendment).

<sup>160</sup> See Lawrence, *Regulating Racist Speech*, *supra* note 137, at 59.

<sup>161</sup> See generally Delgado, *Tort Action*, *supra* note 136, at 133.

<sup>162</sup> See MUST WE DEFEND NAZIS?, *supra* note 15, at x.

<sup>163</sup> See Matsuda, *Public Response*, *supra* note 157, at 36.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 39.

<sup>166</sup> See *id.* at 36.

such attacks "are not tied to the structural domination of another group."<sup>167</sup> The ancient principle that laws should be of general application is less important to race-crits than silencing white racist speech, and thereby, according to Delgado, changing how racists think.<sup>168</sup> The race-crits show no concern for where such precedents might lead<sup>169</sup> because their result-oriented postmodernism reduces all law to politics and dismisses legal precedent as worthless.<sup>170</sup>

Another common focus of criticism is the U.S. Supreme Court's 1976 ruling in *Washington v. Davis*<sup>171</sup> that state laws with no discriminatory purpose do not violate the Equal Protection Clause of the Fourteenth Amendment simply because they happen to have a racially disproportionate impact.<sup>172</sup> Race-crits argue that because racism works unconsciously, courts can never know if the purpose behind a given law is racist.<sup>173</sup> Accordingly, judges should not question whether the perpetrator had racist motives, but should focus only on the harm done to the alleged victim.<sup>174</sup> That approach, as Justice White observed in his opinion for the Court in *Davis*, could "invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."<sup>175</sup> Such a result, however, is acceptable to the race-crits, even if it nullifies many well-intentioned,<sup>176</sup> democrati-

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<sup>167</sup> *Id.* at 39.

<sup>168</sup> See Delgado, *Tort Action*, *supra* note 136, at 149.

<sup>169</sup> Mari Matsuda, for example, does not worry that regulating hate speech might set a precedent for suppression of other unpopular ideas, such as Marxism. See Matsuda, *Public Response*, *supra* note 157, at 37. Communism, she declares, is not "universally condemned," while the "doctrine of racial superiority" is. See *id.* Similarly, Richard Delgado thinks the fear that campus hate speech rules would lead to more widespread repression is purely hypothetical. See Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 873-74 (1998).

<sup>170</sup> See Bell, *Who's Afraid?*, *supra* note 50, at 900 (quoting with approval GLS writer Stanley Fish's view of precedent as "a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of the law" (quoting STANLEY E. FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING*, TOO 21 (1994)).

<sup>171</sup> 426 U.S. 229 (1976).

<sup>172</sup> See *id.* at 247-48.

<sup>173</sup> See Lawrence, *Id, Ego*, *supra* note 40, at 237.

<sup>174</sup> See RACE WAR, *supra* note 9, at 21-22.

<sup>175</sup> 426 U.S. at 248.

<sup>176</sup> See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1143-46 (1998) (arguing that the Equal Protection Clause should be construed to require heightened judicial scrutiny of facially neutral laws, regardless of their intent, that "significantly contribute[] to . . . race and gender stratifica-

cally-enacted laws. Democracy, like law, is of less concern to the race-crits than advancing their group's interests.<sup>177</sup>

## 2. Group Rights

Some race-crits would substitute group rights for the individual liberties shielded by the liberal tradition.<sup>178</sup> In shifting the paradigm to group rights, race-crits seek to avoid the common objection that race-based remedies are unfair to individuals. For example, Mari Matsuda believes that the victims of racism should be able to sue both the "perpetrator descendants and current beneficiaries of past injustice" for reparations.<sup>179</sup> Because all whites "continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims," she reasons, they should be "taxed" (apparently by a court) for the sins of their race, even if they and their ancestors had nothing to do with racial oppression.<sup>180</sup> Because the rights of white people are defined by the relative position of their group, she implies, individual fairness is unimportant.<sup>181</sup>

The group rights model also serves as the basis for the race-crits' calls for more affirmative action.<sup>182</sup> In a particularly stark example, Paul Butler has suggested that "affirmative action" should be applied to criminal law to reduce the disparate percentages of blacks and whites in the prison population.<sup>183</sup> Most African Americans are in prison, Butler says, because "white people have driven them there."<sup>184</sup> Therefore, he argues, either more blacks should be freed or more whites imprisoned as reparations for white supremacy and to achieve "diversity" in American prisons.<sup>185</sup>

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tion," including domestic violence laws, the "war on drugs," zoning regulations, sexual assault laws and welfare).

<sup>177</sup> See RODRIGO CHRONICLES, *supra* note 6, at 141 (arguing that democracy is the "source of black people's subordination").

<sup>178</sup> See Matsuda, *supra* note 9, at 75.

<sup>179</sup> *Id.* at 70.

<sup>180</sup> *Id.* at 70, 71.

<sup>181</sup> See *id.*

<sup>182</sup> See Delgado, *Imperial Scholar*, *supra* note 126, at 50 (arguing that reparations rationale is only just basis for affirmative action).

<sup>183</sup> See Butler, *Affirmative Action*, *supra* note 54.

<sup>184</sup> *Id.* at 844.

<sup>185</sup> See *id.* at 866 n.164.

### 3. "Resistance"

For all their talk of "realism,"<sup>186</sup> race-crits are strangely unrealistic in their proposals for reform.<sup>187</sup> Most probably realize that radical measures like racial or ethnic reparations are not likely to be granted, especially by a court. But even unrealistic proposals are rare, because race-crits generally prefer not to suggest solutions, but to "resist" the dominant legal thought, doctrine and policy, whatever that happens to be.<sup>188</sup> As Derrick Bell has put it, "most critical race theorists are committed to a program of scholarly resistance, and most hope scholarly resistance will lay the groundwork for wide-scale resistance."<sup>189</sup> How this ivory tower oppositionalism would foment grassroots revolt is unclear, because CRT professors rarely suggest anything practical. Rather, their exhortations are meant, as Bell says, to "harass white folks" and thereby "make life bearable in a society where blacks are a permanent, subordinate class."<sup>190</sup>

One of the race-crits' few practical programs of "resistance" is Paul Butler's proposal that inner-city juries practice racially-based jury nullification.<sup>191</sup> Jurors of color, Butler argues, have the "moral responsibility" not to apply the criminal law to blacks and whites equally, but to "emancipate some guilty black outlaws" because "the black community" would be "better off" if there were fewer black men in prison.<sup>192</sup> If enough juries were hung or not-guilty verdicts rendered, he imagines, the white-dominated government would change its excessive reliance on incarceration.<sup>193</sup> Butler rejects the ordinary democratic process of legal reform.<sup>194</sup> Democracy, he says, ensures a "permanent, homogeneous majority" of whites that "dominat[es]" African Americans.<sup>195</sup> Butler is probably correct that occasional acts of jury nullification might well express the resentment that many African Americans justifiably feel towards discriminatory law enforcement.<sup>196</sup> As Randall Kennedy

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<sup>186</sup> See Bell, *Realism*, *supra* note 4.

<sup>187</sup> See, e.g., RODRIGO CHRONICLES, *supra* note 6, at 158, 160 (suggesting that if Americans abandoned their use of "color imagery" on television and in conversation, and substituted the metaphor of "touch," they could "learn to hug the world, including the dark people in it . . .").

<sup>188</sup> See Bell, *Who's Afraid?*, *supra* note 50, at 900.

<sup>189</sup> *Id.*

<sup>190</sup> Bell, *Realism*, *supra* note 4, at 377, 379.

<sup>191</sup> See Butler, *Black Power*, *supra* note 14.

<sup>192</sup> See *id.* at 679.

<sup>193</sup> See *id.* at 723-25.

<sup>194</sup> See *id.* at 711-12.

<sup>195</sup> See *id.*

<sup>196</sup> See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 25-27 (1997) (noting lack of faith among black-Americans that law enforcement is impartial).

has pointed out, however, black Americans are disproportionately the victims of crimes,<sup>197</sup> and therefore tend to favor *more*, not *less*, criminal prosecution and punishment.<sup>198</sup>

The race-crits' preference for "resistance"<sup>199</sup> over democratic participation seems to flow from a fear of losing their status as "oppositional scholar[s]"<sup>200</sup> to the game of mainstream law and politics, which they regard as "an inevitably co-optive process."<sup>201</sup> Better to be radically opposed to the "dominant political discourse"<sup>202</sup> and remain an outsider than to work within the current system and lose one's "authenticity."<sup>203</sup> In rejecting the realistic for the "authentic," however, race-crits begin to look like academic *poseurs*—ideological purists striking the correct radical stance, but doing little within the confines of the real world, so sure are they that nothing much can be done.<sup>204</sup>

## II. CRITICAL RACE THEORY'S CHALLENGE TO THE LIBERAL LEGAL SYSTEM

*Any jackass can kick down a barn—but it takes a real carpenter to build one.*

—Sam Rayburn<sup>205</sup>

The race-crits' fatalistic description of race and law in the United States places them far outside the liberal tradition in America.<sup>206</sup> In their cynicism, they insist that our legal system is beyond redemption, that whites are irredeemably racist and that the principles of the liberal legal system are false promises.<sup>207</sup> In short, they reduce law to politics

<sup>197</sup> See *id.* at 11 (noting that black Americans of nearly all income brackets are more likely to be victims of crime than are whites).

<sup>198</sup> See *id.* at 305–06 (noting that in a 1993 Gallup poll, 82% of blacks surveyed said that courts in their area do not treat criminals harshly enough. Seventy-five percent favored putting more police on streets and 68% favored building more prisons so that longer sentences could be imposed).

<sup>199</sup> See Bell, *Who's Afraid?*, *supra* note 50, at 900.

<sup>200</sup> See Calmore, *supra* note 54, at 318.

<sup>201</sup> See Crenshaw, *Race, Reform*, *supra* note 33, at 119.

<sup>202</sup> See *id.*

<sup>203</sup> See generally Calmore, *supra* note 54.

<sup>204</sup> See Bell, *Realism*, *supra* note 4, at 373. The same criticism has been leveled at the critical legal studies movement. See Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 264 (1984) (arguing that CLS movement allows "a few harmless academic leftists to adopt a radical pose, while receiving good salaries and excellent fringe benefits . . .").

<sup>205</sup> Sam Rayburn, *quoted in* Remarks by Congressman Joe Moakley, John W. McCormack Institute for Public Affairs (1995), reprinted at <<http://www.house.gov/moakley/demumass.html>> (visited Mar. 5, 1999).

<sup>206</sup> See *supra* note 2 and accompanying text.

<sup>207</sup> See Matsuda, *supra* note 9, at 63; *supra* notes 34–81 and accompanying text.

and politics to white supremacy.<sup>208</sup> Their theory is a stark departure from what most Americans, of all races, believe.<sup>209</sup>

### A. *The Liberal Tradition in America*

Unlike the race-crits, the vast majority of Americans have believed, at least since the eighteenth century, in a broad set of principles that can be classified, albeit vaguely, as "liberal."<sup>210</sup> As obvious as these principles may seem, it is necessary to revisit them briefly, if only to explain what CRT purports to reject. Liberalism may be defined as belief in government with the consent of the governed;<sup>211</sup> representative democracy;<sup>212</sup> equality;<sup>213</sup> guaranteed liberties;<sup>214</sup> separated institutions checking and balancing one another;<sup>215</sup> and multiple sovereignties of federal, state, local and individual authority.<sup>216</sup> These principles are embodied in the higher law of constitutions, which are enforced (imperfectly) by reasonably independent judges (appointed through political processes), under a rule of law,<sup>217</sup> which is largely insulated from partisan politics.<sup>218</sup>

<sup>208</sup> See *supra* notes 34–81 and accompanying text.

<sup>209</sup> See HUNTINGTON, *supra* note 2, at 17–23; see also *infra* notes 335–40 and accompanying text.

<sup>210</sup> See HARTZ, *supra* note 2, at 9–10 (stating that Americans adhere to "liberal faith"); HUNTINGTON, *supra* note 2, at 21–23 (describing majority adherence to liberal political principles over American history); MYRDAL, *supra* note 2, at 3–9 (describing "American Creed").

<sup>211</sup> See generally EDMUND MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

<sup>212</sup> See THE FEDERALIST No. 10 (James Madison) (explaining that a "republic" delegates government to "a small number of citizens elected by the rest" whose "wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations").

<sup>213</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self evident, that all men are created equal . . .").

<sup>214</sup> See U.S. CONST. amends. I–IX, XIII, XIV, XV.

<sup>215</sup> See THE FEDERALIST No. 51 (James Madison) (explaining that Constitution divides powers of federal government to prevent concentration of powers in one body, thereby protecting liberty).

<sup>216</sup> See U.S. CONST. amends. IX–X.

<sup>217</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (stating that the "government of the United States has been emphatically termed a government of laws, and not of men"); Thomas Paine, *Common Sense*, reprinted in THOMAS PAINE, *COMMON SENSE AND THE CRISIS* 41 (Doubleday Dolphin 1960) (1776) (stating that "in America THE LAW IS KING").

<sup>218</sup> See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1944) (stating that "the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . ."); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 25–26 (Yale 2d ed. 1986) (1962) (discussing advantages of Supreme Court's insulation from politics).



To subscribe to such principles is not necessarily to practice them. The man who wrote the Declaration of Independence owned 200 slaves.<sup>219</sup> He was, like most of us, both principled and inconsistent.<sup>220</sup> Indeed, liberalism makes bold promises and continually fails to live up to them.<sup>221</sup> Nor does faith in the liberal tradition mean that Americans would automatically agree on particular policies if they only were faithful to their common creed. American politics is united by an overarching consensus on basic principles,<sup>222</sup> and divided among a myriad of conflicting interests that make consistent and uniform adherence to common principles unlikely.<sup>223</sup>

Liberal principles are therefore "indeterminate" to the extent that they are not mechanically determinative of every controversy.<sup>224</sup> Indeed, as Samuel Huntington has pointed out, Americans hold potentially conflicting ideals (such as individualism and democracy, liberty and equality) simultaneously, without trying to resolve the conflicts between them once and for all.<sup>225</sup> Rather, they have set up processes and institutions to resolve conflicts pragmatically, case-by-case, issue-by-issue, problem-by-problem.<sup>226</sup> Liberals, unlike radical legal theorists, assume that there are no universal solvents, that values are not easily ranked<sup>227</sup> and that reasoning by analogy is usually more helpful (and more persuasive) than deductions from the abstract theories of philosopher-kings.<sup>228</sup> Liberal politics, like the common-law courts on which it relies, requires perpetual re-examination of both the major and

<sup>219</sup> See JOSEPH ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 144 (1997).

<sup>220</sup> See *id.* at 144-52.

<sup>221</sup> See MYRDAL, *supra* note 2, at 13 ("While the Creed is important and is enacted into law, it is not lived up to in practice.").

<sup>222</sup> See HARTZ, *supra* note 2, at 3-32; MYRDAL, *supra* note 2, at 3-9; TOCQUEVILLE, *supra* note 2, *passim*.

<sup>223</sup> See HUNTINGTON, *supra* note 2, at 5-12 (arguing that America is both united by consensus of general principles and divided by pluralism).

<sup>224</sup> As Oliver Wendell Holmes put it, "General propositions do not decide concrete cases." See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>225</sup> See HUNTINGTON, *supra* note 2, at 16.

<sup>226</sup> See *id.* There is great democratic strength in the liberal system's ability to work conflicts out pragmatically, without having to reconcile grand philosophical tensions imposed from above. See HARTZ, *supra* note 2, at 276-77 (noting that American political pragmatism allowed the New Deal to take place, despite adherence in principle to value of individualism); WOOD, *supra* note 2, at 7-8 (praising eclecticism of Revolutionary generation's writers, who could blend "classical antiquity, Christian theology, English empiricism, and European rationalism" without any sense of incongruity).

<sup>227</sup> See HUNTINGTON, *supra* note 2, at 16.

<sup>228</sup> Learned Hand once said that he would find it "most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs." Quoted in BICKEL, *supra* note 218, at 20.

minor premises of most legal syllogisms. It allows for both continuity and change, stability and flexibility, tradition and innovation.<sup>229</sup>

The liberal system's celebrated capacity for social change rests in the ability of aggrieved citizens to confront power-holders, such as legislators, judges or voters, with their failures to live up to the promises of the "American Creed."<sup>230</sup> In doing so, the aggrieved can argue with some force that they are seeking justice, not revolution, when in fact they may be seeking both.<sup>231</sup> The Voting Rights Act of 1965, for example, was not a radical measure, yet it started a revolution in Southern politics.<sup>232</sup> It purported to secure a right already enshrined in the Fifteenth Amendment,<sup>233</sup> and thus fulfill fundamental notions of equality that most Americans could not easily deny.<sup>234</sup> The Act would probably not have passed, however, if it had been presented as a benefit to one group to the detriment of another in a zero-sum power game.

Second, liberal politics is about morality as well as interests. It is about holding public officials morally and politically responsible for meeting unfulfilled promises.<sup>235</sup> By casting victims of discrimination as legitimate claimants to the promise of equality in the American Creed, liberal politics gives victims the higher moral ground, without fully separating them from the people whose oppressive behavior they seek to change.<sup>236</sup> The Reverend Martin Luther King exemplified this promissory politics best on the steps of the Lincoln Memorial in 1963, when he said:

<sup>229</sup> See generally LEVI, *supra* note 2.

<sup>230</sup> See HUNTINGTON, *supra* note 2, at 3 (describing struggles of 1960s as involving not "conflicts between partisans of different principles," but "a reaffirmation of traditional American ideals and values; [the 1960s] were a time of comparing practice to principle, of reality to ideal, of behavior to belief").

<sup>231</sup> For example, gay rights advocates in the United States are currently arguing that states should recognize gay couples' right to marry on the ground that restricting marriage to opposite-sex couples is gender-discriminatory. See *Bachr v. Lewin*, 852 P.2d 44, 63-68 (Haw. 1993). The argument harks back to fundamental notions of equality, but would radically change our conception of marriage. See *id.*; see also *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that racial classifications embodied in antimiscegenation law violated Equal Protection Clause).

<sup>232</sup> See generally QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>233</sup> See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. 1973 *et seq.*) (describing Act as measure "to enforce the fifteenth amendment to the Constitution of the United States . . .").

<sup>234</sup> See MYRDAL, *supra* note 2, at 8-9.

<sup>235</sup> Samuel Huntington calls this the "ideals versus institutions" gap, which is often responded to with moralistic calls for reform. See HUNTINGTON, *supra* note 2, at 10-12, 64-68.

<sup>236</sup> See HERBERT HAINES, BLACK RADICALS AND THE CIVIL RIGHTS MAINSTREAM, 1954-1970, at 43 (1988) (noting that Martin Luther King could credibly cast himself as "conservative militant" and thereby "talk . . . to whites without alienating them").

In a sense we've come to our nation's capital to cash a check. When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was the promise that all men, yes, black men as well as white men, would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note. . . . America has given Negro people a bad check; a check which has come back marked "insufficient funds." We refuse to believe that there are insufficient funds in the great vaults of this nation. And so we have come to cash this check, a check that will give us upon demand the riches of freedom, and the security of justice.<sup>237</sup>

Through this metaphor, King brilliantly articulated the promises and realities that animated the civil rights revolution in America.<sup>238</sup> He reminded Americans of their founding principles, assumed the fundamental equality of the bargainers, and placed the power structure on the defensive.<sup>239</sup> King did not paint whites as irredeemably racist; he simply insisted that they live up to their obligations.<sup>240</sup>

To Derrick Bell, in contrast, the coffers of justice in America have always been empty. To him, the promises of liberalism are just "bogus freedom checks" which "the Man" will never honor.<sup>241</sup> Bell, like other race-crits, attacks American liberalism from a European political orientation, which conceives of politics as a zero-sum struggle between entrenched classes or groups.<sup>242</sup> In this view, all politics is power politics, and law serves merely as an instrument of oppression by the group

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<sup>237</sup> See Martin Luther King, Jr., *I Have a Dream*, reprinted in 21 NEGRO HISTORY BULLETIN 16-17 (1968) [hereinafter King, *I Have a Dream*].

<sup>238</sup> See *id.*

<sup>239</sup> See *id.*

<sup>240</sup> See *id.*

<sup>241</sup> See FACES, *supra* note 73, at 18.

<sup>242</sup> Compare MARX & ENGELS, *supra* note 44, at 79-94 (describing all history as struggle between two classes—bourgeoisie and proletariat) with Matsuda, *supra* note 9, at 70 (separating society into "victims" of discrimination and "perpetrators" of it). The best-known American counterpart of this class-based tradition is Charles Beard. See generally CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Free Press 1986) (1913) (arguing that Framers' own property interests were primary motivation for creation of Constitution). As Louis Hartz explains, this species of political thought has never found American soil very fertile because Americans never had a feudal past. See HARTZ, *supra* note 2, at 9. Lacking feudalism, Hartz posits, America lacks the class orientation necessary for socialism. See *id.*

that happens to be in power.<sup>243</sup> No common principles exist which might persuade whites to be more inclusive.<sup>244</sup>

The race-crits, like other class theorists, do not attempt to prove that African Americans are permanently disadvantaged; they simply assert it.<sup>245</sup> Nor do they acknowledge that black Americans have made considerable (although far from satisfactory) progress since de jure segregation was ended.<sup>246</sup> Critical race theory, like Marxism before it,

<sup>243</sup> See Bell, *Realism*, *supra* note 4, at 369 (arguing that "the rule of law," despite its formal commitment to racial equality, merely provides cover for racist choices by judges).

<sup>244</sup> Cf. Bell, *Interest-Convergence*, *supra* note 33, at 22–23 (arguing that whites do not support civil rights from principle, but only to serve their own "interests").

<sup>245</sup> See RODRIGO CHRONICLES, *supra* note 6, at 144 (arguing that liberal democracy is "as rigid a system as the Middle Ages" in keeping minorities down, but offering no evidence to support that assertion).

<sup>246</sup> Although still disadvantaged and discriminated against, African Americans have made substantial progress over the last forty years. Most strikingly, a black middle class has emerged that, as a group, now outnumbers the black poor. See PATTERSON, *supra* note 23, at 22, 30. As of 1995, according to sociologist Orlando Patterson, 36% of black families were in the middle class, compared to 26.4% that were poor. See *id.* The trend has continued since Patterson's book: between 1996 and 1997, the poverty rate for African-American families declined from 26.1% to 23.6%. See Bureau of the Census Public Information Office, *Number of African Americans in Poverty Declines While Income Rises*, *Census Bureau Reports*, Press Release, Sept. 24, 1998 <<http://www.census.gov/Press-Release/cb98-176.html>> (visited Feb. 19, 1999). The median income of black families rose 5.4% during the same period. See Bureau of the Census, *Money Income in the United States: 1997*, at 15. And, for the first time in American history, a significant category of black Americans now earn more than their white counterparts: as of March 1993, black women with bachelors' degrees earned a median income of \$27,745, compared with earnings of \$26,356 by white women with similar educational attainment. See PATTERSON, *supra* note 23, at 27.

The growth of the black middle class has been fueled in large part by rising educational attainment. In 1940, the percentage of black Americans ages 25 to 29 who had completed four years of high school was 12.3%, compared to 41.2% of white youths. See *id.* at 20. By 1995, that gap had all but been eliminated: the black graduation rate had risen to 86.5%, while that of whites rose to 87.4%. See *id.* College completion rates are less encouraging. Although black graduation rates have increased tenfold, from 1.5% in 1940 to 13% in 1995, this is still barely half the 24% college completion rate of whites. See *id.* at 21.

The economic record remains mixed. On the positive side, the per capita income of African Americans nearly doubled between 1967 and 1997, from \$6,199 to \$12,351, measured in 1997 dollars. See U.S. Bureau of the Census, *Historical Income Tables—People* <<http://www.census.gov/hhes/income/histinc/p01b.html>> (visited Feb. 19, 1999). The poverty rate for blacks, however, has been slow to decline—between 1975 and 1993 it stagnated at about 30%. See Bureau of the Census, *Measuring 50 Years of Economic Change Using the March Current Population Survey*, Sept., 1998, at 45. Most tragically of all, the brunt of African-American poverty is borne by children—41.5% of black children under the age of 18 living in families were poor in 1995. See PATTERSON, *supra* note 23, at 29.

The progress of black Americans is also mixed when incomes are compared. In 1967, the per capita income of black Americans was about 54% that of whites. See U.S. Census Bureau, *Historical Income Tables—People* <<http://www.census.gov/hhes/income/histinc/p01b.html>> (visited Feb. 19, 1999). In 1997, blacks as a group earned only 60% of what whites did. See *id.* There is also a striking gap, however, between black men and black women: the median income

clings to group "domination" as the single cause of disadvantage.<sup>247</sup> It takes one unifying idea—racial domination—and tries to fit all facts and law into it.<sup>248</sup>

Liberalism, on the other hand, distrusts grand unifying theories, preferring to emphasize process over ends.<sup>249</sup> As a result, liberalism frustrates anyone, Left or Right, who would have governments embrace their ideologies.<sup>250</sup> Because of the value liberals place on liberty, they tend to be wary of the sort of power concentrations that could mandate changes quickly.<sup>251</sup> They prefer a more incremental approach to political change that depends on the consent of the governed, even when the governed are often ignorant, misguided and even bigoted.<sup>252</sup> Liberalism is never utopian, by anyone's definition, but always procedural, because it presupposes a society of people who profoundly disagree with each other and whose interests, goals, stakes and stands, cannot easily, if ever, be fully reconciled.<sup>253</sup> Because of these differences, liberals know there is no such thing as a "benevolent despot," and that utopias almost invariably turn out to be dystopias.<sup>254</sup>

of black men in 1997 was 69.3% that of white men, up from 57.2 in 1967. See Bureau of the Census, *Measuring 50 Years of Economic Change Using the March Current Population Survey*, Sept. 1998, at C-7. Black women of all education levels now make 94.6% of what white women do, up from 78.7% in 1967. See *id.*

<sup>247</sup> Compare MARX & ENGELS, *supra* note 44, at 79-94 (describing all history as struggle between two classes—bourgeoisie and proletariat) with Matsuda, *supra* note 9, at 70 (separating society into "victims" of discrimination and "perpetrators" of it).

<sup>248</sup> See generally KEY WRITINGS, *supra* note 9.

<sup>249</sup> See, e.g., ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 163-75 (1989) (rejecting familiar contrast between "substance" and "process" in politics, arguing instead that democratic process is a "rich bundle of substantive goods"); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 101 (1980) ("What has distinguished [the American Constitution], and indeed the United States itself, has been a process of government, not a governing ideology").

<sup>250</sup> Cf. THE FEDERALIST NO. 10 (James Madison) (stating that Constitution is intended to control effects of "faction," the natural human tendency to separate into groups that could harm interests or rights of others).

<sup>251</sup> Cf. THE FEDERALIST NO. 51 (James Madison) (explaining that Constitution divides powers of federal government to prevent concentration of powers in one body, thereby protecting liberty).

<sup>252</sup> As Winston Churchill noted, "Democracy is the worst form of government except all those other forms that have been tried from time to time." See Winston Churchill, Address at the House of Commons (Nov. 1947), in INTERNATIONAL THESAURUS OF QUOTATIONS 231 (1970).

<sup>253</sup> See ELY, *supra* note 249, at 88-101 (noting that main purpose of Constitution is to set up decisionmaking processes that embody popular sovereignty yet protect minorities in pluralistic democracy); George Kateb, *Remarks on the Procedures of Constitutional Democracy*, in CONSTITUTIONALISM: NOMOS XX 215, 217 (J. Roland Pennock & John W. Chapman eds., 1979) (stating that "[c]ertain procedures are the soul of constitutional democracy, precisely because of their intrinsic value" in thwarting oppression).

<sup>254</sup> See, e.g., ALDOUS HUXLEY, *BRAVE NEW WORLD* (Perennial Classics 1998) (1932); GEORGE ORWELL, 1984 (Signet Classic 1989) (1949).

Race-crits, on the other hand, are profoundly utopian and sometimes totalitarian.<sup>255</sup> In their view, the law should ferret out and eliminate white racism at any cost.<sup>256</sup> Richard Delgado, for example, complains that "[n]othing in the law requires any [white] to lend a helping hand, to try to help blacks find jobs, befriend them, speak to them, make eye contact with them, help them fix a flat when they are stranded on the highway, help them feel like full persons. . . . How can a system like that change anything?"<sup>257</sup>

The race-crits, in their preoccupation with power, forget that the power to persuade remains the principal way of achieving lasting change in a democratic political culture.<sup>258</sup> A beneficial but controversial measure is much more likely to survive changes of the party in power if it can be said to carry out the will of "the people," from whom all power in the United States is said to derive.<sup>259</sup> For example, the Civil Rights Act of 1964, controversial as it was,<sup>260</sup> has remained a bulwark of civil rights protection for thirty-six years because of its democratic and constitutional legitimacy.<sup>261</sup> On the other hand, if Malcolm X or the Black Panthers had attempted to set up a separate black state on American soil in the tradition of John Brown, their efforts would have been crushed immediately.

### B. *Are Race-Crits Legal Theorists?*

At bottom, CRT fails because of its single-mindedly "critical" character. Race-crits bewail minority disadvantage, blame liberal values for "constructing" this disadvantage and dismiss any defense of them as a

<sup>255</sup> See RODRIGO CHRONICLES, *supra* note 6, at 141, 144 (insisting that Enlightenment democracy is "source of black people's subordination").

<sup>256</sup> See *id.* at 78-79.

<sup>257</sup> *Id.* at 78.

<sup>258</sup> See TOCQUEVILLE, *supra* note 2, at 107 (stating that people who wish to attack democratically-enacted laws must "either change the opinion of the nation, or trample upon its decision").

<sup>259</sup> See U.S. CONST. preamble ("We the People . . . do ordain and establish this Constitution for the United States of America."); TOCQUEVILLE, *supra* note 2, at 106, (stating that "there is an amazing strength in the expression of the will of a whole people; and when it declares itself, even the imagination of those who would wish to contest it is overawed").

<sup>260</sup> See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

<sup>261</sup> The Act was passed by an overwhelming vote in Congress, see *id.* at 215, 226, and upheld repeatedly by the U.S. Supreme Court. See *Katzbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (upholding public accommodations provision of Civil Rights Act of 1964).

legitimation of white supremacy.<sup>262</sup> But here endeth their analysis. As CLS scholar Mark Tushnet admitted: "Critique is all there is."<sup>263</sup>

"Critique," however, never built anything, and liberalism, for all its shortcomings, is at least constructive. It provides broadly-accepted, reasonably well-defined principles to which political advocates may appeal in ways that transcend sheer power, with at least some hope of incremental success.<sup>264</sup> Critical race theory would "deconstruct" this imperfect tradition, but offers nothing in its place.

An apt example of how unconstructive CRT is can be found in its approach to equality. To the extent that race-crits discuss "equality" at all, they do so less to advance tangible goals than to disparage liberalism's different approaches, including the ultimate goal of a society where race does not matter.<sup>265</sup> The race-crits are particularly hostile to the liberal ideal of "color blindness," expressed most eloquently by Martin Luther King's dream that his children "will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."<sup>266</sup> To the race-crits, this integrationist goal of color-blind constitutionalism is not just naïve or premature.<sup>267</sup> In Neil Gotanda's words, it "supports the supremacy of white interests and must therefore be regarded as racist."<sup>268</sup> Unlike King, who saw affirmative action as a color-conscious means to a more inclusive, integrated nation,<sup>269</sup> race-crits consider affirmative action an end in itself, more akin to an award of permanent damages than transitional assistance.<sup>270</sup> To the race-crits, any doctrine that gets in the way of that end, including egalitarian colorblindness, is ipso facto "racist."<sup>271</sup>

<sup>262</sup> See WORDS THAT WOUND, *supra* note 7, at 6.

<sup>263</sup> MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 318 (1988).

<sup>264</sup> See *supra* notes 210-40 and accompanying text.

<sup>265</sup> See, e.g., KEY WRITINGS, *supra* note 9, xiii-xxxii (disparaging liberal equality theories, but offering no replacements).

<sup>266</sup> King, *I Have a Dream*, *supra* note 237, at 16-17; see also KEY WRITINGS, *supra* note 9, at xv (criticizing liberal adherence to King's dream).

<sup>267</sup> See KEY WRITINGS, *supra* note 9, at xv, xxix (parodying liberalism's adherence to "color-blindness" as naïve belief that "if we could just agree to abandon race-consciousness, racism and racial power would somehow recede from the American political imagination").

<sup>268</sup> Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* in KEY WRITINGS, *supra* note 9, at 257, 272.

<sup>269</sup> King argued, "How then can he [the Negro] be absorbed into the mainstream of American life if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis?" MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 134 (1964). King's goal was integration, not "atonement for atonement's sake." *Id.* at 135.

<sup>270</sup> See Delgado, *Imperial Scholar*, *supra* note 126, at 50 (advocating reparations theory of affirmative action over social utility theory because former recognizes "the obligation of the majority to render [minority communities] whole").

<sup>271</sup> See Gotanda, *supra* note 268, at 272.

Race-crits also reject the liberal idea of equality as "belonging" that inspired much of the civil rights movement.<sup>272</sup> Under this view, so eloquently advanced by Kenneth Karst, equality occurs when all people "belong" to America, that is, when they gain equal citizenship and equal justice under the Constitution, despite their pluralistic differences.<sup>273</sup> The race-crits, however, usually reject inclusion. They prefer the separatist and unattainable goal of black nationalism.<sup>274</sup> Richard Delgado, for example, believes that whites are so different from minorities that the groups should have as little to do with each other as possible.<sup>275</sup>

Finally, the race-crits ridicule the idea of "equal opportunity" that inspires much of liberal political and economic thought.<sup>276</sup> In a pervasively racist society, they say, there is no such thing as equality of opportunity for minorities because the system and its operators will always favor members of the majority.<sup>277</sup> "Merit," to the race-crits, is a racist construct calculated to keep whites in charge, and therefore a merit-based equality of opportunity amounts only to "affirmative action for whites."<sup>278</sup> A better endeavor, they argue, would engage in "a broad-

<sup>272</sup> See, e.g., Sterling A. Brown, *Count Us In*, in *WHAT THE NEGRO WANTS* 308, 331 (Rayford W. Logan ed., 1969) (1944) ("Negroes want to be counted in. They want to belong. They want what other men have wanted deeply enough to fight and suffer for it. They want democracy.").

<sup>273</sup> See generally KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

<sup>274</sup> An entire chapter of Delgado's compilation of critical race theory is dedicated to themes of racial separatism. See CUTTING EDGE, *supra* note 17, at 345-87; see also WORDS THAT WOUND, *supra* note 7, at 6 (stating that CRT borrows from "nationalism").

<sup>275</sup> See RACE WAR, *supra* note 9, at 31 (arguing that whites should not attempt to help minorities, but should stick to themselves instead); Delgado, *Imperial Scholar*, *supra* note 126, at 48-49 (stating that whites cannot faithfully represent interests of minorities).

<sup>276</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 227 (1977) (speaking of "the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else"); JOHN RAWLS, *A THEORY OF JUSTICE* 92-93 (1971) ("[A] person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances."); MICHAEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 22 (1991) (defining equality of opportunity as idea that "individuals are entitled to equal autonomy and equal respect as subjects of moral choice capable of devising and pursuing their own respective life plans").

<sup>277</sup> See RODRIGO CHRONICLES, *supra* note 6, at 72 (concluding that whites invariably come out ahead in system of equality of opportunity); Richard Delgado, *Recasting the American Race Problem*, 72 CAL. L. REV. 1389, 1398 (1991) (stating that "Law's preference for protecting only equality of opportunity is . . . a veiled way of assuring that those who benefit from the current rules of the game continue winning").

<sup>278</sup> See RODRIGO CHRONICLES, *supra* note 6, at 72; see also KEY WRITINGS, *supra* note 9, at xv (scoring liberals for "constructing 'discrimination' as a deviation from otherwise legitimate selection processes" and thereby endorsing the possibility of objective, neutral academic selection standards).



scale inquiry into why jobs, wealth, education, and power are distributed as they are."<sup>279</sup>

So what conception of "equality" would the race-crits impose in place of liberal egalitarianism? They never say, but they come closest with their occasional calls for "equality of results" through reparations-based affirmative action.<sup>280</sup> For example, Cheryl Harris proposes that affirmative action should "equaliz[e] treatment by redistributing power and resources in order to rectify inequities and to achieve real equality."<sup>281</sup> Similarly, Mari Matsuda argues for racial reparations in part because they would alleviate "the destabilizing inequities in wealth distribution,"<sup>282</sup> while Richard Delgado advocates "equality of result" as a more simple, direct and effective goal than the complicated, value-laden "equality of opportunity."<sup>283</sup>

No race-crit, however, has explained what "equality of results" means. The term seems to suggest equality of resources for all citizens, but race-crits do not explicitly advocate either communism or socialism. More likely, they would prefer a rough distribution of resources between "racial" groups—e.g., a reparations tax system that would grant each ethnic group money and power commensurate with its percentage of the population.<sup>284</sup> Yet the race-crits do not say who should pay and who should benefit from such a system.<sup>285</sup> Should the "one drop of blood" method of racial classification apply,<sup>286</sup> or should a person have to be primarily of minority stock to receive reparations? To the race-crits, all black Americans are clearly victims of slavery and racism,<sup>287</sup> but should recent immigrants from Haiti, Africa or Europe receive the same benefits as descendants of American slaves? Are all black descendants of American slaves entitled to payments, or do blacks with slave-owning ancestors fit into Mari Matsuda's class of

<sup>279</sup> KEY WRITINGS, *supra* note 9, at xv.

<sup>280</sup> See, e.g., RODRIGO CHRONICLES, *supra* note 6, at 70. This focus on "equality of result" is also consistent with their criticism of the bad motive requirement articulated in *Davis*. See *supra* notes 171-77 and accompanying text.

<sup>281</sup> Cheryl I. Harris, *Whiteness as Property*, in KEY WRITINGS, *supra* note 9, at 276, 289.

<sup>282</sup> Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 391 (1987).

<sup>283</sup> RODRIGO CHRONICLES, *supra* note 6, at 71.

<sup>284</sup> Paul Butler endorses this percentage approach as a way to change the racial makeup of prison populations. See Butler, *Affirmative Action*, *supra* note 54, at 886-87.

<sup>285</sup> They also fail to say which governmental institution would order such a redistribution.

<sup>286</sup> Under the "one-drop of blood" rule, which has its origins in the racist fear of miscegenation, anyone with "one drop" of African ancestry is classified as "black." For a good discussion on the sinister implications of the "one drop" rule, see PATTERSON, *supra* note 23, at 68-72.

<sup>287</sup> See, e.g., Butler, *Affirmative Action*, *supra* note 54, at 861-62.

"perpetrator descendants" who must pay?<sup>288</sup> Would Asians be classified as an oppressed minority, or would they be forced to give up their disproportionate share of wealth?<sup>289</sup> If all Asians are "victims," as Matsuda has suggested,<sup>290</sup> must a third-generation Japanese American be aided equally to a recently-arrived Vietnamese or Laotian immigrant? Should all Native American tribes receive payments, or only those without successful casinos? Suppose, after the initial payment, one ethnic group's average wealth fell behind that of another. Should the allocations be reshuffled annually to achieve "equality of result?"<sup>291</sup>

And how much of a redistribution of "power" is necessary to achieve "equality of result?"<sup>292</sup> Should official positions be rotated among representatives of various ethnic groups, or is it enough to gerrymander voting districts to assure the election of minorities?<sup>293</sup> Perhaps political appointments, (especially those of judges),<sup>294</sup> should be distributed among race-group caucuses in proportion to the percentage of ethnic groups in the population. And perhaps corporations should be required to elect CEOs from among different ethnic groups every few years.

Critical race theory's failure to address the difficulties of administering a reparations-based, "equality of result" system leaves one with the impression that either they really are not serious, or their invocation of "equality" is little more than an assertion of group interests. Indeed, the more pessimistic race-crits, like Derrick Bell, would be happiest if social reformers jettisoned the goal of "equality" altogether, because that goal "merely perpetuates our disempowerment."<sup>295</sup> If legal doctrine is to be judged solely by how it advances the interest of racial minorities, the race-crits implicitly dismiss any vision of equality that could aid other disadvantaged groups, or that could treat disadvantaged members of the racial majority with equal concern and respect.<sup>296</sup>

<sup>288</sup> See Matsuda, *supra* note 9, at 70.

<sup>289</sup> See Bureau of the Census, Public Information Office, *Asians and Pacific Islanders Have Nation's Highest Median Household Income in 1997*, Census Bureau Reports, Press Release, Sept. 24, 1998.

<sup>290</sup> See Matsuda, *supra* note 9, at 70-71.

<sup>291</sup> See Harris, *supra* note 281, at 289.

<sup>292</sup> See *id.*

<sup>293</sup> See generally Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, in KEY WRITINGS, *supra* note 9, at 205.

<sup>294</sup> See generally Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997) (arguing that Fourteenth Amendment's Due Process Clause should be read to require appointment of more minority judges).

<sup>295</sup> Bell, *Realism*, *supra* note 4, at 377.

<sup>296</sup> Compare *infra* note 297 with DWORKIN, *supra* note 276, at 227 (defining equality as "the right . . . to be treated with the same respect and concern as anyone else").

To the race-crits, the proper inquiry is not how the law lives up to aspirations or principles, but how it serves the interests of a constituency.<sup>297</sup>

In this respect, the race-crits are more political advocates than legal scholars.<sup>298</sup> There is, of course, nothing wrong with being an advocate, and disadvantaged people certainly need advocates. But legal theories—the principles and ideas that guide the determination of legal outcomes—must transcend mere factional interests if they are to aid minorities. They must win the majority's acquiescence, if not its active support. So far, race-crits have not provided such a theory. CRT is only "scholarly resistance" that lives within, and indeed depends upon, the liberal legal order.<sup>299</sup> Without liberalism to "critique," critical race theory would have little meaning. In the end, critical race theory could no more supplant liberalism than the mission statement of a political action committee could replace the Constitution.

### C. *Critical Race Theory as Advocacy*

How effective, then, is CRT as advocacy for racial minorities within the liberal system? The answer depends, of course, on one's criteria. As a therapeutic screed against the frustrations of incremental liberalism, critical race theory probably "works" well.<sup>300</sup> It may also push liberals into constructive action, much as black radicals pushed whites into the arms of Martin Luther King, Jr.<sup>301</sup> If advocacy is judged by its ability to persuade others, however, CRT must be judged a failure.

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<sup>297</sup> Consider, for example, the following monologue by Delgado's character Rodrigo:

The law-lover will subscribe to the mythic, heroic views about the rule of law and insist that everything else be addressed within that framework. We, by contrast, will take a more utilitarian view of law, as the Panthers did. We'll ask "What can law do for us at this time and place?"

RACE WAR, *supra* note 9, at 47.

<sup>298</sup> See Abernathy, *supra* note 47, at 378 (arguing that Charles Lawrence and Mari Matsuda's recent book defending affirmative action amounts to "advocacy scholarship" which "overstates the case, dehumanizes the opposition, and turns off as many readers as it may convert").

<sup>299</sup> See Bell, *Who's Afraid?*, *supra* note 50, at 900.

<sup>300</sup> Derrick Bell considers the therapeutic effect of railing against white racism to be an important part of CRT. See *id.* at 910 (suggesting that CRT need not be justified by what it accomplishes, but rather serves as "its own legitimization. . . . There is sufficient satisfaction for those who write in the myriad methods of critical race theory that comes from the work itself"); Bell, *Realism*, *supra* note 4, at 364, 377 (arguing that blacks should abandon goal of equality and instead seek to "make their voice and outrage heard" through adoption of "racial realism," a mindset that accepts the permanence of subordination, thereby making "life bearable in a society where blacks are a permanent, subordinate class").

<sup>301</sup> See HAINES, *supra* note 236, at 75-76.

Despite its ten years as a "movement,"<sup>302</sup> its voluminous publications and ubiquitous presence in law schools,<sup>303</sup> critical race theory has had almost no influence outside the walls of academia.<sup>304</sup> This poor showing can be attributed to the inherent inadequacies of the theory.

First, the race-crits' critique of liberalism is historically and analytically at odds with the common law system of reasoning by analogy and ensuring equality by following precedent. To them, the unifying explanation of American history is racial domination, so any seeming departure from that ideology must be either a fleeting aberration or a ruse to protect white supremacy.<sup>305</sup> For example, Derrick Bell believes that because the federal Constitution accommodated slavery, no meaningful theory of racial equality can possibly be deduced from it.<sup>306</sup> He holds to this absolute position despite decades of opinions and laws that have subjected racial classifications to a degree of scrutiny so strict in theory that it is fatal in fact.<sup>307</sup> Indeed, Bell's focus on the intentions of the Framers rather than their larger purposes is as unhelpful in its own way as Raoul Berger's slavish historicism.<sup>308</sup>

By contrast, liberal jurisprudence allows legal advocates to ignore the specific intentions of ignoble framers in order to give nobility to their grand promises.<sup>309</sup> Thus, Sir Edward Coke was not bothered by the fact that the Magna Carta was obtained by extortion and meant to

<sup>302</sup> See KEY WRITINGS, *supra* note 9, at xiii (describing CRT as "movement of left scholars").

<sup>303</sup> See Lewis, *supra* note 1 (stating that critical race theorists "are on the faculty at almost every major law school").

<sup>304</sup> In a recent Westlaw search, the author found no reference in any U.S. court opinion to "critical race theory." The most prominent CRT luminaries, Derrick Bell, Mari Matsuda and Richard Delgado, are rarely cited—when they are, it is usually in support of the unremarkable claim that racial insults can amount to the tort of intentional infliction of emotional distress. See, e.g., *Taylor v. Metzger*, 706 A.2d 685, 695 (N.J. 1998) (citing Delgado, *Tort Action*, *supra* note 136). Mari Matsuda was also cited by the Minnesota Supreme Court in its 1991 ruling, later reversed, in *In re Welfare of R.A.V.*, which upheld a municipal hate-speech code. See 464 N.W.2d 507, 508 (Minn. 1991) (citing Matsuda, *Public Response*, *supra* note 157), *rev'd*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). None of CRT's more radical assertions have made it into U.S. case law—a rather poor showing for what Cornel West has called "the most exciting development in contemporary legal studies." KEY WRITINGS, *supra* note 9, at xi.

<sup>305</sup> See Bell, *Interest-Convergence*, *supra* note 33, at 22.

<sup>306</sup> See Bell, *Realism*, *supra* note 4, at 376.

<sup>307</sup> See, e.g., *Loving*, 388 U.S. at 2 (holding that racial classifications embodied in antimiscegenation law violated Equal Protection Clause); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that state-sanctioned racial segregation of public schools violates Equal Protection Clause).

<sup>308</sup> See generally *RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977) (arguing that Fourteenth Amendment must be construed precisely within limits of its framers' intent, which allegedly excluded substantive due process analysis).

<sup>309</sup> See *infra* notes 310–15 and accompanying text.

benefit the nobility.<sup>310</sup> By creative interpretation, he transformed that crabbed feudal contract into a mythic charter of liberty.<sup>311</sup> Abraham Lincoln knew that the most inspiring words of the Declaration of Independence were not meant to end slavery, but he realized their potential.<sup>312</sup> Congresswoman Katherine St. George understood that equality for the sexes was added to the Civil Rights Act of 1964 by racist, sexist men in a cynical effort to defeat the bill.<sup>313</sup> She just smiled, knowing that great legal principles have a way of transcending their origins.<sup>314</sup> In short, American liberals have not allowed their jurisprudence to become frozen by an excess of historicism. In jurisprudence, as in nearly everything else, they have been cheerfully eclectic, pragmatic and undogmatic.<sup>315</sup>

The second reason the race-crits fail as legal advocates is that their "deconstruction" of neutral principles and the rule of law leave them unpersuasive to judges who have pledged to uphold both. No judge could possibly trust a piece of scholarship to reflect law or facts accurately if the scholar who wrote it had previously declared that law is merely politics and that political ends are all that count in legal advocacy.<sup>316</sup> For example, Kimberlé Crenshaw has described the civil rights litigation of the 1950s and 1960s not as an effort to redeem principles, but as a cynical "manipulation of legal rhetoric" and use of "appropriate rhetorical and legal incantations" to dupe the state into achieving the desired political outcome: dismantling white supremacy.<sup>317</sup> Given judges' institutional commitment to legal principles (not to mention their distaste for being overturned on appeal), it is unlikely that even liberal judges would give further "incantations" from Crenshaw much weight.

In debunking the rule of law, the race-crits think of themselves as more "realistic" than liberals who believe (or hope) that the law can

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<sup>310</sup> See A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEADE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 6-8 (1968); ANNE PALLISTER, *MAGNA CARTA: THE HERITAGE OF LIBERTY* 34, 78 (1971).

<sup>311</sup> See HOWARD, *supra* note 310, at 118-22. Herbert Wechsler once celebrated the creative interpretation of Magna Carta: "I cannot find it in my heart to regret that interpretation [of Magna Carta] did not ground itself in ancient history but rather has perceived . . . a compendious affirmation of the basic values of a free society . . ." Wechsler, *supra* note 85, at 19.

<sup>312</sup> See GARRY WILLS, *LINCOLN AT GETTYSBURG: WORDS THAT REMADE AMERICA* 99-103 (1992).

<sup>313</sup> See WHALEN & WHALEN, *supra* note 260, at 115-18.

<sup>314</sup> See *id.* at 117.

<sup>315</sup> See HUNTINGTON, *supra* note 2, at 15-16; WOOD, *supra* note 2, at 7.

<sup>316</sup> See Lawrence, *Word & River*, *supra* note 10, at 340.

<sup>317</sup> See Crenshaw, *Race, Reform*, *supra* note 33, at 117.

be impartial.<sup>318</sup> In truth, they are less so. Instances in which judges ignore precedent to achieve some blatantly partisan end are not unknown, but they are rare. More often, judges swallow their political misgivings about laws and apply them. This was certainly true of the nineteenth-century judges who opposed slavery yet enforced the fugitive slave laws,<sup>319</sup> as it is of present-day judges who oppose mandatory sentences, but impose them.<sup>320</sup> It is as true of the judges who ruled in favor of the *Amistad* captives<sup>321</sup> as it is of the president who sent troops to Little Rock to enforce a judicial order to desegregate the schools.<sup>322</sup> Such officials may be political apparatchiks, but that is different from their being purely partisan.

Third, race-crits are politically ineffective because they deliberately choose racist rhetoric that alienates whites.<sup>323</sup> Unlike Dr. King, who extended his hand to whites and expressed his faith that they could redeem the promises of their ancestors,<sup>324</sup> race-crits give up on whites as slaves to bigotry.<sup>325</sup> Consider Bell's "Space Traders" story: in the year 2000, Bell posits, seventy percent of Americans would vote to send blacks away in spaceships if presented with the right benefit.<sup>326</sup> Jewish Americans would oppose the trade, he says, but not from principle.<sup>327</sup> They would fear that "in the absence of blacks, Jews could become the scapegoats."<sup>328</sup> Some rich whites would protest the deal, but only because they know that blacks deflect potential class-based

<sup>318</sup> See Bell, *Realism*, *supra* note 4, at 365-67.

<sup>319</sup> See, e.g., ELIJAH ADLOW, *THE GENIUS OF LEMUEL SHAW: EXPOUNDER OF THE COMMON LAW* 93-94 (1962) (explaining that Chief Justice Lemuel Shaw upheld federal Fugitive Slave Act of 1850, despite his personal loathing of slavery, in order to protect integrity of Constitution and of Union).

<sup>320</sup> See, e.g., Bob Herbert, *A Great Injustice*, N.Y. TIMES, Nov. 25, 1996, at A15 (telling story of Angela Thompson, a seventeen-year-old girl with no prior criminal record, who was sentenced under New York's tough anti-drug laws to eight years to life by Justice Juanita Bing Newton. The judge admitted that having to impose the sentence brought her "to tears, literally").

<sup>321</sup> See HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* 170-94 (1987) (noting that several Southerners (including Chief Justice Taney, who would later write the *Dred Scott* decision, see *Dred Scott v. Sandford*, 60 U.S. 393 (1856)), voted to free the illegally-held slaves at issue in the *Amistad* case).

<sup>322</sup> See ROBERT F. BURK, *THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS* 192 (1984).

<sup>323</sup> See, e.g., Butler, *Affirmative Action*, *supra* note 54, at 844 ("It is important for the law to recognize that there are so many African Americans in prison because white people have driven them there.").

<sup>324</sup> See *supra* notes 237-40 and accompanying text.

<sup>325</sup> See RACE WAR, *supra* note 9, at 31; Bell, *supra* note 74 and accompanying text.

<sup>326</sup> See Bell, *Space Traders*, *supra* note 74, at 192.

<sup>327</sup> See *id.* at 186.

<sup>328</sup> *Id.*

unrest by poor whites, who are pacified in the knowledge that they "at least, remained ahead of blacks."<sup>329</sup> In sum, Bell clearly implies, all whites are racist—those who appear to stand up for minorities are only looking out for number one.<sup>330</sup> It is hard to imagine how this story could inspire anything but frustration, dismay and resentment among white readers.

There is much to be done on behalf of minorities—the criminal justice system, for example, screams for reform.<sup>331</sup> But like it or not, nothing can be accomplished in this country without widespread support from white Americans. Name-calling and blame games like those of the race-crits can only make reforms less likely to occur.

Finally, even if the race-crits were to stop demonizing whites, they would still be doomed to political irrelevancy because their Marxian, group-based theories have little resonance in a nation which, since its founding, has rejected the idea of hereditary entitlements.<sup>332</sup> Slavery and racial discrimination are exceptions to this tradition—huge, horrific exceptions, but exceptions nonetheless. For all the hypocrisies and bigotries of its citizens and leaders, the United States does promise liberty, equality and justice. The gap between these promises and realities often yaws wide, but the promises abide. They are part of the "American Dream," the "American Creed"<sup>333</sup> and the American "civil religion"<sup>334</sup> which no amount of "realism" or cynicism seems able to smother.

No group in American history has had more reason to disbelieve America's promises than African Americans. No group should be more amenable to the cynical separatism of the academic race-crits. And yet, race-crits are largely marginal among African Americans. Imbued with Christianity and the American Creed,<sup>335</sup> most black Americans rejected

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<sup>329</sup> *Id.* at 181.

<sup>330</sup> *See id.* at 158–94.

<sup>331</sup> *See generally* THE REAL WAR ON CRIME, *supra* note 24, at 195–219 (suggesting reforms to stem ever-growing prison population).

<sup>332</sup> *See* HARTZ, *supra* note 2, at 5–6 (arguing that American history lacks feudalism and therefore lacks hereditary, class-based orientation necessary for socialism).

<sup>333</sup> *See supra* notes 2, 210–54 and accompanying text.

<sup>334</sup> *See generally* ROBERT N. BELLAH, THE BROKEN COVENANT: AMERICA'S CIVIL RELIGION IN TIME OF TRIAL (1975) (examining Americans' quasi-religious adherence to nation's founding principles).

<sup>335</sup> Black Americans have historically believed strongly in the American creed. In 1903, W.E.B. Du Bois wrote that "there are to-day no truer exponents of the pure human spirit of the Declaration of Independence than the American Negroes . . ." W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 8 (Bantam Classic 1989) (1903). In 1944, Gunnar Myrdal observed that despite their full knowledge of their subordinate status, the "[American Negroes'] faith in the Creed is not simply a means of pleading their unfulfilled rights. They, like the whites, are under the spell of

the appeals of socialists in the late nineteenth century,<sup>336</sup> Communists in the 1930s<sup>337</sup> and neo-Marxist "liberationists" in the 1960s.<sup>338</sup> Rather, when America's unpaid "promissory note" came due in the 1950s and 1960s, they marched forth from Christian churches to demand fulfillment of the very American promise that "all men are created equal."<sup>339</sup> And faith in the redeemability of America's promises remains in the African-American community today, sustaining efforts to overcome continued segregation, unjust incarceration and enduring economic inequality.<sup>340</sup> Thus, the more the race-crits rail against the principles of liberal democracy,<sup>341</sup> the further they separate themselves from the very people for whom they claim to speak.

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the great national suggestion." MYRDAL, *supra* note 2, at 4. According to Myrdal, black Americans had faith, even in the face of seemingly impossible odds, "that ultimately the American Creed will come out on top." *Id.* at 799. In 1963, Martin Luther King eloquently expressed that faith from a jail cell: "We will reach the goal of freedom in Birmingham and all over the nation, because the goal of America is freedom. Abused and scorned though we may be, our destiny is tied up with America's destiny." Martin Luther King, Jr., *Letter from Birmingham Jail*, in MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 92-93 (1964). Later that year, he spoke for a generation of black Americans when he said that he had "a dream." "It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed—we hold these truths to be self-evident, that all men are created equal." King, *I Have a Dream*, *supra* note 237, at 17. Indeed, even the Black Panthers, opposed as they were to integration, could not resist quoting as part of their platform the first two paragraphs of the ultimate creedal document, the Declaration of Independence. See THE BLACK PANTHERS SPEAK 4 (Philip S. Foner ed., 1970). Black Americans' adherence to the American creed continues today: black sociologist Orlando Patterson states that "[African Americans] share the same dreams as their fellow citizens, love and cherish the land of their birth with equal fervor . . . and, to every dispassionate observer, are, in their values, habits, ideals, and ways of living, among the most 'American' of Americans." PATTERSON, *supra* note 23, at 171.

<sup>336</sup> See generally AUGUST MEIER, NEGRO THOUGHT IN AMERICA, 1880-1915 (1963) (finding little interest in socialism among black Americans in late-19th century); SALLY MILLER, RACE, ETHNICITY, AND GENDER IN EARLY 20TH CENTURY AMERICAN SOCIALISM 42 (1996) ("In the first decades of this century, the Negro demonstrated very little interest in the abolition of capitalism. . . . As much as other more favored Americans, he was taught the American mystique of individual initiative.").

<sup>337</sup> See IRVING HOWE & LEWIS COSER, THE AMERICAN COMMUNIST PARTY: A CRITICAL HISTORY 207 (2d. prtg. 1962) (1957) (describing irrelevance of Communist party to black Americans in 1930s).

<sup>338</sup> See HAINES, *supra* note 236, at 67-70 (describing left-leaning black "liberationist" groups of late 1960s as being "quite small in size and limited in impact").

<sup>339</sup> See King, *I Have a Dream*, *supra* note 237.

<sup>340</sup> See *The Rainbow/PUSH Coalition* <<http://www.rainbowpush.org/aboutrpc/index.html>> (visited Mar. 5, 1999) (quoting Reverend Jesse L. Jackson as stating, "The American Dream is one big tent of many cultures, races and religions. Under that tent everybody is assured equal protection under the law, equal opportunity, equal access and a fair share. Our struggle demands that we open closed doors, extend the tent and even the playing field.").

<sup>341</sup> See, e.g., RODRIGO CHRONICLES, *supra* note 6, at 141, 144 (insisting that Enlightenment democracy is "source of black people's subordination").



## CONCLUSION

Despite CRT's more radical rhetoric, some race-crits have recognized the power of the liberal tradition all along, suggesting that many of them may not be so revolutionary after all.<sup>342</sup> Angela Harris once noted that race-crits, in their non-deconstructive moments, seek "not to abandon the Enlightenment ideals of freedom and liberal democracy, but to make good on their promises."<sup>343</sup> Similarly, Patricia Williams has conceded:

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, mothered them—not just the notion of them. We nurtured rights and gave rights life.<sup>344</sup>

Giving rights life, of course, is what liberalism is all about.

As a movement, critical race theory will eventually dissipate into the ether from which it came. It has always been irrelevant outside of academia<sup>345</sup> and is now feeling the stress of factionalism within its ranks.<sup>346</sup> Hopefully, race-crits will return to the liberal fold sooner

<sup>342</sup> See Harris, *supra* note 11, at 760; Patricia Williams, *Alchemical Notes: Resconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987).

<sup>343</sup> See Harris, *supra* note 11, at 760.

<sup>344</sup> See Williams, *supra* note 342, at 430. In reviewing the Critical Legal Studies movement, Sanford Levinson noted that despite their intentions to produce a radical new concept of the law, CLS writers exhibited the same inability to truly transcend liberalism's tradition of rights. See generally Sanford Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466 (1983) (book review).

<sup>345</sup> See *supra* note 304.

<sup>346</sup> There may be "something in the water" of group-based scholarly movements that causes them to split into smaller and smaller groups, thus weakening their influence. The Critical Legal Studies movement was founded to destroy "hierarchy," discrimination and oppression of all kinds, see Delgado, *Ethereal Scholar*, *supra* note 110, at 313, but minority scholars split off to form critical race theory. The CLS movement then began to fade. See generally Owen Fiss, *What Is Feminism?*, 26 ARIZ. ST. L.J. 413, 424 (1994) (stating that "Critical legal studies is dead"); *Minority Critiques*, *supra* note 109, at 297-447. In recent years, CRT has itself split into two "offshoots": "critical race feminism" and "LatCrit theory." See Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 10 LA RAZA L.J. 423 (1998); Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. L. ISSUES 357, 371 (1998). According to Tam Tran, "critical race feminism" was founded to focus exclusively on the oppression of women of color, because CRT "was insufficient in calling attention to the gender element of racial oppression." Tran, *supra*, at 371. LatCrit theory, according to Jean Stefancic, is "a spin-off of Critical Race Theory, [which] calls attention to the way in which conventional, and even critical [meaning CRT], approaches to race and civil rights ignore the problems and special situations of Latino people—including bilingualism, immigration reform, the binary black/white structure of existing race remedies law,

rather than later. The hardscrabble, incremental world of legal reform could use their help.

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