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THE RISE, DEVELOPMENT AND FUTURE DIRECTIONS OF CRITICAL RACE THEORY AND RELATED SCHOLARSHIP

ATHENA D. MUTUA[†]

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INTRODUCTION

This essay tells the story of the rise, development and future directions of critical race theory and related scholarship.¹ In telling the story, I suggest that critical race theory (CRT) rises, in part, as a challenge to the emergence of colorblind ideology in law, a major theme of the scholarship.² I contend that conflict, as a process of intellectual and institutional growth, marks the development of critical race theory and provides concrete and experiential examples of some of its key insights and themes. These conflicts are waged in various institutional settings over the structural and discursive meanings of race and the role that race plays in society, an argument made in part, by Kimberlé Crenshaw,³ and a story drawn in parts from her, Stephanie Phillips,⁴ and Cheryl Harris.⁵

1. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995) [hereinafter CRT: KEY WRITINGS]; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) [hereinafter CRT: CUTTING EDGE]; RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (Juan Perea, Richard Delgado, Angela Harris, & Stephanie Wildman eds., 2000); CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS (Dorothy A. Brown ed., 2003) [hereinafter CRT: CASES]; RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) [hereinafter DELGADO & STEFANCIC, CRT: AN INTRODUCTION]; CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris eds., 2002); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter THE LATINO/A CONDITION]; FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002); Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993), reprinted in CRT: CUTTING EDGE, *supra*, at 354-68 and reprinted in part in POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 211-15 (Leslie Bender & Daan Braveman eds., 1995) [hereinafter POWER, PRIVILEGE AND LAW]; Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Symposium, *Critical Race Theory*, 82 CAL. L. REV. 741 (1994); Symposium, *Critical Race Lawyering: Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101 (2005).

2. See, e.g., Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991), reprinted in CRT: KEY WRITINGS, *supra* note 1, at 257-75; see also DERRICK BELL, RACE, RACISM, AND AMERICAN LAW, 115-35 (5th ed. 2004); DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 21-22; Harris, *supra* note 1, at 1229-30; Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998); discussion *infra* notes 25-36, 78-88, 168-203 and accompanying text.

3. CRT: KEY WRITINGS, *supra* note 1, at xiii-xxxii; Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343 (2002), reprinted in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 9-31.

4. See generally Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247 (1999).

5. See generally Harris, *supra* note 1. In telling the story of CRT's development, Crenshaw specifically notes at the outset that CRT did not develop in the "abstract but in the context shaped by

Conflict within CRT in turn, to some extent spurs the development of CRT-related scholarship, such as Asian American Legal Scholarship, Critical Race Feminism and specifically Latino and Latina Critical Schools (LatCrit).⁶ Though this related scholarship could be seen as fragmenting the CRT movement,⁷ I suggest, focusing primarily on LatCrit, that it has actually deepened it. However, a significant area that CRT has not adequately addressed is the issue of class and its relationship to race and other subordinating structures. I examine reasons why this is the case even though CRT scholars have repeatedly called for analyses of the relationship between race and class and propose critical class analyses or classcrits as a necessary future direction of CRT and related scholarship.⁸

A few caveats are in order. This story could be told in as many different ways as there are CRT theorists.⁹ Further, although this rendition presents CRT as a “fully unified school of thought,” this is not the case, as CRT remains a work in progress.¹⁰ In addition, while I present what

specific institutional struggles over concrete issues that were set in motion by certain individuals.” Crenshaw, *supra* note 3, at 9.

6. See *infra* notes, 46-52, 104-16 and accompanying text.

7. See Otis T. Bryant, *Factualism Within the Critical Race Theory Movement: Fact or Fiction? A Comparative Analysis of the Emerging LatCrit and AsianCrit Self-Identification Theories and a Continued Critique (and Defense) of the Black/White Binary* (discussing the fragmentation of the movement and suggesting that the differences are small) (manuscript on file with author).

8. Martha McCluskey and I, with support of the Baldy Center for Law and Social Policy at University at Buffalo recently planned a workshop scheduled for January 2007 to explore the possibility of launching a new network of scholars interested in developing a progressive legal economic theory and politics. We explained that the term “ClassCrits” (taken from an earlier draft of this paper) reflected “our interest in focusing on economics through the lens of critical legal scholarship movements, such as critical legal studies, critical feminist theory, critical race theory, LatCrit, and queer theory. That is, we start[ed] with the assumption that economics in law is inextricably political and fundamentally tied to questions of systemic status-based subordination.” We explained our interest and posed a number of questions in an invitation roughly as follows:

Economic inequality has become a growing problem locally, nationally and internationally. In light of this central social and political reality, it is time to foreground economics in progressive jurisprudence and to reconsider longstanding assumptions and approaches in legal scholarship and practice. We aim to provide an alternative to the predominant discussions of “law and economics” grounded in neoclassical economic theory and its denial of “class.” Many legal scholars are now interested in challenging or broadening some of the assumptions of neoclassical economics. Nonetheless, the question of class and the role of institutionalized inequality still lurks beneath the surface of most discussions of economics in legal academia.

Here are a few of the questions we want to explore through a critical analysis of economic inequality. How might a critical class analysis of law and economic inequality build on, differ from or respond to other approaches to analyzing law and economic inequality, such as Law and Economics, poverty law, labor law, socioeconomic and legal realism? How might a focus on class contribute to the debates within critical theory and practice, such as how to address legal and societal subordination? What insights from earlier work in critical legal studies and legal realism might be revived, updated, and improved to better address contemporary concerns and debates? What is the relationship between subordinated identity based on economic class and institutionalized structures of economic subordination? How might the perspectives and insights of critical feminism and critical race theory help develop previous work on economic class in law? How might ClassCrits build upon the idea of anti- subordination praxis and intersectionality? What can we do to build a ClassCrits network?

9. See Crenshaw, *supra* note 3, at 9; see also Harris, *supra* note 1, at 1218 (making a similar point).

10. Crenshaw, *supra* note 3, at 20.

are commonly agreed to be the “tenets” of CRT,¹¹ not every precept presented here is held valid by every self-described critical race scholar. Perhaps that is as it should be. And finally, although I provide an overview of Asian American Legal Scholarship, Critical Race Feminism, and LatCrit as CRT-related scholarship, I primarily focus on the thematic and institutional development of “LatCrit” because it in part grows out of internal conflict within CRT and because of its deep institutionalization, especially given the cessation of the CRT workshop.¹²

Parts One through Four of this article present a narrative of the origins and development of Critical Race Theory. Part One provides an overview of CRT and related scholarship and some of its basic themes. Part Two discusses CRT’s intellectual antecedents. Part Three discusses a series of four sets of conflicts that I suggest have contributed to its intellectual content and institutional development. These involve conflicts between future critical race scholars with the Harvard Law School administration in the early eighties, later conflicts with critical legal studies, and a debate at the University of California Los Angeles Law School (UCLA) around the issue of affirmative action in the context of the California Proposition 209. They also involve conflicts internal to CRT, one challenging CRT views on sexual oppression and another involving the experiences and perspectives of non-black people of color, the latter in part leading to the establishment of LatCrit. Part Four then lays out CRT’s basic tenets and methodological fingerprints.

Part Five builds upon the context developed in the first four sections of the paper and applies critical theory insights and methods to an historical analysis of law and race. In doing so, I seek to provide a counter-narrative, as Derrick Bell suggests,¹³ to the dominant story about race and law. The dominant story suggests that the struggle for racial justice, though long and incremental, is nevertheless forward-moving, progressive, and eventually triumphant, given the American creed and precepts.¹⁴ The counter-narrative challenges this, suggesting that racial justice has not triumphed and that the white supremacy of American law first based explicitly on a theory of white superiority and black inferiority continues now under the guise, through the operation, and on a theory of colorblindness. Part Five, thus, seeks to *do* Critical Race Theory. Part Six, summarizes a number of the key insights of related CRT scholarship with a particular focus on LatCrit. While it has been suggested that the development of this related scholarship has fragmented the CRT pro-

11. See *infra* note 131 and accompanying text.

12. See *infra* notes 131-34 and accompanying text.

13. BELL, *supra* note 2, at 21-22; see also DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 40-41.

14. BELL, *supra* note 2, at 21-22.

ject,¹⁵ I suggest that these movements and insights necessarily inform the CRT project.

Part Seven briefly takes up an important refrain and critique of CRT: that it more systematically explore the relationship between class and race.¹⁶ This I think requires serious engagement with the notion and structures of class. Drawing on similar work and critiques by Richard Delgado,¹⁷ I explore possible reasons why CRT, which has made significant contributions to feminist legal scholarship,¹⁸ and gay, lesbian, and queer legal scholarship,¹⁹ in addition to race scholarship, has not adequately engaged the issues of class. I suggest class analyses or the founding of classcrits as a future direction of CRT scholarship and advocacy.

I. OVERVIEW

One of the most significant developments in law on issues of race and ethnicity in the last twenty years is the development of Critical Race Theory (CRT) and related scholarship.²⁰ The name, "Critical Race Theory" was coined in the late 1980's by Kimberlé Crenshaw who explained that the theory represented a racial analysis, intervention and critique of traditional civil rights theory on the one hand, and of Critical Legal Studies insights on the other.²¹ Its basic premises are that race and racism are endemic to the American normative order and a pillar of American institutional and community life. Further, it suggests that law does not merely reflect and mediate pre-existing racialized social conflicts and relations.²² Instead law, as part of the social fabric and the larger hegemonic order, constitutes, constructs and produces races and race relations

15. See *infra* note 117.

16. See *infra* note 247.

17. See generally Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writings About Race, Crossroads, Directions, and a New Critical Race Theory*, 82 TEX. L. REV. 121 (2003) [hereinafter Delgado, *Blind Alleys*]; Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001) [hereinafter Delgado, *Two Ways to Think About Race*]; Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269 (2006) [hereinafter Delgado, *The Current Landscape of Race*]; *infra* notes 247-98.

18. I am thinking, for instance, of intersectional theory as a significant contribution to feminist legal theory. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991), reprinted in part in CRT: KEY WRITINGS, *supra* note 1, at 357-83 [hereinafter Crenshaw, *Mapping the Margins*]; KIMBERLÉ CRENSHAW, A BLACK FEMINIST CRITIQUE OF ANTIDISCRIMINATION LAW AND POLITICS, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356-80 (David Kairys ed., 3d ed. 1998) [hereinafter THE POLITICS OF LAW], see also *infra* notes 221-27 and accompanying text.

19. Here I am thinking about multidimensionality theory as a contribution to gay, lesbian, and queer theory. See, e.g., Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999); Francisco Valdes, *Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship*, 75 DENV. U. L. REV. 1409 (1998); see also *infra* notes 228-33 and accompanying text.

20. See generally, *supra* note 1.

21. Crenshaw, *supra* note 3, at 9-31; CRT: KEY WRITINGS, *supra* note 1, at xiii-xxxii.

22. Harris, *supra* note 1, at 1216-17.

in a way that supports white supremacy.²³ Critical Race Theory, as Cheryl Harris explains, “coheres in the drive to excavate the relationship between the law, legal doctrine, ideology, and [white] racial power and the motivation ‘not merely to understand the vexed bond between law and racial power but to change it.’”²⁴

Critical Race Theory arose during the ascendance of, and as a challenge to the ideology of colorblindness in law,²⁵ which asserts that race, like eye color, is and should be irrelevant to the determination of individuals’ opportunities. A noble sentiment perhaps, but Critical Race Theory, while maintaining that race is not like eye color,²⁶ argues that legal colorblindness operates as if a colorblind society already exists and has always existed in the United States.²⁷ In doing so, it ignores and cements the racial caste system constructed in part by law.²⁸ In other

23. *Id.* For recent discussions of the construction of racial identity at the personal level, see, e.g., Michelle Adams, *Radical Integration*, 94 CAL. L. REV. 261 (2006); Angela Onyuchi-Willig, *Undercover Other*, 94 CAL. L. REV. 873 (2006).

24. Harris, *supra* note 1, at 1218 (quoting CRT: KEY WRITINGS, *supra* note 1, at xiii).

25. See CRT: KEY WRITINGS, *supra* note 1, at xvi-xvii (noting that at the emergence of CRT, many of its principle figures experienced the “boundaries of ‘acceptable’ racial discourse as becoming suddenly narrowed” and explaining that while there were differences between liberal and conservative positions they “defined and constructed ‘racism’ the same way, [in contrast to future CRT scholars] as the opposite of color-blindness”); see also Crenshaw, *supra* note 3, at 22 (noting that CRT came into “existence at the twilight of what had been a transformative social period” referencing the civil rights movement of the sixties and seventies). In retrospect, it becomes clear that CRT’s initial conflicts are related to the colorblind perspectives of their adversaries. See *infra* notes 78-92. Further, CRT emerges at the same time that the Supreme Court’s interpretations of the Equal Protection Clause in the racial context increasingly shift toward and are based on notions of colorblind individualism. See *infra* notes 30-36, 171-206 and accompanying text. For discussions of colorblindness, see BELL, *supra* note 2, at 115-35; DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 21-22; Gotanda, *supra* note 2, at 257-75. See generally MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 193 (2003) [hereinafter BROWN ET AL., WHITEWASHING RACE] (reviewed, from a CRT perspective by Delgado, *The Current Landscape of Race*, *supra* note 17); Cheryl Harris, *Review Essay: Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907 (2006); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1 (1995); Eric K. Yamamoto, Carly Minyer, & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241 (2006).

26. Harris, *supra* note 1, at 1229. Critical race theorists would argue that race is socially constructed in a process, in which social and materially relevant meanings are assigned to certain biological traits, whereas eye color is a biological trait to which no overriding social meaning has been assigned. For good treatments of the social construction of race, see BELL, *supra* note 2, at 5-8; Robert S. Chang, *Critiquing “Race” and Its Uses: Critical Race Theory’s Uncompleted Argument*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 87-96; IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) reprinted in CRT: CUTTING EDGE, *supra* note 1, at 626-34; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S 9-13 (2d ed., 1994); Gotanda, *supra* note 2, at 257-75; Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 3-10 (1994), reprinted in part in CRT: CUTTING EDGE, *supra* note 1, at 191-203. W.E.B. Du Bois anticipated this position. See *The Conservation of Race*, in W.E.B. DU BOIS SPEAKS: SPEECHES AND ADDRESSES, 1890-1919, 50-54 (Philip Foner ed., 1998); see generally FRANZ BOAS, RACE, LANGUAGE, AND CULTURE 3-195 (1940) (these pages include multiple essays discussing race).

27. This argument is not meant to suggest that the ideal society in the future would be a colorblind society. An ideal society might be one that embraces and respects human diversity.

28. See BROWN ET AL., WHITEWASHING RACE, *supra* note 25, at 193; Gotanda, *supra* note 2, at 274; see also BELL, *supra* note 2, at 126-27; DELGADO & STEFANCIC, AN INTRODUCTION *supra* note 1, at 21-22; Harris, *supra* note 1, at 1229-30; Harris, *supra* note 25 (arguing in reference to

words, it maintains the oppressive conditions and lack of opportunities for subordinated groups that continue to be structured by the historical and modern use of race in law and throughout the society. It amounts to what has been called “colorblind racism.”²⁹

Colorblindness, or more specifically, “colorblind individualism,”³⁰ as an ideology applied in law, fully emerges after the civil rights movement but has deep historical roots even in American law itself. One of its earliest and clearest articulations is found in the dissent to the infamous U.S. Supreme Court case, *Plessy v. Ferguson*.³¹ In *Plessy*, the Court held that the Equal Protection Clause of the fourteenth amendment to the U.S. Constitution, enacted as part of the Civil War amendments that abolished slavery, allowed the separate but equal treatment of racialized people. *Plessy* thus made legal the practices of racial, “Jim Crow” segregation in the United States³² that the civil rights movement, almost one hundred years later, would challenge. Justice John Marshall Harlan, the lone dissenter in the case, in rejecting the holding asserts the colorblind claim: “[I]n the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”³³ The separate but equal legal doctrine of *Plessy* was overturned in the *Brown v. Board of*

conservative interpretations that race was not a factor in the aftereffects of Hurricane Katrina, that colorblindness is a perspective that narrows the definition of race to that arising from the aberrant individual’s intentional action); Hernandez, *supra* note 2. From this colorblind perspective, the response to the question of whether race played a role in the government’s slow response to hurricane victims, the argument is no one or group of individuals could be said with certainty to have intentionally delayed governmental action. Of course this does not address more unconscious influences in individuals and it does not explain why, out of the 1.3 million people who make up the New Orleans metropolitan area—all hit by the hurricane—the 120,000 or so people stranded in New Orleans after the hurricane were overwhelmingly black? See Virginia R. Dominguez, *Seeing and Not Seeing: Complicity in Surprise*, in SOCIAL SCIENCE RESEARCH COUNCIL, UNDERSTANDING KATRINA: PERSPECTIVES FROM THE SOCIAL SCIENCES (2005), <http://understandingkatrina.ssrc.org/Dominguez/pf/> (providing these statistics and making a similar point); see also *infra* notes 297-316 (discussing class, race and Hurricane Katrina).

29. See generally EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 137-66 (2001); LESLIE G. CARR, “COLOR-BLIND” RACISM 107-170 (1997).

30. This term is used to capture both the ideas of race neutrality and the emphasis in American law on the individual. For instance, Kevin Brown uses this term to capture these two different dynamics in discussing the demise of school desegregation efforts in the U. S. See KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 103-28 (2005); see also John O. Calmore, *New Demographics and the Voting Rights Act: Race-Conscious Voting Rights and the New Demography in a Multi-racing America*, 79 N.C. L. REV. 1253, 1271-72 (2001) (discussing the way the Supreme Court is transporting “individualized colorblindness” across different context and explaining why this is ridiculous in the voting dilution context, a context that only makes sense in the terms of identifiable groups and yet blind to white group bloc voting).

31. 163 U.S. 537 (1896). See generally CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

32. See C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed., 1974). “Jim Crow” laws were laws that imposed racial separation in schools, common carriers, public accommodations, and in public facilities generally, both governmental and private.

33. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

Education case,³⁴ decided in 1954, which made segregation in schools unconstitutional.

The rediscovery in the seventies of colorblind notions in law, was given a boost by the appropriation by conservative forces of colorblind discourse within the civil rights movement,³⁵ as captured in the 1963 speech of Martin Luther King, Jr., a civil rights hero. King aspired to a time when every person would be judged “by the content of his character rather than the color of his skin.”³⁶ However, while Dr. King believed, worked, and died fighting for peace and racial and economic justice, the application of legal colorblindness has worked to undermine that dream. A central theme of Critical Race Theory, therefore, is to explore the ways in which legal colorblindness, in supplanting overt legal racial ordering, has not only allowed law to ignore the social and institutional structures of oppression created historically and recreated presently in law and practice but also has blunted efforts to dismantle the racial caste system, working instead to maintain it. Critical Race Theory’s main goal is the liberation of minorities and other socially subordinated people; its stance is one of “antisubordination.”³⁷

Critical Race Theory supports its claim by analyzing cases, laws, and legal patterns that unearth the many ways in which law constitutes and/or supports the status quo of white racial power and black and non-white subordination. For example, CRT scholars have examined the

34. 347 U.S. 483 (1954). See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2d ed., 2004). For consideration of the consequences of *Brown*, see generally CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION* (2004); JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLING LEGACY* (2001), reviewed by Carlo A. Pedriali, *Under a Critical Race Theory Lens*, 7 *AFR.-AM. L. & POL’Y REP.* 93 (2005).

35. See BELL, *supra* note 2, at 115 (referring to modern-day colorblind ideology as a rediscovered constitutional rationale). For early conservative misappropriations of the civil rights aspiration as captured by King, see generally PAUL SEABURY, *REVERSE DISCRIMINATION* (Barry Gross ed., 1977); NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975).

36. Martin Luther King, Jr., *I Have a Dream*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.*, 217, 219 (James Melvin Washington ed., 1986), quoted in CRT: KEY WRITINGS, *supra* note 1, at xv. Dr. King was obviously speaking of judgments of personal moral worth, not about a theory of constitutional interpretation. Constitutional colorblindness is part of the Supreme Court’s rationale for the application of strict scrutiny to all racial classifications, even those intended to remedy the effects of discrimination. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); BELL, *supra* note 2, at 115-35.

37. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), reprinted in part in *POWER, PRIVILEGE, AND LAW*, *supra* note 1, at 479-81; Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. REV.* 1003, 1005 (1986); Francisco Valdes, *Outsider Scholars, Critical Race Theory, and “OutCrit” Perspectivity: Postsubordination Vision as Jurisprudential Method*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra* note 1, at 399-409; Elizabeth M. Iglesias, *Structures of Subordination? Women of Color at the Intersection of Title VII and the LLRA. Not!*, 28 *HARV. C.R.-C.L. L. REV.* 395 (1993), reprinted in part in *CRITICAL RACE FEMINISM: A READER* 317-32 (Adrien Katherine Wing 1997) [hereinafter *CRITICAL RACE FEMINISM*]; Elizabeth M. Iglesias & Francisco Valdes, *Afterword to LatCrit V Symposium: LatCrit at Five: Institutionalizing a Post-Subordination Future*, 78 *DENV. U. L. REV.* 1249, 1265-66 (2001).

ways that past naturalization laws,³⁸ together with cases such as *Dred Scott* both constructed whiteness and defined it as a condition of citizenship.³⁹ They have examined how current laws legitimate racial profiling of black and other non-white peoples, thereby reinforcing elements of the caste system developed throughout the nation's history.⁴⁰ And they have analyzed the ways in which race-neutral housing laws facilitated white flight and suburban sprawl after the *Brown* decision, perpetuating in new form the old pattern of racial residential segregation.⁴¹ From this perspective, CRT rejects the conventional claims of lawyers, judges, and others that law, through the professional processes of reasoned analysis of abstract rules such as equality, is neutral, objective, and distinct from and outside the realm of politics and political choices.⁴² Having emerged from a critique of civil rights, Critical Race theorists initially focused on constitutional and civil rights issues. However, they now explore the relationship between white racial power and law in a range of topics from business law⁴³ to international law.⁴⁴

38. Uniform Naturalization Act of 1790, 1 Stat. 103 (repealed 1795).

39. *Ozawa v. United States*, 260 U.S. 178, 195 (1922); *Scott v. Sandford*, 60 U.S. 393, 419-20 (1857). See generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

40. See Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851 (2002); see, e.g., *Whren v. United States*, 517 U.S. 806 (1996); see also BELL, *supra* note 2, at xx; William H. Buckman & John Lamberth, *U.S. Drug Laws: The New Jim Crow?: Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, 10 TEMP. POL. & CIV. RTS. L. REV. 387 (2001); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offences: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 338 (1991), reprinted in part in CRT: CASES, *supra* note 1, at 206-28; Kathryn K. F. Russell, "Driving While Black": Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717 (1999); *United States v. Harvey*, 16 F.3d 109, 114 (6th Cir. 1994) (Keith, J., dissenting).

41. John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1492-94 (1993), reprinted in part in SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW 884-92 (Martha R. Mahoney, John O. Calmore, & Stephanie M. Wildman eds., 2003) [hereinafter SOCIAL JUSTICE].

42. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 746 (1994). See generally Phillips, *supra* note 4.

43. See, e.g., CRT: CASES, *supra* note 1, at 138-177; Keith Aoki, *The Stakes of Intellectual Property Law*, in THE POLITICS OF LAW, *supra* note 18, at 259-78; Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991), reprinted in part in A WOMAN'S PLACE IS IN THE MARKETPLACE: GENDER AND ECONOMICS 295-318 (Emma Coleman Jordan & Angela P. Harris eds., 2006) [hereinafter A WOMAN'S PLACE]; Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995); Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cotton Field to the Courtroom*, 28 CONN. L. REV. 5, 6-7 (1995); Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004); Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003); Cheryl L. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993), reprinted in part in CRT: CASES, *supra* note 1, at 279-87, and in CRT: KEY WRITINGS, *supra* note 1, at 276-91, and in A WOMAN'S PLACE, *supra* at 357-71; Emily M.S. Houh, *Critical Interventions: Towards an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003); Blake Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997); Muriel Morisey, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89 (1993),

In addition, CRT helped spawn the development of the Latina and Latino Critical Theory (LatCrit)⁴⁵ and Asian American critical legal analyses and movements.⁴⁶ By shifting the Critical Race Theory lens to other racialized groups, these analyses brought in important discussions of both historical and contemporary issues of citizenship and immigration law as sources of racial and ethnic subordination, as well as, for example, language suppression and stereotypes (Latina/os)⁴⁷ or the model minority myth (Asian Americans).⁴⁸ These issues were less visible in the original context of CRT's employment of the white over black paradigm and the particularities of the African American experience as analytical frameworks.

The LatCrit movement is particularly interesting because it explicitly incorporates and builds upon feminist legal insights and queer theory as foundational philosophies, explores international issues, and explicitly and consciously articulates the social justice position of antiracism—a stance against all forms of oppression. Further, LatCrit scholars

reprinted in part in CRT: CASES, *supra* note 1, at 160-64; David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1695 (2004); Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117 (2004); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1994), reprinted in part in CRT: CASES, *supra* note 1, at 138-43, 165-68, 176-77.

44. See generally CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 303-75; Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000), reprinted in part in SOCIAL JUSTICE, *supra* note 41, at 880-82; Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361 (1996); CRITICAL RACE FEMINISM, *supra* note 37, at 339-85; GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000) [hereinafter GLOBAL CRITICAL RACE FEMINISM]; Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000).

45. See Francisco Valdes, *Afterword: Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, QueerCrits, and LatCrits*, 53 U. MIAMI L. REV. 1266, 1266 (1999).

46. See generally WU, *supra* note 1; Chang, *supra* note 1, at 355; Margaret Chon & Donna E. Arzt, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary: Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005); Frank H. Wu, *The Arrival of Asian Americans: An Agenda for Legal Scholarship*, 10 ASIAN L.J. 1 (2003). Recently these scholars have called their work Asian American Jurisprudence. See, e.g., John Hayakawa Torok, *Asian American Jurisprudence: On Curriculum*, 2005 MICH. ST. L. REV. 635.

47. Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Literature: Can Free Expression Remedy Systemic Ills?*, 77 CORNELL L. REV. 1258, 1273 (1992), reprinted in part in POWER, PRIVILEGE AND LAW, *supra* note 1, at 82-89.

48. Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 813-14 (1996); Chang, *supra* note 1; Uy, *supra* note 43, at 131-32. See generally NAZLI KHRIA, *BECOMING ASIAN AMERICAN: SECOND-GENERATION CHINESE AND KOREAN IDENTITIES* (2002); DIANA TING LIU WU, *ASIAN PACIFIC AMERICANS IN THE WORKPLACE* (1997); STACEY J. LEE, *UNRAVELING THE "MODEL MINORITY": LISTENING TO ASIAN AMERICAN YOUTH* (1996).

have established an institutional framework for the future development of LatCrit and other Critical Race Theory scholarship.⁴⁹

While feminist theory, particularly feminist legal theory and black feminist theory, were inherent in the original Critical Race Theory scholarship through the work of people like Crenshaw and Angela Harris,⁵⁰ Critical Race Feminism, a term coined originally by Richard Delgado, and a field adopted and promoted specifically by Adrien Wing, has taken off as a separate, newly-developing theory and body of scholarship.⁵¹ Critical Race Feminism builds on Critical Race Theory as well as insights specifically from black feminist theory and is also a leftist legal critique that primarily focuses on the intersections of race, ethnicity, and/or colonialism on the one hand and gender on the other. In addition, it explores the international manifestations of racialized gender oppression. The exploration of the sex/gender system, generally, its relationship to the racial order, and the living reality of sexual minorities of color, coupled with Critical Race Theory's embrace of the larger social justice project of working toward the liberation of all, has resulted in many critical race theorists also examining the ways in which law subordinates sexual minorities.⁵²

Together these issues have led to insights about the ways in which identity is multidimensional. For instance, critical race theorists, among others, point out that people are not simply raced (black, white, yellow, or "Hispanic"); they are also gendered, (masculine, feminine or transgendered) and possess sexual identities (heterosexual, homosexual, or bisexual), etc. From this perspective, every person's identity is multidimensional.⁵³ This insight of multidimensionality goes further. The so-

49. LatCrit literature is readily available at the LatCrit website, Latina and Latino Critical Theory (2004), <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/index.html> (listing, *inter alia*, 16 colloquia and symposia on LatCrit). See generally, THE LATINO/A CONDITION, *supra* note 1; Colloquium: *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996); Panel: *Latina/o Identity and Pan-Ethnicity: Toward LatCrit Subjectivities*, 2 HARV. LATINO L. REV. 175 (1997); Joint Symposium: *Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997).

50. See generally CRT: KEY WRITINGS, *supra* note 1; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990), *reprinted in part in* POWER, PRIVILEGE AND LAW, *supra* note 1, at 484-85, 539-43, and in CRT: CUTTING EDGE, *supra* note 1, at 253-66, and in CRITICAL RACE FEMINISM, *supra* note 35, at 11-18.

51. See CRITICAL RACE FEMINISM, *supra* note 37, at 1; GLOBAL CRITICAL RACE FEMINISM, *supra* note 44; CRT: CUTTING EDGE, *supra* note 1, at 261-74; Adrien K. Wing & Christine A. Willis, *From Theory to Praxis: Black Women, Gays, and Critical Race Feminism*, 4 AFR.-AM. L. & POL'Y REP. 1 (1999); see also *Women of Color in Legal Academia: A Biographic and Bibliographic Guide*, 16 HARV. WOMEN'S L.J. 1 (1993).

52. See generally Hutchinson, *supra* note 19; Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997).

53. Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights – Rules and Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 667-68 (1996). See generally Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001), *reprinted in part in* SOCIAL JUSTICE, *supra* note 41.

cial structures of race, gender, sexuality, and class as systems of power are interrelated and mutually reinforcing. They create multiple and intersecting positions of subordination for members of the groups they disadvantage. So for example, racism in the United States is patriarchal and patriarchy in the United State is racist. As Dorothy Roberts points out, some of the first laws passed in America involved changing the legal/social practice of children inheriting the status of their fathers, to children inheriting the status of their mother if their mothers were (black) slaves, while patrolling and later prohibiting sexual relations between white women and black men. "Black women [were forced to] produce[] children who were legally Black to replenish the master's supply of slaves . . . [while] White women [were compelled to] produce[] white children to continue the master's legacy."⁵⁴ Black men passed on little.⁵⁵ The racism that both black men and women experienced was thus, also gendered. To these analyses, scrutiny of the specific relations of class could be added as well as an analysis of compulsory heterosexuality. As such, the structure of black oppression was and has remained multidimensional.

CRT theorists have often explored the material harms caused by race, gender, and sexuality as mutually reinforcing social systems embedded in and constructed, albeit not exclusively, by law; and they have suggested that these systems reinforce the reproduction of class within the United States. However, they have not in any sustained manner theorized the ways in which class functions as a site for identity formation, or the various ways in which class as a specific function of the creation and distribution of resources, operates both independently and mutually with other subordinating structures to limit the material well-being of people including racial and other minorities. These kinds of analyses await further development and constitute a necessary future direction of CRT.

II. INTELLECTUAL ANTECEDENTS

Many scholars have described the origins of Critical Race Theory. They suggest that it owes its intellectual genesis to three intellectual movements. The first is the civil rights movement and the critical assessments of its effects in changing the actual conditions of black life. Second, CRT builds upon the themes and critical understandings of law exposed by the Critical Legal Studies movement.⁵⁶ And third, it incor-

54. Dorothy E. Roberts, *Racism and the Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL'Y & L. 1, 8 (1993), reprinted in FEMINIST LEGAL THEORY, VOLUME II (Frances E. Olsen ed., 1995). See generally JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985).

55. Presumably where black men were free and had children with a free woman, he passed on his legacy.

56. See generally CRT: KEY WRITINGS, *supra* note 1; CRT: CUTTING EDGE, *supra* note 1. For a discussion on the Critical Legal Studies (CLS) movement, see generally CRITICAL LEGAL STUDIES (Jones Boyle ed., 1992); CRITICAL LEGAL STUDIES (Allan C. Hutchinson ed., 1989);

porates many of the insights and theorizing of feminist legal and other feminist scholars.⁵⁷

Richard Delgado traces CRT genesis to the early seventies when several legal scholars began to express doubt about the effectiveness of the civil rights movement's legal strategy to racial justice. For instance, Derrick Bell, considered a forefather of CRT, in an essay in 1976, suggested that civil rights attorneys' approach to litigating school cases for purposes of desegregating entire school districts (and balancing them racially) might be at odds with their clients'—African American families—very real hopes and concrete goals of immediately improving their children's educations.⁵⁸ In another article, Bell argued that the result in the 1954 *Brown v. Board of Education* decision, although heralded as a triumph of the civil rights legal strategy, might be better explained by what he called "interest convergence,"⁵⁹ a theme that has become a mainstay of critical race analysis.⁶⁰ *Brown*, he suggested, came about not because of some belated realization by whites of the harms black children suffered under segregation,⁶¹ but rather, because of its value to

CRITICAL LEGAL STUDIES (Peter Fitzpatrick & Alan Hunt eds., 1987); CRITICAL LEGAL STUDIES: ARTICLES, NOTES, AND BOOK REVIEWS SELECTED FROM THE PAGES OF THE HARVARD REVIEW (1986); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Symposium: *Critical Legal Studies*, 36 STAN. L. REV. 1-674 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

57. See generally CRT: CUTTING EDGE, *supra* note 1, at 499-550.

58. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976), reprinted in CRT: KEY WRITINGS, *supra* note 1, at 5-19, and in part in CRT: CUTTING EDGE, *supra* note 1, at 228-38, and in SOCIAL JUSTICE, *supra* note 41, at 328-33; see DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 30-31.

59. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980), reprinted in CRT: KEY WRITINGS, *supra* note 1, at 20-29 [hereinafter Bell, *Interest Convergence Dilemma*]; see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 51-74 (1987). Bell's theory had a precursor in the "Slave Power" theory constructed by antislavery elements, such as future Chief Justice Samuel P. Chase, prior to the Civil War. They argued that the South was under the political control of slave owners who, through the Democratic Party, dominated all branches of the national government, which was its tool for the denial, in the interests of slavery, of the freedoms of Northern whites. This became part of the ideology of the Republican Party whose original commitment was to prevent the extension of slavery. See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970); MICHAEL F. HOLT, THE POLITICAL CRISIS OF THE 1850S (1978).

60. Delgado, *Blind Alleys*, *supra* note 17, at 124; see, e.g., Steven A. Ramirez, *Games CEOs Plan and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583 (2004); Michael Z. Green, *Addressing Race Discrimination Under Title VII after Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937 (2005); John Hayakawa Torok, "Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asian Americans, 1943-1965, 1995 CHINESE AMERICA: HISTORY & PERSPECTIVES 1-15; Marlia Banning, *Critical Race Theory and Interest Convergence in the Desegregation of Higher Education*, in RACE IS - RACE ISN'T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION (Laurence Parker, Donna Deyhle, & Sofia Villenas eds., 1999).

61. Bell, *Interest-Convergence Dilemma*, *supra* note 59, at 523-24. The *Brown* decision also ignored, and apparently could not contemplate, the harms segregation visited upon white students. These harms as Kevin Brown suggests include a false sense of superiority. See BROWN, *supra* note 30, at 164-67. He notes that prominent social scientists filed an amicus brief in the *Brown* cases

whites—a value and interest that converged with black aspirations for freedom and well-being.⁶² The decision, he suggests, was intended to and “helped to provide immediate credibility to America’s struggle with Communist countries to win the hearts and minds of emerging third world peoples.”⁶³ Bell’s argument that the goal of the U.S. government in advocating for the decision in *Brown* had little to do with improving the education or life chances of black children, rang particularly accurate in 2004 when, fifty years after the decision, education in the United States was found to be as segregated (and disadvantaging) in terms of race as it had been at the time of *Brown*.⁶⁴ Bell later argued that racism was pervasive in the American social order, that law was imbued with it, and that racism was a permanent feature of American society including its legal system.⁶⁵

suggesting that segregation hurt all children both black and white, not simply black children. The scientists noted that children taught prejudice learn:

to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The culture [allows] . . . them to direct their feelings of hostility and aggression against whole groups of people . . . perceived as weaker than themselves. They often develop patterns of guilt feeling, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice . . .

Id. at 165. Brown concludes that “if segregation created a false sense of inferiority within blacks, then it must have also generated the psychological harm of a false sense of superiority in whites.” *Id.* at 165-66. He explains this as the dual psychological harm of segregation, the two different sides of the same delusion suffered by the entire society. *Id.* at 166.

The difficulties experienced by minority teachers (as well as women) in the classroom in many ways capture this harm in that white students who often know little about the subject matter of the class act as if there is little a minority teacher can teach them. Consider Derrick Bell’s experience at Stanford Law School in 1986 when first year law students presumed to know more about constitutional law than Professor Bell did and therefore critiqued the class as not covering the appropriate subject matter. The Stanford administration, though later apologizing, initially capitulated to the student’s estimation. See Derrick Bell, *The Price and Pain of Racial Perspective*, STAN. L. SCH. J., May 9, 1986, at 5. In fact these teachers have written quite a bit about their classroom difficulties as minority teachers and the other challenges they face in the context of the predominately white male American law school. See, e.g., Richard Delgado & Derrick Bell, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 360 (1989); Okianer Christian Dark, *Just My ‘Magination*, 10 HARV. BLACKLETTER L.J. 21, 23 (1993); Trina Grillo, *Tenure, and Minority Women Law Professors: Separating the Strands*, 31 U.S.F. L. REV. 747, 753-54 (1997); Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Sub-text: A Critical Essay*, 19 W. NEW ENG. L. REV. 151, 152 (1997). For the perspective of critical students, see Kathryn Pourmand Nordick, *Essay: A Critical Look at Student Resistance to Non-Traditional Law School Professors*, 27 W. NEW ENG. L. REV. 173, 174-75 (2005).

62. Bell, *Interest-Convergence Dilemma*, *supra* note 59, at 524.

63. Bell, *Interest-Convergence Dilemma*, *supra* note 59, at 524; see also Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1998), reprinted in CRT: CUTTING EDGE, *supra* note 1, at 106-17 (noting that the government stated this in their amicus brief submitted in the *Brown* case and further substantiating Bell’s intuition).

64. This point was made during celebrations marking the fiftieth anniversary of *Brown*. See, e.g., Greg Toppo, *Integrated Schools Still a Dream 50 Years Later*, USA TODAY, Apr. 28, 2004, at A1.

65. BELL, *supra* note 2, at 1; see Bell, *supra* note 59, at 518; DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 3 (1993).

Ignored in the rush to proclaim color blindness as the judicial panacea to claims of racial injustice is the fact that virtually all policies adopted as protections against racial injus-

At about the same time, the Critical Legal Studies movement based in the legal academy was growing. This movement questioned the entire edifice of law as an objective arbiter of social conflict distinct from the messiness of politics and political choices. This movement, which included scholars such as Alan Freeman, Peter Gabel, Duncan Kennedy, and Mark Tushnet, successfully demonstrated the ways in which legal rules were, in and of themselves, not determinative of a particular result.⁶⁶ They showed that, for any given rule, there were multiple, contrasting and conflicting rules whose resolution required actors to make choices. These choices were political ones that generally reflected, supported, and legitimized the social power of dominant classes.⁶⁷

However, they rejected what they termed “vulgar instrumentalist” or “structuralist” accounts of law that understand it as merely a tool and reflection of bourgeoisie/elite interests and ideas, or as a merely super-structural phenomenon determined by the underlying economic base. Rather, drawing in part on the Italian Marxist philosopher Antonio Gramsci’s idea of hegemony,⁶⁸ Critical Legal Studies scholars understand law as a complex system with many functions, one of which is to exercise and simultaneously *legitimate* the use of institutional violence within the *prevailing* social arrangements in a way that gains the consent

tices suffered by blacks and other people of color in this country have actually proven to be of more value to whites.

BELL, *supra* note 2, at xx; *see also* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992); Derrick Bell, *Racial Realism – After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990), *reprinted in* CRT: CUTTING EDGE, *supra* note 1, at 2-8 [hereinafter Bell, *Racial Realism*].

66. *See* THE POLITICS OF LAW, *supra* note 18, at 1-7 (providing a good overview of Critical Legal Studies themes). This book has been revised several times. The first edition in 1982 was updated and followed by a revised edition in 1990, and then again in a third edition in 1998, *supra* note 1. I like each of these editions but find the 1982 publication the best for introducing many of the basic CLS concepts and initial ideas. In this edition the ideas tend to be more fully explained, whereas in later publications some key insights are merely summarized. The later editions, however, introduce new thinking developed in a covered area and introduce additional essays that explore a wider breadth of legal fields.

67. *See* Victor Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW, *supra* note 18, at 686; *see, e.g.*, ROBERT L. HAYMAN, JR., NANCY LEWIS & RICHARD DELGADO, JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM 402-13 (2002).

68. Hegemony is an illusive concept, but is to be counterposed to “direct domination” as a paradoxical “‘spontaneous’ consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is ‘historically’ caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.” SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 12, 161, 170, 416-17 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971); *see also* Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in THE POLITICS OF LAW, *supra* note 18, at 647-48; Douglass Litowitz, *Gramsci, Hegemony and the Law*, 2000 BYU L. REV. 515, 515-16 (2000); ALAN HUNT, DICHOTOMY AND CONTRADICTION IN THE SOCIOLOGY OF LAW, in MARXISM AND LAW 86-87 (Piers Beirne & Richard Quinney eds., 1982); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 32 (1982). For an application of Gramsci’s concept of hegemony to antebellum slavery, *see* EUGENE V. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 25-49 (1976), *reprinted in part in* MARXISM AND LAW, *supra* at 279-94.

and acquiescence of the subordinated to their conditions.⁶⁹ Law does this political work by deploying a distinct and elaborate discourse and body of knowledge (popularly perceived as objective and apolitical) to justify its decisions. These decisions, while generally supporting the power of elite groups, sometimes actually restrain the exercise of power and occasionally provide justice to ordinary people. In doing so, however, they lend legitimacy to law and to many of the existing social arrangements and institutions of which law is a part. Thus, while there may indeed be “a difference between arbitrary power and [the] rule of law,” law may also be “in some part sham.”⁷⁰

So for example, in a path-breaking article, Alan Freeman argued that antidiscrimination law offered a credible measure of tangible progress without in any way disturbing the basic class structure of the American society.⁷¹ This was accomplished by using concepts such as intent, fault, colorblindness and formal equality, which over time ultimately located the problem of racism in the intentional actions of bad actors instead of the established caste system that included the conscious and unconscious habitual human and institutional practices of racial ordering. The remedy to the problem, defined in this manner, was to compel the bad actors to act differently instead of changing or dismantling the caste system of embedded racial arrangements.⁷² Thus, although judges declared that law would treat everyone the same, they did so without regard to and so without changing the conditions that stratified people(s) socially and materially in the first place. As such, antidiscrimination law outlawed the obvious and explicit manifestations of racism (the “white only” signs of the Jim Crow era) and thereby provided credible evidence that the law and the basic structure of society were fair,

69. My notion here of legal discourse as backed by violence and justifying its use comes from Robert Cover. See generally, Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). I thank my colleague John Henry Schlegal for pointing out that I should clarify this.

70. Rabinowitz, *supra* note 67, at 688 (citing E.P. Thompson, the celebrated English radical historian who acknowledged the element of false consciousness induced by the legal order, but affirmed the rule of law as a potential basis for progressive change; see E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265-66 (1975), reprinted in part in MARXISM AND LAW, *supra* note 68, at 130-37). Another of Gramsci's concepts is the “organic intellectual,” who is, not a social technician (like most lawyers) but rather someone who instructs popular consciousness “precisely in order to construct an intellectual-moral bloc which can make politically possible the intellectual progress of the race and not only of small intellectual groups.” SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI, *supra* note 68, at 332-33. For a CRT application of these concepts which regards Martin Luther King as one such organic intellectual, see ANTHONY E. COOK, BEYOND CRITICAL LEGAL STUDIES: THE RECONSTRUCTIVE THEOLOGY OF DR. MARTIN LUTHER KING, JR., in CRT: KEY WRITINGS, *supra* note 1, at 90-91.

71. Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978), reprinted in MARXISM AND LAW, *supra* note 68, at 210-35 [hereinafter Freeman, *Legitimizing Racial Discrimination*]; see also Alan Freeman, *Antidiscrimination Law: from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in THE POLITICS OF LAW, *supra* note 18, at 285-311.

72. Freeman also suggests that the Court's momentary flirtation with attacking the actual structural conditions of subordination through ordering school desegregation lent support to its rhetoric of change.

without disturbing the structural and systemic manifestations, including the maldistribution of resources, of that same deeply embedded racism.

And finally, though perhaps not initially obvious, CRT owes a debt to yet another school of thought: feminism. As Delgado notes, CRT builds upon feminist “insights into the relationship between power and the construction of social roles, as well as the unseen, largely invisible collection of patterns and habits that make up patriarchy and other types of domination.”⁷³ In addition, the idea of antistatutory subordination, the central stance of “race crits,” can be traced not only to race scholars but also to feminist scholarship.⁷⁴

III. CONFLICT AS AN ENGINE OF CRT INTELLECTUAL AND INSTITUTIONAL GROWTH

These ideas, according to Kimberlé Crenshaw, met in the actual persons of students attending Harvard Law School in 1981 where a struggle raged over the meaning of race. This struggle was a part of a larger continuum of student movements at universities in the 1970s and 1980s advocating for ethnic study departments, against South African apartheid, and for diversity in student admissions and faculty staffing.⁷⁵ The struggle implicated notions of race consciousness, affirmative action, and the presumptive existence of meritocracy and proved to be a catalyst for the theory’s institutionalization. It also began a pattern of conflict that would engender crucial CRT insights and fuel its growth and entrenchment.

Specifically, the conflict at Harvard led to the Alternative Course, described by Crenshaw as CRT’s first institutional expression. Second, conflict with Critical Legal Studies helped to inspire the formal establishment of the CRT workshop. Third, internal conflict and critique over the commitments and focus of the workshop led to the exploration of the experiences of additional racialized and oppressed groups. The later founding of LatCrit, resulting in part from these conflicts, brought about concerns about fragmentation of the movement.⁷⁶ Nevertheless, it embodied and represented a continuing site for the germination of “Race Crit” insights. And last, the conflict over Proposition 209⁷⁷ and its visions of colorblind justice in the context of the University of California Los Angeles Law School led to CRT’s entrenchment.

73. DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 5.

74. *See supra* note 37.

75. Sumi Cho & Robert Westley, *Historicizing Critical Race Theory’s Cutting Edge: Key Movements That Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 (2000), *reprinted in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 32-70.

76. Crenshaw, *supra* note 3, at 1356-57.

77. California Civil Rights Initiative, California Ballot Proposition 209 (adopted Nov. 6, 1986) (codified at CAL. CONST. art. I, § 31) [hereinafter California Proposition 209].

A. Alternative Course: Confronting Colorblindness

After the departure of Derrick Bell from Harvard Law School in 1981, a group of students asked the administration to continue to offer his semester-long course on Constitutional Law and Minority Issues.⁷⁸ This course, according to Crenshaw, fore-grounded race in the context of legal issues rather than analyzing laws from the typical liberal individual rights perspective of “how do we get blacks some rights” while reconciling other *vested* interests.⁷⁹ Further it assessed laws on the basis of their effectiveness in changing the actual conditions of black subordination while also analyzing the ways in which many of these same laws actually contributed to racial subordination.⁸⁰

These students, seeing the hole in the curriculum created by Bell’s departure as an opportunity to “desegregate the faculty,” asked the administration to hire a person of color to teach the course.⁸¹ The Dean’s response, in particular, was instructive to students who later institutionalized Critical Race Theory. He questioned any value a course on “Constitutional Law and Minorities Issues” might add to a curriculum that already offered courses such as constitutional law and employment discrimination law, both of which dealt with “those” issues.⁸² The Dean asked “why the students would not prefer an excellent white professor over a mediocre black one.”⁸³ And he suggested that there were no people of color in the country “qualified” to be hired at Harvard Law School.⁸⁴ His comment reflected a particular perspective that provoked what later came to be key CRT themes. First, his comments suggested that qualifications or merit were something other than socially defined worth that themselves might embody racial meanings and structure.⁸⁵ Second, although this merit supposedly had nothing to do with color because merit was colorblind;⁸⁶ it was nonetheless captured by the then current predominantly white professors and not in any black professors in the country at the time.⁸⁷ And, third, that Harvard, as a race-neutral

78. CRT: KEY WRITINGS, *supra* note 1; Crenshaw, *supra* note 3, at 1348. Bell later returned to Harvard Law School. During his second stay, he staged a protest in support of Harvard hiring black women. The protest is documented in part in his book, *CONFRONTING AUTHORITY*. See generally DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* (1994).

79. Crenshaw, *supra* note 3, at 1347.

80. CRT: KEY WRITINGS, *supra* note 1, at xxi; Crenshaw, *supra* note 3, at 1347.

81. Crenshaw, *supra* note 3, at 1345.

82. CRT: KEY WRITINGS, *supra* note 1, at xxi.

83. *Id.* at xx.

84. *Id.*; Harris, *supra* note 1, at 1221 n.10.

85. See, e.g., Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1452-1453 (1997).

86. See, e.g., Harris, *supra* note 25, at 911-12 (on colorblindness).

87. See Crenshaw, *supra* note 3, at 1348-49 (discussing the pool problem); see also CHO & WESTLEY, *supra* note 73, at 46 (explaining that the “pool argument” was not credible and noting that the percentage of faculty of color teaching in law schools grew by 85% in two years (1989-1991) after the first nationwide strike by students advocating for faculty diversity).

institution, supposedly did not hire people on the basis of color, and yet the faculty was overwhelmingly white. Crenshaw notes: "This framing of the issue gave many of us involved in that struggle a clear sense about how conceptions such as colorblindness and merit functioned as rhetoric of racial power in presumptively race-neutral institutions."⁸⁸

Harvard responded to the students' request by hiring two distinguished civil rights lawyers, neither of whom was a person of color, to teach a three-week mini course. The students rejected this offer, setting off a national debate on affirmative action.⁸⁹ Instead they organized an alternative course in which they invited a number of professors to teach various parts of the course.⁹⁰ Several of the participants later became prominent figures in CRT, including such scholars as Denise Carty-Benia, Richard Delgado, Linda Green, Neil Gotanda, and Charles Lawrence, who were already law professors, Kimberlé Crenshaw, a law student, and Mari Matsuda, a graduate student at the time. Crenshaw marks the "Alternative Course" as CRT's first institutional expression. Its second institutional expression was in 1989 when Crenshaw, together with Stephanie Phillips, Neil Gotanda and others and with the support of Richard Delgado and the backing of David Trubek, then the director of the Institute of Legal Studies at Wisconsin, organized the first CRT workshop in Wisconsin.⁹¹ Budding scholars such as Angela Harris were to attend this workshop.⁹²

B. Conflict with CLS: The African American Experience as an Analytical and Methodological Framework

In the intervening time, many of these and other future "race crits" had been meeting informally, and in separate sessions, at the Critical Legal Studies meetings, retreats, and summer camps. This engagement had both an intellectual and institutional contribution to CRT. First, the CRT workshop was patterned after the Critical Legal Studies (CLS) summer workshops involving small groups of people to "explore a range of topics."⁹³ Further, future race crits had clashed with CLS scholars in the 1985 and 1987 conferences, when they sought to critique CLS both at the level of practice and theory. At the level of practice, they questioned the whiteness of CLS (as well as the elite maleness of it) and the way these social positionings affected, and potentially limited, CLS analyses. At the level of theory, race crits questioned one of the major theoretical

88. Crenshaw, *supra* note 3, at 1345.

89. CRT: KEY WRITINGS, *supra* note 1, at xxi.

90. *Id.*

91. Crenshaw, *supra* note 3, at 1361.

92. *Id.* at 1361 n.19. Other participants at the Wisconsin workshop, according to Stephanie Phillips, included Paulette Caldwell, John Calmore, Harlon Dalton, Kendall Thomas, and Patricia Williams. *Id.*

93. Crenshaw, *supra* note 3, at 1359.

critiques of CLS scholarship, the trashing of rights.⁹⁴ Some CLS scholars argued that the idea of legal rights and “rights talk”—“I have this or that right”—engaged in by the legal and popular public alike, actually obscured and narrowed the actual concrete conflicts that underlie the talk. Further, they suggested that rights talk limited people’s ability to creatively imagine alternative frameworks and solutions to problems that might include measures or activities outside the realm of law. Some CLS scholars thus advocated abandoning and trashing rights.⁹⁵ Future race critics partly rejected this line of argument because it neglected the reality that blacks and other people of color had in fact used the language of legal rights through the civil rights movement to effect some change in their social treatment, even if using the rights discourse had failed to alter the fundamental conditions of their oppression.⁹⁶

In using the lens of the African American experience to critically examine and challenge the CLS critique of rights, African American insights and experience became a central part of Critical Race Theory’s analytical framework. Further, testing CLS insights against the actual experiences and perspectives of African Americans, as embodied in the civil rights movement for instance, informed CRT’s methodology. And, use of the African American experience also arguably fueled CRT’s optimism and commitment to the progressive use of law and to the modernist ideals of justice, equality, and dignity.

Nonetheless, CLS scholars’ hostile resistance to this critique, and the maelstrom it created, cast a shadow on the race critics’ continued engagement with CLS. In doing so, it sowed the seeds that a leftist, critical law engagement with race required its own space. The critical theory race workshop became that space.

94. See generally *Minority Critique of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (including articles by Richard Delgado, Mari Matsuda, Patricia Williams, and Harlon Dalton); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1356-86 (1988), reprinted in part in CRT: CASES, *supra* note 1, at 27-38; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 302 (1987).

95. See, e.g., Freeman, *Legitimizing Racial Discrimination*, *supra* note 71; Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1590 (1984); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 427 (1984); Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993), reprinted in part in POWER, PRIVILEGE AND LAW, *supra* note 1, at 549-55; Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1386, 1382-83 (1984). The CLS critique of rights, just as some other CLS ideas, was drawn from the Legal Realists of the 1920s and 1930s. See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW, *supra* note 18, at 34-35; see, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

96. CRT: KEY WRITINGS, *supra* note 1, at xxiii-xxiv; DELGADO & STEFANCIC, CRT: AN INTRODUCTION *supra* note 1, at 23-25; PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991), reprinted in part in POWER, PRIVILEGE AND LAW, *supra* note 1, at 35-36, 558-64; Crenshaw, *supra* note 94, at 1334; Phillips, *supra* note 4, at 1249; GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER, *supra* note 44, at 3. Some in CLS by now acknowledge the partial validity of the CRT counter-critique of their rights critique. See, e.g., Gordon, *supra* note 68, at 657-58.

C. Internal Conflict within the CRT Workshop: Expanding the Analytical Framework and Building the Commitment to Antisubordination

The critical race workshop met annually from 1989 until 1997.⁹⁷ Attendance at the workshop was by application and “invitation only”—a policy that contributed to the critique of CRT as elitist.⁹⁸ However, according to Phillips, the policy was meant to facilitate sustained engagement over a five-day period of a small group of people committed to “radical transformative politics.”⁹⁹ As such, the workshop did not issue “a general invitation to all legal scholars of color, no matter how conservative or parochial, to simply come hang out.”¹⁰⁰ Rather, she suggests, this was the workshop’s attempt to institute what Frank Valdes later called “a move from color to consciousness,” the idea that “alliances are best built on shared substantive commitments, perhaps stemming from similar experiences . . . with subordination, rather than traditional fault lines like race or ethnicity.”¹⁰¹ But, this principle was not extended to include white scholars with similar commitments. White scholars were excluded from participating in the workshop, a decision which generated debate as to whether this was a pragmatic attempt to construct safe space and inhibit the reproduction of white racial hierarchy, or simply an unprincipled decision.¹⁰² In either case, the question became moot with the cessation of annual CRT workshops and the almost simultaneous founding of the annual LatCrit conferences with its commitment to anti-essentialist practice and its open-door policy that welcomed whites.¹⁰³

LatCrit developed in part in response to the conflicts in the workshop over two primary issues.¹⁰⁴ According to Phillips, the first issue, erupting during the 1990 workshop, was whether CRT’s commitment to

97. The reason for the cessation of the CRT workshops, as far as I can tell, was that the workshop lacked a firm institutional framework to perpetuate its continuation. CRT scholars attending a workshop would be asked or volunteer to host the next workshop at their school the following year. A committee would then be established to guide the program. This differed from the process eventually established by LatCrit conference where host were identified and secured two years in advance and worked with standing officers and officials.

At the 1997 CRT workshop, Robert Westley, a coordinator of the workshop together with Sumi Cho, approached Stephanie Phillips about hosting the CRT workshop for the following year. I, who was attending the CRT workshop for the first time and was at that time an adjunct faculty member at the University at Buffalo Law School, encouraged her. Stephanie, however was always reluctant to host the conference again, having hosted a workshop in the early nineties. I did not push her on this and later went on to host another project. Thus, we unwittingly became part of the story of the workshop’s demise.

98. Phillips, *supra* note 4, at 1249 n.4.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Crenshaw, *supra* note 3, at 1362-63; Phillips, *supra* note 4, at 1249 n.4.

104. Phillips, *supra* note 4, at 1251-52; see generally Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996) [hereinafter Valdes, *Ethnicities*]; see also Francisco Valdes, *Under Construction - LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1090 (1997) [hereinafter Valdes, *Under Construction*].

racial justice included a commitment to justice and liberation from other forms of oppression, particularly the oppression of gay, lesbian, and transgendered people.¹⁰⁵ It took, she suggests, almost eight years for the workshop to fully embrace the position that antiracial struggle does or should include the fight against oppression of sexual minorities.¹⁰⁶ The second issue involved many of the nonblack people of color participants at the 1992 workshop challenging the workshop's almost exclusive focus on the history and conditions of African Americans to the exclusion of the conditions of nonblack/nonwhite people. Phillips suggests that this was one of the earliest critiques of what is typically known as the black-white paradigm,¹⁰⁷ but which came to be called the white over black paradigm¹⁰⁸ to emphasize the hierarchal ordering of race and alluding to its inclusion of other groups in between whites and blacks.¹⁰⁹ Unlike the issue of sexuality, she notes that the collective response of the workshop to this critique was confessed ignorance,¹¹⁰ apologies and the embarrassment of some who perceived their actions as CRT having done to nonblack peoples of color what CLS did to them. She argues that the workshop thereafter began to explore the experiences of other racialized groups and came to agree that:

[R]acism is not only historical slavery, Jim Crow laws and gerrymandered voting districts in the South; it is also immigration laws and internment camps; it is stolen land grants and silenced languages;

105. Phillips, *supra* note 4, at 1250.

106. *Id.* at 1250-51.

107. *Id.* at 1252. Many scholars have critiqued and examined the limits of the white/black or white over black paradigm. See, e.g., Delgado, *The Current Landscape of Race*, *supra* note 17, at 1272; Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61, 81-82 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1220, 1254 (1997) (arguing that the black/white paradigm promotes the invisibility and marginalized Latina/o experiences). Devon W. Carbado has surveyed and examined a variety of these critiques. See Devon W. Carbado, *Critical Race Studies: Race to the Bottom*, 49 UCLA L. REV. 1283, 1305-12. I agree that there are limitations to the paradigm, it cannot possibly capture the many valences of race in America. See Athena D. Mutua, *Mapping Intellectual/Political Foundations and Future Self Critical Directions: Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1179-80 (1999) [hereinafter Mutua, *Shifting Bottoms*]. However, I see the black experience and blackness as central to and paradigmatic of a colorized racial system in which blackness or anything but blackness is the chief obsession of white power. *Id.* at 1181-82. See also Harris, *supra* note 25, at 916 ("[T]he Black/White paradigm may not accurately reflect racial demographics, because, in part, it does not seek to do so. Instead, it describes racial power."). Further, I see no problem in focusing on the African American experience, or the Latina/o experience, or any other group histories or experiences for that matter. It seems to me there is a difference between a practical focus - concentrating your attention or efforts on one set of experiences—and assuming that this one set of experiences is the whole or represent all there is. See Athena D. Mutua, *Theorizing Progressive Black Masculinities*, in PROGRESSIVE BLACK MASCULINITIES 34 (Athena D. Mutua ed., 2006) [hereinafter PROGRESSIVE BLACK MASCULINITIES] (discussing the multiple struggles inherent in a project to transform the structures of domination that order American society, and noting the difference between a practical focus on one struggle, and assuming that it is the only one as opposed to part of a larger struggle).

108. Phillips, *supra* note 4, at 1252.

109. Mutua, *Shifting Bottoms*, *supra* note 107, at 1189.

110. Phillips, *supra* note 4, at 1253.

it is standardized tests based on standardized culture; it is invisibility and lost identity.¹¹¹

The critique of the white over black paradigm opened the window of recognition into the ways that the racialization of other groups involved the interplay of laws and practices not readily exposed by looking at the domestic experiences and conditions of blacks in the United States. It thus, opened doors for CRT to examine the relationship between race and ethnicity, racism, and nativism, and racism, nationalism, and colonialism.¹¹² It also brought into focus laws related to immigration, citizenship, foreignness, language, and assimilation, among other issues as they related to U.S. foreign policy, and transnational and international law.

These insights together with the way in which some Latina/o scholars, such as Francisco Valdes, experienced the workshop conflicts led them to institutionalize a separate space for the exploration of issues germane to Latina/o communities and Latina/o identity.¹¹³ The insights also led to a call for (initially made by Robert Chang) and the subsequent development of a line of Asian American legal scholarship.¹¹⁴ Further, these insights intermittently drew in scholars who understood the Native American experience both in terms of national oppression and racial oppression.¹¹⁵ And finally it led to and encompassed work that explored whiteness as a practice of exclusion and genocide, as a hidden norm and as a site of unearned privilege by whites through the work of "white crits."¹¹⁶

The establishment of the LatCrit annual conference together with the development of other related scholarship raised concerns over the fragmentation of Critical Race Theory and the potential explosion of multiple identity categories and projects.¹¹⁷ However, not only did these

111. *Id.* at 1254.

112. For those CRT theorists who were familiar with black nationalist discourses, for example, which understood black America as an internal colony and pushed Pan-Africanism, these theorists may have made the connections between racism, nativism, and colonialism, even in the context of the African American experience.

113. Valdes, *Ethnicities*, *supra* note 104, at 8-9.

114. See Chang, *supra* note 1, at 1247-49; Aoki, *supra* note 1, at 1476-79.

115. See, e.g., ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990), reprinted in part in POWER, PRIVILEGE AND LAW, *supra* note 1, at 169-72; Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1987), reprinted in CRT: CUTTING EDGE, *supra* note 1, at 98-109.

116. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 316 (1997); RUTH FRANKENBERG, *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* (1997); PEGGY MCINTOSH, *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES*, reprinted in POWER, PRIVILEGE AND LAW, *supra* note 1, at 23; DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); Barbara Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 956-57 (1993).

117. See, e.g., DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 6; Crenshaw, *supra* note 3, at 1364. See generally, Bryant, *supra* note 7.

developments spur and contribute many important and necessary intellectual insights, they expanded CRT's analytical framework to include other racialized or otherwise oppressed groups' experiences.¹¹⁸ It also expanded CRT's commitment to the liberation of black and other oppressed people of color to include a commitment to the liberation of all oppressed and subordinated peoples.

Though critical race scholarship continued to grow through individual scholarship and group-initiated symposia, the founding of LatCrit filled an institutional gap left by the cessation of the annual CRT workshop. Even though various iterations of CRT workshops have since been held sporadically, another more permanent institutional framework for promulgating Critical Race Theory has not developed.¹¹⁹

D. UCLA, Proposition 209 and the Entrenchment of CRT: Confronting the Whiteness of Colorblindness Again

CRT continues to become more entrenched in the legal academy. Many law schools now offer courses in CRT.¹²⁰ In 2002, the University of California Los Angeles (UCLA) established the first concentration in CRT offered by an elite law school.¹²¹ This event, like the birth of CRT, owes its establishment to the racialized conflict over affirmative action generated by California's Proposition 209 and the ways in which this played out in the institutional context of UCLA. Proposition 209 made illegal the consideration of race in California schools' admissions policy.¹²² The result was a significant decline in minorities attending UCLA.¹²³ The Proposition appealed to and enforced an ideology of co-

118. One tension that arose with this expansion was whether critical race theory should maintain the black experience as a central focus or whether the CRT label should represent and act as an umbrella group for all of the different racial and other antisubordination projects. This idea was broached at the third annual conference of LatCrit where a panel explored whether a separate "black crit" enterprise should be established and devoted to the African American experience, and the experiences of others perceived as racially black such as black Latinos. Phillips, *supra* note 4, at 1251 n.10. Phillips suggested CRT be an umbrella group but seemed simultaneously opposed to establishing yet another separate critical race/black enterprise. See Phillips, *supra* note 4, at 1254-55. As a practical matter, CRT seems to serve as an umbrella label but one that is often qualified with the term "related scholarship," an approach I have tentatively adopted in this piece. See, e.g., Harris, *supra*, note 1, at 1215 (also using these terms). At the same time, CRT has maintained a central focus on the African American experience, with analysis of other racialized experiences captured by the labels of LatCrit, Asian American Legal Scholarship, etc. This centrality, in part is due to how CRT, though always multicultural in membership, developed but also because the African American experience is often viewed as paradigmatic of race in the U.S. See *supra* note 107.

119. For instance, scholars have held subsequent iterations of the workshop at the American University Washington College of Law. These were distinct from the Critical Race Theory Conference held at Yale in 1997.

120. In a survey conducted by LatCrit in 2002, some 23 law schools (out of approximately 180 ABA approved law schools) had courses called or related to Critical Race Theory. See Robert S. Chang, "Forget the Alamo": Race Courses as a Struggle over History and Collective Memory, 13 BERKELEY LA RAZA L.J. 113 (2002) (LatCrit 2002 symposium).

121. Harris, *supra* note 1, at 1215-16.

122. *Id.* at 1221-25.

123. *Id.* at 1223-25.

lorblindness.¹²⁴ But as Cheryl Harris notes, “the ideology . . . could not hide from view what was before our very eyes; racial diversity was eroding.”¹²⁵ In fact, the imposition of colorblind rules in the community context of UCLA revealed, what much of CRT implies—that, given the normative and social structure of the United States, colorblindness is a proxy for whiteness. Harris describes UCLA after Proposition 209:

Given the fact that the school is physically located in southern California—an area teeming with racial complexity—the virtual absence of the full range of diversity within its walls is a constant and stark reminder of the entrenched nature of racial difference in terms of geography, educational opportunity, and access. Admission into the law school community is defined and constituted by rules that capture and reinforce certain background difference and inequalities, particularly those regarding race and class.¹²⁶ . . . However, colorblindness does not in fact ignore race; it rests upon and reflects an investment in a particular conception of race in which race is divested of its historical, societal, or experiential meaning.¹²⁷

In reaction, the UCLA faculty, as Cheryl Harris explains, after serious debate, decided to establish a CRT concentration called Critical Race Studies.¹²⁸ They did so in part to signal UCLA’s continuing commitment to racial equality despite Proposition 209.¹²⁹ Thus, while proponents of 209 pushed color-blindness as an appropriate approach to race, they made the color of colorblindness clear—whiteness; and further entrenched critical race consciousness of difference and Critical Race Theory in the legal academy.

IV. CRT TENETS AND METHODOLOGY

The basic tenets of Critical Race Theory remain true to the original ideas discussed in the 1990 CRT workshop. With little modification, Critical Race Theory:

1. holds that racism is pervasive and endemic to, rather than a deviation from, American norms;¹³⁰
2. [rejects] dominant claims of meritocracy, neutrality, objectivity and color-blindness;

124. *Id.* at 1229-30.

125. *Id.* at 1230.

126. *Id.* at 1229.

127. *Id.*

128. *Id.* at 1232-34.

129. *Id.* at 1230.

130. As W.E.B. Du Bois wrote, “the problem of the twentieth century is the problem of the color-line.” W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 7 (Henry Louis Gates Jr. & Terri Hume Oliver eds., 1999) (1903).

3. [rejects] ahistoricism, and insists on contextual, historical analysis of law;
4. challenges the presumptive legitimacy of social institutions;
5. insists on recognition of both the experiential knowledge and critical consciousness of people of color in understanding law and society;
6. is interdisciplinary and eclectic (drawing upon, *inter alia*, liberalism, poststructuralist, feminism, Marxism, critical legal theory, postmodernism, and pragmatism) with the claim that the intersection of race and the law overruns disciplinary boundaries; and
7. works toward the liberation of people of color as it embraces the larger project of liberating all oppressed people.¹³¹

The purpose of CRT, its *raison d'être*, is twofold. First its purpose is to demonstrate the many ways in which white supremacy is endemic to American society by “exposing the facets of law and legal discourse that create racial categories and legitimate racial subordination.”¹³² Second, its purpose is to destabilize and change this relationship, in part by challenging or proposing alternative laws, among other things, in order to contribute to the liberation of oppressed people. As Jerome Culp notes, Critical Race Theory may mean many different things to different people, but “there is a common belief in an opposition to oppression.”¹³³ And, CRT scholars such as Matsuda and Hutchinson, as well as LatCrit and others have issued a clarion call that *Antisubordination*, a stance against all forms of oppression and subordination, be both the commitment of race scholars and the *principle* upon which racial justice, particularly *equality*, be understood and practiced.¹³⁴

These tenets and the overall commitment to antisubordination that CRT scholars evidence also provide crucial insight into CRT methodological tendencies. CRT is said to have no single, unifying methodology.¹³⁵ Rather it is eclectic, drawing from various schools, disciplines and approaches.¹³⁶ Harris, in providing some examples of the different methodologies employed by Race Critics, notes that they include structur-

131. Phillips, *supra* note 4, at 1249-50.

132. CRT: KEY WRITINGS, *supra* note 1, at xiii.

133. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638 (1999).

134. See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1329-1404 (1991), reprinted in part in RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA, *supra* note 1, at 557-61; see also Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622.

135. See e.g., Harris, *supra* note 1, at 1218; *infra* note 146 (Dorothy Brown making a similar point).

136. Harris, *supra* note 1, at 1217-18.

alism and historical, doctrinal (legal), empirical and economic analyses.¹³⁷

CRT approaches can, however, be said to possess some unifying themes or methodological tendencies. These include a particular focus on context and history.¹³⁸ CRT suggests that a rule or principle may mean different things in different contexts and/or historical periods. So, for instance, they have argued that the idea of colorblindness, first expressed in Justice Harlan's 1896 dissent in *Plessy v. Ferguson*, can be understood at that time as a progressive idea in the context of a society in which law sanctioned the explicit and systematic oppression of blacks after slavery. However, a colorblind approach to race in the current era, when the subordination of blacks is no longer explicit but remains systematic, is no longer a progressive approach.¹³⁹ Thus, as an abstract principle its meaning and progressive potential is neither universal nor trans-historical. CRT, therefore, pays particular attention to the specificity of context in order to understand the meanings of a particular concept or practice, to evaluate a particular position and to render additional information and ideas.

Further, CRT argues that as rules and principles mean different things in different contexts that they *should* mean different things in different contexts. So for instance, equality might mean symmetrical or "same treatment" in a society without vast racial, gender, and class inequalities but might mean and require affirmative practices to bring about equality for historically disadvantaged groups, treating them differently than the privileged, in a society with these alarming disparities.¹⁴⁰

In addition, CRT scholars listen to and scrutinize the voices, understandings and experiences of marginalized and oppressed peoples to situate, test, and inspire the examination of particular and/or novel approaches to law.¹⁴¹ The idea of distinctive minority voices recognizes, for example, that not every Native American critiques the American holiday "Columbus Day."¹⁴² But it does understand that, given Native

137. *Id.* at 1218 n.6.

138. *Id.* at 1229; see Houh, *supra* note 43, at 1061-62.

139. *But see* Gotanda, *supra* note 2, at 257.

140. *See, e.g.,* Hutchinson, *supra* note 134, at 646 (discussing equality as not symmetrical).

141. *See e.g.,* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (urging CLS to draw on the experiences and writings of marginalized groups to inform their theory).

142. In 1992, the five hundredth anniversary of Columbus' arrival in the Western Hemisphere was marked by Indian protests across the country. MATTHEW DENNIS, RED, WHITE, AND BLUE LETTER DAYS: AN AMERICAN CALENDAR 154-55 (2002). Columbus Day had not been officially celebrated until the tercentenary in 1892, one hundred years earlier, when "some – especially African-Americans – began to contest the Columbus celebrations, not so much the accepted view of Columbus the Man but rather the image of Columbia the land of freedom, opportunity and progress." *Id.* at 148. *See generally* IDA B. WELLS, FREDERICK DOUGLASS, IRVINE GARLAND PENN, & FERDINAND L. BARNETT, THE REASON WHY THE COLORED AMERICAN IS NOT IN THE WORLD'S COLUMBIAN EXPOSITION (Robert W. Rydell ed., 1999); Sylvia Wynter, 1492: *A New World View*, in RACE, DISCOURSE AND THE ORIGIN OF THE AMERICAS: A NEW WORLD VIEW 5-57 (Vera Law-

American history, the conditions of oppression, and the cultural nature of their resistance, Native Americans might find the idea of Columbus *discovering* America problematic, and not exactly a cause for celebration.¹⁴³ This understanding has led CRT scholars to excavate forgotten or overlooked histories, rules, and cases, as well as the cultural practices, stories, and perspectives of marginalized groups as sources for grounding their analysis.

In this vein, race critics have often successfully employed storytelling or narrative to explore alternative meanings, insights, and perspectives on an issue. Some of the leading legal storytellers include Derrick Bell (*And We Are Not Saved* (1989), *Faces at the Bottom of the Well* (1993), and *Gospel Choirs* (1996)), Richard Delgado in his *Rodrigo* series (1996) and *When Equality Ends* (1999), and Patricia Williams in *The Alchemy of Race and Rights* (1991).¹⁴⁴ Legal storytelling has garnered significant critique, including criticisms (1) that such stories are not subject to empirical or other typical methods of evaluation; (2) that challenge the idea of a particular minority voice or perspective; and (3) that charge that such stories tend to distort the “truth,”¹⁴⁵ a truth understood by many CRT theorists, as simply the common sense understandings that arise under the current hegemonic ideologies and practices. It has further led to the suggestion as Dorothy Brown points out, that CRT stands against empiricism as a form of argumentation and verification because it refutes narrative.¹⁴⁶ This idea is buttressed by CRT’s embrace of CLS’

rence Hyatt & Rex Nettleford eds., 1995) (for a critique of Columbus and what he stands for from a modern black perspective).

143. See James Barron, *He’s the Explorer/Exploiter You Just Have to Love/Hate*, N.Y. TIMES, Oct. 12, 1992, at B1.

144. See generally Bell, *supra* note 59, at 20-29; Bell, *supra* note 65; DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL FOR AN ALIEN LAND CALLED HOME* (1996); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1996), reprinted in part in CRT: CUTTING EDGE, *supra* note 1, at 388-396; RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* (1999); WILLIAMS, *supra* note 96; DELGADO & STEFANCIC, *CRT: AN INTRODUCTION*, *supra* note 1, at 37-49; CRT: CUTTING EDGE, *supra* note 1, at 41-91; Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY*, *supra* note 1, at 243-301; Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders’ Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990), reprinted in CRT: CUTTING EDGE, *supra* note 1, at 9-20; Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989), reprinted in CRT: CUTTING EDGE, *supra* note 1, at 42-51; William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990), reprinted in part in *POWER, PRIVILEGE AND LAW*, *supra* note 1, at 565-81; Rachel F. Moran, *Full Circle*, in *CRITICAL RACE FEMINISM*, *supra* note 37, at 113-17; CARL GUTIÉRREZ-JONES, *CRITICAL RACE NARRATIVES: A STUDY OF RACE, RHETORIC, AND INJURY* (2001).

145. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). But see Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993).

146. Dorothy A. Brown, in the Symposium, *Critical Race Theory: The Next Frontier: Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485 (2004), suggested that CRT rejects numbers as neutral, that the privileging of numbers refutes narrative, and thus empirical research may be incompatible with CRT. *Id.* at 1486-87. But she argued that empirical evidence is

critique of the Law and Economics movement,¹⁴⁷ a scholarly tendency that often employs empirical data. While most law is viewed from the liberal perspective of individual rights perceived as neutral and objective, the Law and Economics School, like CLS, is critical of that approach. Law and Economics, however, is a conservative approach, which according to critics, simply replaces law's claims of impartiality and neutrality with similar claims for the field of economics.¹⁴⁸ Economics, however, is neither neutral nor objective. Rather, it too involves political choices both at the level of practice and study. And, arguably, both are replete with the values, assumptions, presumptions and dictates about human behavior and the operation of society as determined and understood by the current economic order of capitalism.¹⁴⁹

Harris, however, notes that CRT scholars have employed both empirical data and economic analysis.¹⁵⁰ Nevertheless, an argument based on empiricism or economic analysis, according to CRT, is just that, a form of argumentation in which political choices are made as to what should be included or excluded and what is important or not, as well as how the facts or statistics should be interpreted. Similar empirical data could presumably be used, like various rules, to support contrary and alternative arguments and interpretations.¹⁵¹

necessary to reach out to white America. *Id.* at 1489. Darren Hutchinson argues that CRT theorists usually rely on law and legal reasoning, but could buttress their arguments by also relying on political science data that, for instance, have used polling to demonstrate that the Supreme Court largely responds to majoritarian concerns in its decision-making and facilitates majoritarian interests. Darren Lenard Hutchinson, *Critical Race Theory: History, Evolution, and New Frontiers: Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1213-14 (2004). That was also a common theme in the public law subfield of political science. See generally ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (2d ed. 1994); MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); 1 CORWIN ON THE CONSTITUTION (Richard Loss ed., 1981); 2 CORWIN ON THE CONSTITUTION (Richard Loss ed., 1987); 3 CORWIN ON THE CONSTITUTION (Richard Loss ed., 1988); Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

147. See generally RICHARD I. IPPOLITO, *ECONOMICS FOR LAWYERS* (2005); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2002); GORDON TULLOCK, *LAW AND ECONOMICS* (Charles K. Rowley ed., 2005).

148. Mark G. Kelman, *Critical Legal Studies Symposium: Trashing*, 36 STAN. L. REV. 293, 294 (1984); Mark G. Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEGAL EDUC. 274, 274 (1983); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 387 (1981); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 713 (1980).

149. James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 176 (1986).

150. Harris, *supra* note 1, at 1218 n.6. See, e.g., Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1757 (2003) (book review), reprinted in part in A WOMAN'S PLACE, *supra* note 43, at 140-53; Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 N. ENG. L. REV. 913, 914 (1994) (critiquing Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978)); William Bratton, *Anti-Subordination and the Legal Struggle Over the "Means of Communication": Law and Economics of English Only*, 53 U. MIAMI L. REV. 973, 973-74 (1999).

151. See *supra* note 148; see also Harris, *supra* note 25, at 907-14 (reviewing the empirical study undertaken in the book *Whitewashing Race*, see BROWN ET AL., *WHITEWASHING RACE*, *supra*

Finally, the tendency of CRT to deconstruct and expose the racial meanings of law betrays its post-modern sensibilities and contradicts its commitment to modernist ideals of justice, truth, and dignity¹⁵² (because as race critics and other post-modern scholars might argue a principle in one context may mean something radically different in another). However, in view of the dual vision that W.E.B. Du Bois located in the oppressed, and the dual respect and disdain that oppressed people have shown for the law,¹⁵³ scholars have encouraged race critics to inhabit the tension between its post-modern insights and its modernist ideals of justice because within that tension lie CRT's creative potential.¹⁵⁴

V. LAW AND THE CONSTRUCTION OF RACE

Below I provide a brief structural history of the relationship between race and law focusing primarily on case law, and drawing on and applying some of the insights and methodological tendencies of Critical Race Theory. Specifically, I employ historical analysis and narrative to tell the story of this relationship between law and race. The narrative emphasizes the longevity of American racial ordering and practice, the breadth of that racial ordering, and its depth in regulating American life. It does so to demonstrate the ways in which law both constructs and produces races and racism and the deeply structured nature of race in U.S. society. Further, it is meant to show, focusing on the United States Supreme Court, how the law's increasing reliance on colorblind individualism works to maintain, rather than undermine the racial caste system created over several hundred years.¹⁵⁵ In doing so, it provides a counter-narrative to the dominant and ever popular story about race and law that

note 25, and arguing that although the study thoroughly contested the colorblind conception of racism as the function of individual bigoted action, empirical evidence alone is insufficient to dislodge the theory). Harris, examining the various interpretations of whether race played a role in aftermath of Hurricane Katrina, explains that empirical evidence was not enough, in part, because colorblindness is a well-funded ideology promoted over the last several decades; but primarily because "the ability to process empirical facts into a different understanding [is] . . . compromised by the divergent . . . perspectives through which the facts are viewed." See Harris, *supra* note 25, at 913. She argues that there are frames or frameworks, in this case racial frames, which allow us to make sense of facts; they are "what lies between the facts and our perceptions - the mediating structures that allow us to make sense of the world." *Id.* at 914. Regarding Katrina she ventures:

...while people of all races agree that Katrina exposed the social costs of poverty, most Whites consider race largely irrelevant in explaining what happened (or did not happen) while Blacks tend to view race as a crucial part of the story. In the aftermath of Katrina, the question that is being debated is less a matter of what happened - what is at issue is why - and here the absence of a consensus demonstrates how racial divisions in the interpretation of seemingly uncontested facts can result in entirely divergent assessments of causation. The facts in this case did not seem to lead to a new racial paradigm; indeed, initial differences in the perceptions of the salience of race seemed to persist, notwithstanding relative agreement on the facts.

Id. at 913.

152. See generally Harris, *supra* note 42, at 743.

153. WILLIAMS, *supra* note 96, at 35-36; see DU BOIS, *supra* note 130, at 3.

154. Harris, *supra* note 42, at 760, 778 (suggesting that in inhabiting this tension, CRT race-crits aspire to and attempt to make real the dreams that modernity promised).

155. DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 21-22.

suggests that the struggle for racial justice, though long and incremental, is nevertheless forward-moving, progressive, and eventually triumphant, given the American creed and precepts.¹⁵⁶ Instead it suggests the stagnation of racial progress because of the continuity of the underlying structures of white supremacist thought, operation, and social arrangements, though accomplished through new and changing forces and rationalizations.

A. *Early Construction of Race by Law*

Throughout most of American history, legislators, legal practitioners, and judges have made and interpreted various legal doctrines, rules, and procedures to define, construct, produce, and preserve white privilege and black subordination, as well as the subordination of other people of color. Throughout most of its history, American law has been decidedly race conscious and specifically white supremacist whenever it has encountered what it, itself, has often defined as Other.

For instance, in order to perpetuate a white state, judges defined whiteness through case law to determine whether a Japanese man was white for purposes of citizenship, whether a Chinese person was black or Indian for the purpose of determining whether he could testify against a white, and whether Mexicans were white and thus entitled to serve on juries.¹⁵⁷ American law facilitated, defined, and established white privileges by limiting the rights of Indians to their land and facilitating white appropriation of the same land.¹⁵⁸ It did so using slave laws, black codes, and Jim Crow laws to exploit Black labor and maintain Black subordination for the purposes of white wealth accumulation and white racial class consolidation.¹⁵⁹ It has constructed race for the purposes of determining who might vote, the manner in which those who presumably were entitled to vote could do so, and whether such people could actually and effectively vote.¹⁶⁰ It delineated a range of businesses practices af-

156. See DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1; BELL, *supra* note 2, at 22.

157. *Hernandez v. Texas*, 347 U.S. 475, 477, 482 (1954); *Ozawa v. United States*, 260 U.S. 178 (1922); *People v. Hall*, 4 Cal. 399, 399 (Cal. 1854); see also Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1695 (2000) (comparing *People v. Hall* and the *Dred Scott* case); Miguel A. Méndez, *Hernandez: The Wrong Message at the Wrong Time*, 4 STAN. L. & POL'Y REV. 193 (1993), reprinted in part in THE LATINO/A CONDITION, *supra* note 1, at 602-04.

158. *Johnson v. M'Intosh*, 21 U.S. 543, 587-88 (1823); see also Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67, 67 (2001).

159. *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896); *Scott v. Sandford*, 60 U.S. 393, 404-06 (1857).

160. TEX. REV. CIV. STAT. ANN. ART. 3107 (Vernon 1925). In "1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared 'in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas.'" *Smith v. Allwright*, 321 U.S. 649, 658 (1944) (citing *Nixon v. Herndon*, 273 U.S. 536 (1927)). In *Breedlove v. Suttles*, 302 U.S. 277, 280-281 (1937), the Supreme Court upheld a Georgia provision requiring payment of a poll tax as a prerequisite for voting. Though a white man brought the case, the estab-

fecting everyone from laborers to professionals including who could be treated by a doctor or a nurse. It has used racial categories to the detriment of people of color to determine questions concerning where people can live,¹⁶¹ who they can marry,¹⁶² what schools they can attend,¹⁶³ and where they sit on a train, and in a cafeteria, or theater.¹⁶⁴

From a CRT perspective, the movement from overt racial oppression sanctioned by law to law's racial neutrality or colorblindness has done little to undo the systemic and accumulated conditions of racial oppression created by and through law over several hundred years. For that matter, except for two very brief though significant periods, American law has been and remains a bulwark of white supremacy. The promulgation of the Emancipation Proclamation, and the ratification of the thirteenth, fourteenth and fifteenth amendments,¹⁶⁵ should have disrupted

ishment of poll taxes was one of the many ways in which blacks were prohibited from voting. *Breedlove* was overruled by *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

161. *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946) (upholding restrictive covenants in housing). *Kraemer* was overturned by the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948). See also *Hurd v. Hodge*, 334 U.S. 24, 33-34 (1948) (companion case invalidating racially restrictive covenants in the District of Columbia—to which the fourteenth amendment did not apply—by applying the Civil Rights Act of 1866); *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (damages not awardable for breach of a racially restrictive housing covenant). *But see* BELL, *supra* note 2, at 294-96 (describing subsequent history and current problems of housing discrimination). See generally CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959). Three Justices did not participate in *Shelley* and *Hurd*, reportedly because they owned property subject to racially restrictive covenants. C. HERMAN PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 142 (1954). For other discussions of housing segregation, see Calmore, *supra* note 41; DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); DAVID DELANEY, RACE, PLACE, AND THE LAW, 1836-1948 (1998).

162. *Jackson v. State*, 72 So. 2d 114 (1954). Bell notes that “[a]ccording to one study, 38 states had miscegenation statutes at one time or another during the nineteenth century, and as late as 1951, 29 statutes were still on the books.” BELL, *supra* note 2, at 256. The United States Supreme Court struck down these laws in *Loving v. Virginia*, 388 U.S. 1 (1967). See RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE 6 (2001).

163. *Sweatt v. Painter*, 210 S.W.2d 442, 444 (Tex. Civ. App. 1948), *rev'd*, 339 U.S. 629, 635-636 (1950) (ruling that a black student could attend a white university). However, while the Court granted relief in this case it did not address the constitutionality of the separate but equal doctrine. Rather this doctrine was finally overturned in *Brown*.

164. See *Plessy v. Ferguson*, 163 U.S. 537, 545, 548 (1896).

165. U.S. CONST., amend. XIII-XV. It should be noted that between 1777 and 1817, slavery had been abolished in the Northern states by, variously, constitutional provisions, constitutional interpretation, judicial decisions, and most often by gradual emancipation statutes. See LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 3-20 (1961); BELL, *supra* note 2, at 22-23; ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 169-89 (1967). Slavery had already been abolished by judicial decision in England—but not in its colonies—in 1772. *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772); see also A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 313 (1978). The American national government, however, protected slavery through the fugitive slave clauses of the Articles of Confederation, the Northwest Ordinance, and the U.S. Constitution, among other provisions, although these instruments studiously avoided using the word. Articles of Confederation, art. 6 (1781); Northwest Ordinance, art. 6 (1787); U.S. CONST., art. IV, §2, cl. 3. Other provisions of the original Constitution implicitly upheld slavery. U.S. CONST., art. I, § 2, cl. 3 (slaves counted as three-fifths the number of free persons for purposes of apportionment of representation in the House of Representatives); U.S. CONST., art. I, § 9, cl. 1 (no Congressional prohibition of the importation of slaves before 1808). Generally, courts enforced the fugitive slave clause despite its increasing unpopularity in the North.

the legal construction of white racial supremacy and nonwhite racial subordination, but ultimately failed to do so. Nonetheless, wrenched from a civil war, these laws helped radically change the status of most blacks from slaves to free people and might have held the promise of providing the economic, social, and political rewards of citizenship and belonging.¹⁶⁶ But the promise of Reconstruction was short-lived, as the nation's political leadership capitulated to the southern elites' efforts to reassert white control over black life.¹⁶⁷ Various legal actors including judges, enacted laws and interpreted legal doctrine, to narrow the rewards of citizenship based on race helping to legitimate the Jim Crow era of racial segregation. Significant among these developments was the Supreme Court's interpretation of the Equal Protection Clause of the fourteenth amendment in *Plessy* permitting the segregation and subordination of black people.

The legal strategies of the NAACP and others beginning in the 1920's¹⁶⁸ and culminating in decisions such as *Hernandez* and *Brown*, helped to spark the civil rights movement, renewing the promise of equality in the 1960's. It was successful to the extent that it unraveled the explicit manifestations of racial ordering.¹⁶⁹ Crucial to this limited success was the Supreme Court's reinterpretation of equal protection as sanctioning the use of racial measures, such as affirmative action and school desegregation to potentially undo the racialized social and institutional patterns of oppression.¹⁷⁰

See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 175-89 (1975).

166. See JOHN HOPE FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 36-39 (1960); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877* 12 (1965); *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS* 473-531 (Kenneth M. Stampp & Leon F. Lutwack eds., 1969); WILLIAM BROCK, *CONFLICT AND TRANSFORMATION: THE UNITED STATES, 1844-1877* 360-61 (1973); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* 77-79 (1988); DAVID HERBERT DONALD, JEAN H. BAKER & MICHAEL F. HOLT, *THE CIVIL WAR AND RECONSTRUCTION* 536 (2001).

167. WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION, 1869-1879* 3-7 (1979); C. VANN WOODWARD, *REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* 3-4, 246 (1951); *RECONSTRUCTION: AN ANTHOLOGY OF REVISIONIST WRITINGS*, *supra* note 166, at 473-531. Whatever the reasons for the judiciary's rapid retreat from enforcing the constitutional and statutory law of Reconstruction, they did not include any overall aversion to so-called judicial activism. In this period, the courts regained the prestige and increased the power they enjoyed before the *Dred Scott* case. See STANLEY I. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 31-35 (1968); William F. Wiecek, *The Reconstruction of Federal Judicial Power*, 13 AM. J. LEGAL HIST. 333 (1969), *reprinted in part in AMERICAN LAW AND THE CONSTITUTIONAL ORDER* 237-45. (Lawrence M. Friedman & Harry N. Scheiber eds., 1988).

168. KLUGER, *supra* note 34, at 100-750; MARK TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* xi (1987).

169. Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 247 (1968) (Carter, a veteran NAACP litigator stated "[F]ew in the country, black or white, understood in 1954 that racial segregation was merely the symptom, not the disease; that the real sickness is that our society in all its manifestations is geared to the maintenance of white superiority").

170. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300-301 (1955).

The highlights of this period were the passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the decision in *Griggs v. Duke Power Co.*¹⁷¹ The latter case involved hiring practices, based on standards not related to job performance, which had the effect of disqualifying disproportionate numbers of blacks relative to whites. In *Griggs*, the Supreme Court took an approach to race (not the colorblind approach) that might have engendered actions that would result in actual changes in the conditions of black lives in terms of poverty, wealth accumulation, health, etc. This was so because it potentially rendered successful, suits brought on evidence of racial disparities and the impact of laws (demonstrated largely through statistical evidence of continuing disparities), instead of on proof of some individual's intention to discriminate.¹⁷²

B. Colorblindness in Law Blocking Racial Progress

However, just as during and after Reconstruction,¹⁷³ courts began to narrow these laws, thereby stabilizing and legitimizing the prevailing order of white privilege and nonwhite disadvantage. So for example, though the desegregation (integration) of secondary schools in the United States had only begun in earnest in 1964 due to the Court's initial hesitancy and massive white resistance,¹⁷⁴ the Court had already signaled its retreat from desegregation by 1973 by allowing a school board to poten-

171. Civil Rights Act of 1964, 42 U.S.C.S. § 2000a (2006); Voting Rights Act of 1965, 42 U.S.C.S. § 1971 (2006); Fair Housing Act of 1968, 42 U.S.C.S. § 3601 (2006); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (construing Title VII of the Civil Rights Act of 1964).

172. *Cf. McCleskey v. Kemp*, 481 U.S. 279, 329-330 (1987) (involving the Georgia sentencing system, which does not mention race (race-neutral) but has a disparate and disadvantaging impact on blacks). Georgia's capital sentencing system had been invalidated three times and Georgia had a long history of a "dual system." In the case, *McCleskey*, a black man, was sentenced to death for murdering a white police officer. *Id.* at 283. He challenged the death sentence in his case based on a sophisticated statistical study, finding that prosecutors in Georgia sought the death penalty in seventy percent of cases involving a black defendant and white victim, compared to only thirty-two percent of the time where both defendant and victim were white. *Id.* at 286-87. It also showed that the death penalty was assessed in twenty-two percent of cases involving black defendants and white victims, as compared to only 8 percent in cases involving both whites. *Id.* at 286. The Court rejected the use of the statistical reports to document discriminatory effect in the absence of proof of intentional discrimination. *Id.* at 297-99. The Court nevertheless stresses its "unceasing" efforts to overcome racism in the criminal justice system, *id.* at 309, but undercut this assertion near the outset of the case by limiting the examination to one of "purposeful discrimination." *Id.* 292. Thus, the Court's unceasing efforts to eradicate racial prejudice in the criminal justice system stopped at the door of proof of intent against and in an individual defendant's case without an examination of the systemic context in which the case was decided. *See Hernandez, supra* note 2, at 141-43 (discussing this case).

173. *See, e.g., The Civil Rights Cases*, 109 U.S. 3, 23-26 (1883); *The Slaughter-House Cases*, 83 U.S. 36, 77-79 (1873).

174. *See, e.g., OLGETREE, supra* note 34, at 10 (discussing the Court's "deliberate speed"); *see also BROWN, supra* note 30, at 167-74 (discussing the massive white resistance to *Brown* ranging from protest, and violence against black students attempting to attend white schools to white officials entirely eliminating public schools while publicly funding white children's private school attendance and including rapid and substantial movement of white families to the suburban areas in order to avoid sending their children to schools where the possibility of integration with blacks was slimmer).

tially escape the imposition of desegregation (integration) orders if it could show that segregation had occurred in the district owing to acts other than the board's *intentional* activities.¹⁷⁵ The Court held this despite the fact that the de facto practice of racial segregation in society was nearly universal.

In *Milliken v. Bradley*,¹⁷⁶ decided a year later, the Court dealt the "deathblow to the [nation's] ability to successfully integrate public schools."¹⁷⁷ It effectively made U.S. suburbs safe havens for whites who did not want their children to attend integrated schools with black children, and in doing so, the Court contributed to "white flight" to those suburbs.¹⁷⁸ Further, that blacks and other minorities would have to prove that some individual or institution had engaged in individual and identifiable discriminatory acts in order for the Courts to redress their grievances or remedy discrimination, was later confirmed in *Washington v. Davis*,¹⁷⁹ despite the pervasive and systemic presence of racism, racial segregation, and racial discrimination in the country.¹⁸⁰

The Supreme Court, however, narrowed the laws, not only by focusing primarily on intentional, identifiable acts of discrimination, but also by focusing on the individual and by virtually banning the use of racial categories—arguably long before affirmative uses of these categories could affect any significant change in the social arrangements and structure of white racial power. In focusing on the individual, the courts

175. BROWN, *supra* note 30, at 208-10 (discussing *Keyes v. School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973)). In *Keyes*, the plaintiffs proved the Denver county school board had operated to deliberately segregate schools in a core section of the city district in which over one-third of the black children attended, but the Court held the school board could rebut the presumption of system-wide segregation by proving that they had not intentionally segregated the schools system-wide. *Keyes*, 413 U.S. at 252-53.

176. 418 U.S. 717 (1974). *Milliken* was one of the first desegregation cases to be pursued in the North, where there had been few laws requiring segregation, but de facto segregation was prevalent. The plaintiffs sought a remedy for the segregation of Detroit schools, which would involve the adjoining, predominantly white suburban school districts. *Id.* The trial court had held that the State of Michigan was responsible for designing the school district system in which the city of Detroit was effectively racially segregated. *Id.* The Supreme Court held that, absent a showing that a constitutional violation in one district produced a significant desegregation effect in another, there could be no "cross-district remed[ies]." *Id.* at 744; see BROWN, *supra* note 30, at 213. According to Kevin Brown, the effect of the decision was that the suburbs were deemed safe havens by whites who could afford to move and who wanted to avoid integration. BROWN, *supra* note 30, at 210. Although the *Keyes* and *Milliken* cases represented the Court's initial retreat from school desegregation, Brown argues that the primary reason for the complete abandonment of desegregation throughout the 1980's and 1990's was the result of the application of the ideology of colorblind individualism to school desegregation cases.

177. BROWN, *supra* note 30, at 210-11.

178. BROWN, *supra* note 30, at 211.

179. 426 U.S. 229, 240 (1976).

180. Justice Thurgood Marshall—the first black U.S. Supreme Court Justice and the attorney that had argued *Brown* before the Court—responded to a similar idea in *Regents of the University of California v. Bakke*: "It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact." 438 U.S. 265, 400 (1978).

were able to ignore or trivialize societal-wide racial ordering that burdened minorities as a group and individuals based on group membership, and pretend that racism was an unfortunate feature of the past only currently existing in the aberrant individual.¹⁸¹ In taking a colorblind approach, the Court prohibited almost all uses of racial categories regardless of whether they were being used to subordinate blacks and other non-whites ("invidious discrimination") or to redress systemic white racial oppression of and on behalf of blacks and other nonwhites ("benign discrimination"). In essence, the Court increasingly applied the approach of colorblind individualism.¹⁸² And, because *Brown* and its progeny had largely eliminated explicit racial subordinating laws, the focus and targets of this colorblind approach became the *remedies* and *measures* meant to address racial oppression (measures opposed mostly by whites as reverse discrimination), even as minorities have sought to expand these.

The Supreme Court has not, in so many words, declared colorblindness to be the new interpretation of equal protection, but rather it has largely accomplished it through various procedural and other standards drawing on its logic.¹⁸³ These include not only limiting remedies to intentional conduct, but also applying the Court's highest and toughest level of review, strict scrutiny now to all cases involving racial classifications, even if they are employed remedially to redress the consequences of earlier intentional discrimination. The Court's rationale is that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect," and that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people."¹⁸⁴ The Court is motivated by a number of concerns, but seems particularly concerned about protecting "innocent people,"¹⁸⁵ a phrase used generally to refer to white people.¹⁸⁶

181. See *infra* notes 193-99 and accompanying text (discussing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)); see also, e.g., DELGADO & STEFANCIC, CRT: AN INTRODUCTION, *supra* note 1, at 7.

182. See BROWN, *supra* note 30.

183. Prior to 1995, the Supreme Court had been divided as to whether strict scrutiny should apply to all cases involving racial classifications. Strict scrutiny had been applied to "invidious" discrimination cases where discrimination built over centuries of practice was meant to disadvantage minorities. The Court, however, had applied a more lenient level of scrutiny to remedies that relied on race to benefit minorities and undo the past discrimination. This had been termed by the Court "benign" discrimination. However, in 1995 a solid majority of the Court held in favor of applying strict scrutiny to all uses of race-specific laws. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 222 (1995).

184. *Adarand*, 515 U.S. at 223-25 (internal citations omitted). Strict scrutiny requires that the use of a racial classification be narrowly tailored to meet a compelling governmental interest.

185. See, e.g., *Wygant*, 476 U.S. at 276; *Bakke*, 438 U.S. at 308 (using the phrase "innocent persons" meaning innocent third parties).

186. See BELL, *supra* note 2, at 123; Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 180; Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 297-301 (1990), reprinted in CRT: CUTTING EDGE, *supra* note 1, at 635-47;

But the Court has also expressed a concern for protecting subordinated racial groups from stereotypical stigmas associated with remedies such as affirmative action, claiming “it may not always be clear that a so-called preference is in fact benign.”¹⁸⁷ The effect of the requirement to prove intent and the application of strict scrutiny in the context of equal protection defined as individual as opposed to group protection and increasingly influenced by colorblind ideology are many. They include, the Court: (1) treating racial classifications as if they are the source of racial oppression as opposed to the systemic racial ordering in the human and institutional decision-making and operation of white power in the United States; (2) treating claims of white people to maintain the unearned privileges bestowed by the racial caste system as if they were the same as nonwhite claims to change and make the social system more fair; (3) ignoring societal wide racial ordering and the racial caste system by isolating and remedying only those practices that can be specifically identified and proven as the products of intentional actions; and (4) thus severely limiting anti-discrimination or anti-oppression measures, either forward-looking or past-correcting, thereby preserving the status quo of racial inequality.

For example, in *Regents of the University of California v. Bakke*,¹⁸⁸ a suit brought by a white applicant denied admission to a medical school, the Supreme Court struck down an admissions program that reserved a number of seats for minority students in the entering class.¹⁸⁹ The Court noted, “the guarantee of equal protection cannot mean one thing when applied to one *individual* and something else when applied to a person of another color.”¹⁹⁰ According to Justice Powell’s majority opinion, then, strict scrutiny—which had hitherto been applied primarily in cases where the government had used racial identification to disadvantage minorities—should apply to any racial classification for any purpose. The Court thus struck down a program meant to undo the racial ordering of white privilege and nonwhite subordination, arguing that equality protected the individual regardless of his “race,” or should be blind to “race” (biology), despite the socially-constructed meaning, both material and expressive, of race in America that rendered admissions into the medical school predominantly white in the first place.¹⁹¹ In addition, Justice Powell expressed concern for “innocent [white] persons,” noting that it was impermissible for them to be forced “to bear the burdens of redressing grievances not of their making,”¹⁹² but seemed blind to the fact that that his *decision left blacks bearing the burdens of exclusion, subordination and discrimination not of their own making.*

187. *Adarand*, 515 U.S. at 226 (quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)).

188. 438 U.S. 265 (1978).

189. *Id.* at 289-90.

190. *Id.* (emphasis added).

191. *See supra* note 26 and accompanying text (on the meaning of race).

192. *Bakke*, 438 U.S. at 298.

Further in 1986, the Court struck down provisions of a collective bargaining agreement that in response to past integration litigation provided black teachers greater protection against layoffs than it provided to white teachers with higher levels of seniority.¹⁹³ In absence of the agreement, an agreement, again, meant to undo the racial ordering of white privilege and nonwhite subordination, black teachers would have been the first fired because they were the last hired, their hiring presumably occasioned in the first place by affirmative action measures.¹⁹⁴ Brought by white teachers seeking to protect their positions through the seniority plan, the Court, referring to whites, noted that the level of scrutiny did not alter "because the challenged classification operates against a group that historically had not been subject to governmental discrimination."¹⁹⁵ Commenting on societal-wide racial discrimination as a basis for upholding the agreement, the Court notes:

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive.¹⁹⁶

Apparently it was acceptable for blacks and other nonwhites to suffer the cost of societal discrimination operating to the benefit of whites, but inappropriate and over-expansive for whites to bear any costs in eliminating this same societal discrimination that primarily and inappropriately privileged them.

And in 1989, the Court struck down a plan by the city of Richmond requiring those who received city contracts to subcontract thirty percent of the contract's value to businesses owned by minorities.¹⁹⁷ The city enacted the plan to remedy past discrimination in the construction industry based on a number of factors including, (1) testimony about racial discrimination in the industry, (2) the fact that, although black residents constituted almost fifty percent of the city, they received less than one percent of public contracting funds; (3) that there were almost no minority contractors in local and state contractors' associations; and (4) that "in 1977, Congress [had] made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally."¹⁹⁸ The Court explained that these facts did not "provide the city of Richmond with a 'strong basis in evidence for its conclu-

193. *Wygant*, 476 U.S. at 273; see also Ross, *supra* note 186, at 638 (discussing this case).

194. Ross, *supra* note 186, at 638.

195. *Wygant*, 476 U.S. at 273.

196. *Id.* at 276 (emphasis omitted).

197. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477, 498 (1989) (plurality opinion).

198. *Id.* at 499 (plurality opinion).

sion that remedial action was necessary.”¹⁹⁹ The Court reasoned that the wrong was so “ill-defined” that “relief”—apparently incredulously and impermissibly—“could extend until the percentage of public contracts awarded to [minority-controlled businesses] in Richmond mirrored the percentage of minorities in the population as a whole.”²⁰⁰ And although the Supreme Court in *Grutter v. Bollinger*,²⁰¹ ultimately allowed applicants’ “race” to be considered in the limited area of admissions in higher educational institutions in a case involving a white student denied law school admission,²⁰² it did so on a theory of diversity that abstracted and disconnected the meaning of diversity from exclusionary practices and racial/social justice concerns.²⁰³

However, it is in the complicated area of voting where the colorblind ideology seems to have received its greatest boost. Here, despite the fact that the 15th Amendment was initially enacted to provide the newly emerging slaves a right to vote and there has been and continues to be a long and appalling struggle to ensure meaningful enfranchisement,²⁰⁴ the Court, according to Bell, has established a new constitu-

199. *Id.* at 500 (plurality opinion) (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)).

200. *Id.* at 498 (plurality opinion). Justice O’Connor also seemed concerned by the fact, in a section of the opinion lacking a majority, that Richmond was 50 percent black and five of the nine council officials that passed the ordinance were black. She suggested that this presented a stronger need for the application of strict scrutiny since it was not a majority of whites acting in a way that burdened themselves but was the act of minorities doing so. *Id.* at 495-96 (opinion of O’Connor, J.). “Many commentators, the Court dissenters included, were astonished by the *Croson* decision.” BELL, *supra* note 2, at 666; see also *Croson*, 488 U.S. at 551-52 (Marshall, J., dissenting); Patricia Williams, *Legal Storytelling: The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 at 2129-30 (1989); Ross, *supra* note 144, at 381.

201. 539 U.S. 306 (2003).

202. The decision came on the heels of lower court decisions and statutes applying colorblind approaches to similar affirmative action cases. The effects of these laws were that fewer black and brown students gained admission into these institutions, leaving them overwhelmingly white. See, e.g., California Proposition 209, *supra* note 77; Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996). These events revealed not only the social embeddedness of white supremacist racial ordering but demonstrated the way in which colorblindness policies were a proxy for and a mechanism for maintaining white access and privilege.

203. *Who Gets In: A Quest for Diversity after Grutter – The 2004 James McCormick Mitchell Lecture*, 52 BUFF. L. REV. 531, 579, 584 (2004) (transcript of discussion by Frank Wu and Charles Daye). Other panelists included Athena Mutua, Shedon Zedeck, Margaret Montoya and David Chambers. Law school admissions continue to be a focus of CRT attention. See, e.g., Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 5 (2006); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of “A Systemic Analysis of Affirmative Action in American Law Schools,”* 7 AFR.-AM. L. & POL’Y REP. 1, 1-5 (2005). The decision was then justified in part on proclaiming the benefits of diversity as teaching presumably white students that “there is no minority viewpoint,” and “visibly” lending legitimacy to the system by signifying that the “path to leadership [is] . . . open to talented and qualified individuals of every race and ethnicity.” *Grutter*, 539 U.S. at 320, 332 (internal citations omitted).

204. This struggle of course continues up until this very day. Consider the efforts to disenfranchise minorities in Florida during the 2000 Presidential election and again in Ohio in the 2004 election. For discussions of these events, see, e.g., Calmore, *supra* note 30, at 1267-71; Hugh M. Lee, *An Analysis of State and Federal Remedies for Election Fraud, Learning from Florida’s Presidential Election Debacle*, 63 U. PITT. L. REV. 159, 159-160 (2001); see also U.S. COMMISSION ON CIVIL RIGHTS, DRAFT REPORT: VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (approved by the Commissioners on June 8, 2001), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm>; Monique L. Dixon, *Constructive Disenfran-*

tional injury. First articulated in the case of *Shaw v. Reno*,²⁰⁵ the injury seems to be that of a state by “a predominant use of race in redistricting” impermissibly sending the message “that racial identity is and should be an American citizen’s most salient political characteristic.”²⁰⁶ The point is that redistricting should be race-blind.²⁰⁷ Unsurprisingly, the case involved blocked efforts to create a voting district that would render black votes meaningful, while ignoring the pervasive historical and current realities of racial bloc voting by whites who often have been reluctant to elect black representatives or elect whites who will effectively represent black or other nonwhite interests and ignoring the racialized politics and gerrymandering of white politicians.²⁰⁸ The ultimate effect of these interpretations is that law, while denying blacks and other non-

chisement: The Problems of Access & Ambiguity Facing the American Voter: Minority Disenfranchisement During the 2000 General Election: A Blast from the Past or a Blueprint for Reform, 11 TEMP. POL. & CIV. RTS. L. REV. 311, 311-313 (2002). On felony disenfranchisement, one of the major forms of minority disenfranchisement used in Florida, see, e.g., Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 109-14 (2003); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345-46 (2003); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1147-50 (2004); Marc Mauer, *Disenfranchisement of Felons: The Modern-Day Voting Rights Challenge*, CIVIL RIGHTS JOURNAL, Winter 2002, at 40; J. Wyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435, 435-36 (2001); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felon’s Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1598-1601 (2004); Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 67, 68-72 (Christopher Mele & Teresa A. Miller eds., 2005); Note, *One Person, No Vote: The Law of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939-42 (2002). For a discussion specifically on the 2004 election, see, e.g., Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 938-39 (2005) (discussing problems with the 2004 presidential election); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1220-39 (2005) (discussing problems with the 2004 presidential election in Ohio).

205. 509 U.S. 630 (1993).

206. BELL, *supra* note 2, at 516.

207. *Id.* (explaining that the new objective of the Court was to enforce a color-blind approach); see also Calmore, *supra* note 30, at 1271-74 (arguing that the Supreme Court is undermining the Voting Rights Act through an imposition of colorblind injustice and commenting that “[w]hile the Supreme Court majority opinions are death to black race consciousness, they are amazingly naive or intellectually dishonest when it comes to appreciating that whiteness is also deployed in bloc voting ways”). Calmore goes on to argue that:

The race opinions of a five-to-four majority on the Supreme Court achieve a false coherence through an incredible process of decontextualization. As a consequence of this radical decontextualization, the Supreme Court majority appears literally blinded by color as it - the same five characters each time - neither acknowledges nor recognizes the degree of racially polarized white bloc voting and therefore will not permit black bloc voting in what really amounts to self defense. The Court acts as if black bloc voting is the first move rather than the second, the initial fire rather than the return fire. Through this misrecognition of whiteness, the Court majority subjects this second move to strict scrutiny as it claims to be unable to distinguish invidious from benign racial discrimination. The second move, blacks taking race predominantly into account, violates the equal protection rights of whites, because they are deemed to suffer individual ‘expressive harm.’ Individual rights trump efforts to redress vote dilution, a group harm.

Id. at 1273 (internal citations omitted).

208. See also BELL, *supra* note 2, at 489-527 (tracing the cases and various obstacles to meaningful enfranchisement for blacks).

whites justice, has protected vested white interests accumulated over time, such as seniority systems, educational advancement, wealth, and/or or white expectations, through the racialized orderings of the society, *first on a theory of white superiority and increasingly on the theory of colorblindness.*

Until the job of racial justice is done, CRT theorists might argue, CRT will expose the whiteness of colorblindness, the white supremacist effects of colorblind laws and rulings, and the white consciousness of American society and power. And CRT theorists will do so, from inside the experiences, consciousness, and perspectives of Black, Native American, Latina/o, and Asian American people, etc., using these essentialized categories that white power created to oppress, strategically as sources of solidarity, empowerment, and analysis.

VI. CRT-RELATED SCHOLARSHIP, THE LATCRIT EXAMPLE: DEEPENING AND BROADENING THE CRT PROJECT?

The development and proliferation of other scholarship and alternative institutions such as LatCrit, Asian American legal scholarship, and critical race feminism, and the writings of sexual minorities of color to explore race, law, and other systems of oppression has raised concerns about the fragmentation of the Critical Race Theory (CRT) project. The development of this CRT-related scholarship, and for instance the separate institutionalization of the LatCrit project, also raised concerns over the multiplication of identity-based groups and thus the elevation of identity politics as opposed to the formation of a broad political movement, a criticism widely made in reference to identity politics.²⁰⁹ However, though a broad political movement has yet to emerge, this “fragmentation” has actually deepened and broadened the Critical Race Theory project by providing the necessary intellectual expansion and theoretical bridges between identity politics and a politics of solidarity based on difference.²¹⁰ So, for instance, these bodies of scholarship broadened the racial lens through which the workings of white racial privilege were revealed, such as through Asian American legal scholarship’s exploration of Asian-American experiences, and deepened the commitment to the project of antiracism by focusing on other systems of social subordination, such as the patriarchal gendered oppression of women explored in the context of critical race feminism, as discussed earlier. However, in addition, they spurred the development of other theories

209. See, e.g., discussion *supra* note 118; Delgado, *Blind Alleys*, *supra* note 17 at 127-28; Bryant, *supra* note 7.

210. A politics of solidarity based on difference stresses common projects and commitments and embraces difference and diversity. But it rejects assimilation of one group into another as a prerequisite to or on basis of that solidarity. It also rejects the universalization of one group’s experience. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 157-158 (1990); NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION 197-205 (1997) (examining and critiquing this idea).

through which to analyze the systems of subordination and developed concepts that emphasized coalition and praxis. Multidimensionality is one such emerging theory which is based on the insights of antiessentialism and intersectionality, insights foundational to the formation of related scholarship communities; while the concept of antisubordination praxis has stressed coalition building in addition to and through theory-informed practice and practice-informed theory. And finally, LatCrit, in particular, in institutionalizing the LatCrit conference also institutionalized the *practice* of continuing to develop critical theory, building coalitions, and engaging practice.

A. Antiessentialism and Intersectionality: Informing Formation, Leading to Multidimensionality

The depth of LatCrit institutionalization and the conscious theorizing around this institutionalization and development is unique among much of the CRT-related scholarship, and I focus on LatCrit for this reason.²¹¹ But several of the themes I discuss here as basic to LatCrit theory have been built upon, shared and/or mutually developed by the work of scholars who identify as CRT scholars or with one or another related body of work.

People such as Robert Chang, Jerome Culp, Angela Harris, Berta Hernández-Truyol, and particularly Frank Valdes and later Elisabeth Iglesias,²¹² among others, were the spirit behind the establishment and/or blossoming of LatCrit. They saw LatCrit as a first cousin of CRT and were committed to building on its strengths and avoiding its mistakes.²¹³ The first mistake they sought to avoid was the perceived elitism and exclusivity of CRT, while nonetheless focusing on issues germane to the Latina/o community and Latina/o identity (a focus that could be perceived as exclusive).²¹⁴ The latter was a challenge, in part because Latina/o identity as a practical matter seemed to embrace people representing a host of different nationalities with different cultural perspec-

211. LatCrit also is now an incorporated non-profit organization. While not heavily institutionalized, there are at least two journals committed to the promotion of Asian American legal scholarship focusing primarily on Asian Pacific American communities. These are the Asian Law Journal at University of California Boalt Hall School of Law and the Asian Pacific American Law Journal at University of California Law School. Adrien Wing has done the most work in theorizing and pulling together materials that represent critical race feminist insights by publishing two readers, one on Critical Race Feminism, see CRITICAL RACE FEMINISM, *supra* note 37, and another on Global Critical Race Feminism, see GLOBAL CRITICAL RACE FEMINISM, *supra* note 44.

212. I believe few people would argue with my characterizing Francisco “Frank” Valdes as the father of LatCrit. However, for many of us, Elizabeth “Lisa” Iglesias is the mother of LatCrit. From what I can figure out Lisa became a central part of LatCrit by around LatCrit’s second annual conference. She remained immersed in LatCrit very much guiding its efforts with Frank and bringing to the fold people like myself. She left LatCrit sometime after Latcrit VIII (I was out of the country during that year). But the parting and its aftereffects seemed anything but amenable and for some of us represented a low moment for LatCrit as a community committed to life affirming practice, scholarship and safe space.

213. Valdes, *Ethnicities*, *supra* note 104, at 3-7.

214. *Id.*; Valdes, *Under Construction*, *supra* note 104, at 1090.

tives and historical experiences; and who were raced differently, as black, white, and/or mestizo, among other differences. Valdes envisioned a larger pan-Latina/o identity, but one which both respected and explored the diversities within the group while building solidarity among the differently positioned individuals and groups within the larger pan-ethnic collectivity.²¹⁵ From this perspective, to exclude white people, black people or lesbian people or just about anybody else committed to social justice, had the potential of excluding someone who might identify as Latina/o. Further, the founders of LatCrit understood that those who identified as non-Latina/o might have analogous experiences that would also contribute to the building of LatCrit theory.

In this way, LatCrit faced the issue of antiessentialism in Latina/o identity concretely in its experience of politically promoting group formation for the purpose of producing knowledge and building community.²¹⁶ The anti-essentialism critique had engendered substantial prior debate in CRT, feminist, and other intellectual circles.²¹⁷ It recognizes that there is no single Latina/o essence, no coherent collective identity or single experience that could reflect the common interests of the people constituting the group “without acknowledging the intra-group differences,²¹⁸ and rejects the idea of essentialism in Blackness, Asian Americanness, women and the like. For example, CRT scholars joined other women of color who had long challenged the category of “woman” in feminist writings as largely reflecting the interest and priorities of white middle class women in the United States and thus not representative of all women’s experience; a quintessential anti-essentialist critique.²¹⁹

Although LatCrit and other CRT related scholarship took an anti-essentialist approach to the categories of blacks, Latina/os, Asian-Americans, and/or women with regard to the dynamics and definition of the groups, their formation was simultaneously premised on the pragmatic idea that these essentialized group identities, having arisen in part

215. Valdes, *Ethnicities*, *supra* note 104, at 9.

216. Asian-American legal scholarship faced similar challenges. It focused on the unique and varied experiences of Asian Americans in U.S. society. Asian Americans, like Latina/os, consist of people from widely varying Asian communities and nationalities. Like Latina/os they experience a racialized identity that often flattens misunderstands their differing ethnic diversities. Their experiences often include an American view of them as foreign, thereby delegitimizing and limiting their human potential while simultaneously holding them up as model minorities, as against other minorities. ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 1-2 (1999); Aoki, *supra* note 1, at 1477; Chang, *supra* note 1, at 1303; Chang, *supra* note 26, at 87-96; Gotanda, *supra* note 2, at 28; Saito, *supra* note 1, at 294-95.

217. See, e.g., Elizabeth M. Iglesias & Francisco Valdes, *Introduction: Expanding Directions, Exploding Parameters: Culture and Nation in LatCrit Coalitional Imagination*, 33 U. MICH. J.L. REFORM 203, 227-232 (2000).

218. Elizabeth M. Iglesias, *Toward Progressive Conceptions of Black Manhood – LatCrit and Critical Race Feminist Reflections Thought Piece*, May 2001, in *PROGRESSIVE BLACK MASCULINITIES*, *supra* note 107, at 55.

219. See, e.g., Harris, *supra* note 42, at 755.

in response to oppression based on essentialism, had been and could be used strategically, politically, and consciously to fight oppression.²²⁰

The antiessentialist insight was complemented by intersectional theory, which allowed for a more nuanced understanding of intra-group difference. It simultaneously demonstrated the links between different systems of subordination such as racism, sexism, and heterosexism as located in the particular social positions of racial subgroups, such as Latinas or black women.²²¹ Intersectional theory, first articulated as a theory by Kimberlé Crenshaw, drew upon black feminist thought which had consistently argued that black women were not only oppressed by the white supremacist system of racism but were also oppressed by the patriarchal practices and system of sexism.²²² The theory thus explored the experiences of black women at the intersection of racism and sexism, rejecting a single-axis framework (race or gender) for understanding the arguably doubly burdened conditions of black women.²²³ As such, Crenshaw's concept of intersectionality, found a ready home and a site for its further development in LatCrit²²⁴ Asian American legal scholarship,²²⁵ and Critical Race Feminism,²²⁶ as it had in CRT.²²⁷ Each of these bodies of scholarship has made substantial contributions to further

220. OMI & WINANT, *supra* note 26, at 53-60 (suggesting that oppressed people come together strategically for survival because they are oppressed based upon essentialized categories); *see also* Robert S. Chang & Natasha Fuller, *Performing LatCrit: Introduction*, 33 U.C. DAVIS L. REV. 1277, 1291-92 (2000) (citing Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1414 (2000)) (noting that: "unbounded anti-essentialist theory can be disabling to community organizing, and 'once set in motion, anti-essentialism unmodified has no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves.' Cho and Westley criticize the second wave's fascination with anti-essentialism as 'the ahistorical pursuit of the 'theoretical' that represents an abdication of political engagement and the relinquishment of the full promise of anti-subordinationist intellectual production.' Anti-essentialist theory is understood here to be antithetical to effective political organizing. If this is right, those within the field of CRT may be working at cross purposes; perhaps CRT needs to reform itself and embrace what Professor Cho describes elsewhere as 'essential politics.'" (citations omitted)).

221. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, reprinted in part in POWER, PRIVILEGE AND LAW, *supra* note 1, at 465-72 [hereinafter Crenshaw, *Demarginalizing Intersection*]; *see also* K.L. Broad, *Critical Borderlands & Interdisciplinary, Intersectional Coalitions*, 78 DENV. U. L. REV. 1141, 1143 (2001); Crenshaw, *Mapping the Margins*, *supra* note 18, at 1299; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7-9 (1989);

222. *See* Crenshaw, *Mapping the Margins*, *supra* note 18, at 1252.

223. *Id.*

224. *See, e.g.*, Berta Esperanza Hernández-Truyol, *Women's Right as Human Rights—Rules and Realities and the Role of Culture: A Formula for Reform*, 21 BROOKLYN J. INT'L L. 605, 610-11 (1996); DELGADO & STEFANCIC, *supra* note 1; *see also* discussion *supra* note 212 (role of Valdes and Iglesias).

225. *See, e.g.*, Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1288 (1997).

226. *See, e.g.*, CRITICAL RACE FEMINISM, *supra* note 37, at 177-79.

227. *See, e.g.*, Hutchinson, *supra* note 19, at 9-12; Matsuda, *supra* note 221, at 9. Much of the discussion on multidimensionality is taken from and appears in my chapter on progressive black masculinities. *See* PROGRESSIVE BLACK MASCULINITIES, *supra* note 105, at 21-23.

developing the idea of intersectionality, including using it as a basis for the emerging theory of multidimensionality.

B. Multidimensionality: An Emerging Theory?

The theory of multidimensionality captures three separate ideas. First, it recognizes that an individual has many dimensions, some of which are embodied human traits such as skin color, sex, ear-lobe length, eye color; and others which are expressive, such as being Methodist or Catholic, a cat owner or dog owner, etc. Second, multidimensionality identifies some of these dimensions as materially relevant,²²⁸ meaning that a particular society has taken some dimensions such as color, sex, or a particular religious belief (but not ear-lobe length or owning a cat or a dog) and constructed meanings about the groups that possess them. It then allocates or denies both material and status-related resources through systems of racism, sexism, and anti-Semitism, for example. These systems operate on the individuals who belong to groups that inhabit or express a particular trait producing a host of experiences, rewards or demerits. Said differently, multidimensionality captures the way society disadvantages people or benefits them primarily on the basis of their possessing a particular trait. Thus, the second idea of multidimensionality is a focus on systems of subordination and privilege, such as racism, sexism, and heterosexism.²²⁹

Third, multidimensionality recognizes that these systems intersect, inter-relate, and are mutually reinforcing so that for example, racism is patriarchal and patriarchy is racist. In addition, however, the intersection of two or more systems of disadvantage or privilege often produces unique categories and experiences. So for example, intersectional theory might suggest that black men are privileged by gender and oppressed by race.²³⁰ But this might not sufficiently explain racial profiling as a phenomenon that happens most frequently to black men.²³¹ Multidimensionality, however, might better capture the idea that black men are sometimes oppressed because they are “blackmen” one word, one position, one socially, multidimensionally constructed oppressed group of people—they are both black and men.²³² The positionality of blackmen—one word—could be further analyzed by looking at the class or another materially relevant status of those who are, in this example, racially profiled. In this sense, it replaces an approach that is additive, that is, one that says, for instance, that poor black men are poor + black +

228. Valdes, *Under Construction*, *supra* note 107, at 1094.

229. Hutchinson, *supra* note 144, at 1199.

230. PROGRESSIVE BLACK MASCULINITIES, *supra* note 107. However, Stephanie Phillips has pointed out to me that these interpretations may not be correct interpretations of the intersectional theory. She argues instead that there is no meaningful difference between the theory of intersectionality and multidimensionality.

231. *Id.* at 21-22.

232. *Id.* at 23.

men, to one that allows the analyst to explore the way that axes of classism, racism, and gender oppression mutually construct unique positions for individuals and groups, while simultaneously demonstrating that these same forces are implicated across identity categories.

And finally, multidimensionality is an approach. In recognizing, for example, that racial oppression is also gendered, sexualized, and classed, a multidimensional approach conceptually links the struggles of racial justice, gender justice, and class justice; and has the potential to link the differing groups fighting for these different types of justice. As such a multidimensionality approach is an approach to building solidarity and potentially coalitions.²³³

C. Antisubordination Praxis

Ideas about solidarity, multidimensionality and coalition-building are meant both to inform and to serve the principle and project of anti-subordination. In LatCrit, the commitment to antisubordination stated explicitly at the beginning of the movement meant that LatCrit embraced participation of people from other groups that had been historically oppressed. Thus, LatCrit embraced those who were fighting also against heterosexism, and other sexually-based oppressions. This effort was made easier by Valdes' participation, as he was known affectionately in some quarters as the Queer Theory Philosopher after the publication of a path-breaking piece on sexual identity.²³⁴ At the same time, LatCrit's anti-subordination commitment²³⁵ and its kinship with CRT led the organizers to consciously pursue both a theory and the practice of coalition building as well as a theory of praxis—theory—informed practice and practice—informed theory, as explored by Eric Yamamoto, among others.²³⁶ So for example, LatCrit developed a number of programmatic devices that have been employed in LatCrit conference planning to help balance the demands of facilitating their commitment to both anti-essentialism and coalition building. One such device was the practice at each conference of rotating centers, in which a non-Latina/o group's experiences and insights were "centered" in a conference workshop for exploration. In this way, LatCrit hoped to expand its theory, deepen its knowledge about various groups' histories, and having brought these groups into the conference, potentially to build coalitions with them.²³⁷

233. Valdes, *Ethnicities*, *supra* note 104, at 1094.

234. Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995).

235. Iglesias & Valdes, *supra* note 37, at 1265-67.

236. Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829 (1997).

237. Iglesias & Valdes, *supra* note 37, at 1267. Another device not related to coalition building was the practice of "streaming a topic," such as class. Streaming required that LatCrit would return to a topic over a period of years in order to build upon previous and new insights.

The idea of coalition building is also at the center of LatCrit, CRT and other related scholarship's commitment to critical race praxis, as developed by Eric Yamamoto.²³⁸ This concept is often termed "antisubordination praxis," to encompass the many justice projects that inform the antisubordination commitment. Yamamoto had been involved in justice struggles that brought different but conflicting minority groups together.²³⁹ Thus, the idea of coalition and alliances are a part of the idea. But, a critical race praxis or antisubordination praxis also refers to the idea that critical theorizing should and needs to be informed by practice, by active engagement with developments on the ground while practice should and needs to be informed by theorizing and theories about what is happening, all for the benefit of oppressed communities. Yamamoto's notion of critical race praxis is summarized as:

[Combining] critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities. Its central idea is that racial justice requires antisubordination practice. In addition to ideas and ideals, justice is something experienced through practice . . . It requires in appropriate instances, using critiquing, and moving beyond notions of legal justice pragmatically to heal disabling wounds and forge intergroup alliances. It also requires, for race theorists, enhanced attention to theory translation and deeper engagement with frontline practice; and for political lawyers and community activists, increased attention to a critical rethinking of what race is, how civil rights are conceived, and why law sometimes operates as a discursive power strategy.²⁴⁰

While this definition raises a number of provocative issues, two seem particularly important. The first is the recognition that justice is experienced through practice and that racial justice in particular requires an antisubordination practice.²⁴¹ These ideas capture and reinforce CRT

238. Yamamoto, *supra* note 236, at 829. For a fuller examination of the idea of critical race praxis, particularly its focus on interracial healing or community building by CRT-related scholars, see, e.g., Keith Aoki & Margaret Chon, *Nanook of the Nomos: A Symposium on Critical Race Praxis*, 5 MICH. J. RACE & L. 35, 36 (1999); see also Gitanjali S. Gutierrez, Note, *Taking Account of Another Race: Reframing Asian-American Challenges to Race Conscious Admission in Public Schools*, 86 CORNELL L. REV. 1283, 1312-1318 (2001) (explaining critical race praxis as the pursuit of interracial justice through antisubordination practice, political lawyering, and education. Antisubordination practice "seeks to disrupt the use of law as an instrument for perpetuating hierarchical power relations. Political lawyering calls for "lawyers to play a more active role in working with their minority clients to shape and guide antidiscrimination litigation" and "could involve bringing lawsuits as part of a comprehensive impact strategy." The "educative function of litigation seeks to increase "awareness of the court and parties alike about the interdependence of the legal rights of opposing minority litigants as well as the distinctions between their historical and current experiences of racial subordination" (internal quotation marks and citations omitted)); Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U.L. REV. 1361, 1365-66 (2004) (defining critical race praxis in similar ways as antisubordination praxis but critiquing the race consciousness implicit in the idea).

239. Yamamoto, *supra* note 236, at 829.

240. Aoki & Chon, *supra* note 238, at 36 (summarizing Yamamoto, *supra* note 236).

241. See Yamamoto, *supra* note 236, at 880.

notions that context is important and that what is considered fair will be contextual on the one hand, and on the other that different groups will have to work together to accomplish justice, the justice for healing their intergroup wounds or otherwise. Second, Yamamoto insists that CRT theorists translate theory into practical use for activist and legal practitioners and that these practitioners think critically and theoretically about what their work means and the ways it may be limited.²⁴² This is best accomplished by these groups working together, theorist and activist, to mutually inform one another's work; and more importantly, to do so on behalf of and in conjunction with communities of color. Critical race and related scholarship theorists believe that engaged community work and practice as well as attention to this work should dictate and inform the contours of CRT theorizing, grounding it and potentially rendering it more useful for community advancement. This idea is reminiscent of their experiences of having grounded their critique of CLS scholarship in the African American civil rights experience.²⁴³ However, antisubordination praxis requires something more than knowing an experience, it requires active engagement.

These commitments and ideas, for instance, were institutionalized in annual LatCrit conferences. The conferences were organized around four functions, namely, "(1) the production of knowledge; (2) the advancement of social transformation; (3) the expansion and connection of anti-subordination struggles; and (4) the cultivation of community and coalition,"²⁴⁴ both within and beyond the confines of legal academia in the United States. Further LatCrit established "early guideposts," that in some ways mirrored but greatly expanded CRT tenets, evidencing a commitment to antisubordination praxis and multidimensional/antiessentialist theorizing. These were to:

[1] Recognize and Accept the Political Nature of Legal "Scholarship" Despite Contrary Pressures.

[2] Conceive Ourselves as Activist Scholars Committed to Praxis to Maximize Social Relevance.

[3] Build Intra-Latina/o Communities and Inter-Group Coalitions to Promote Justice Struggles.

242. *Id.* at 828-30.

243. *See, e.g.,* Matsuda, *supra* note, 141 at 344-45. But antisubordination requires more than just knowledge of an experience, it requires engagement. In a time of backlash; however, where there is increasing ideological pressure to be blind to racial and racialized events, such as Hurricane Katrina. *See infra* notes 300-16 and accompanying text (noting that being engaged may be simply naming and re-naming, hearing, and re-telling the hearing of our experiences from our collective perspective). But even this telling and retelling must be done in community or in some sort of minority public sphere.

244. Iglesias & Valdes, *supra* note 37, at 1262; *see* Valdes, *Ethnicities*, *supra* note 104, at 1095; *see* Valdes, *supra* note 19, at notes 161, 175.

[4] Find Commonalities While Respecting Differences to Chart Social Transformation.

[5] Learn from Outsider Jurisprudence to Orient and Develop Lat-Crit Theory and Praxis.

[6] Ensure a Continual Engagement of Self-Critique to Stay Principled and Grounded.

[7] Balance Specificity and Generality in LatCritical Analysis to Ensure Multidimensionality.²⁴⁵

In addition, LatCrit institutionalized a host of projects in order to facilitate the production of critical scholarship and antisubordination practice.²⁴⁶

In these and other ways, LatCrit, CRT related scholarship and others, such as queer legal theory, critical work on whiteness and on Native Americans, have contributed valuable insights to the CRT project. The insights into various social groups supply the knowledge base of CRT and inform efforts to build coalitions among various groups. The information and coalitions are meant to service the goal of antisubordination praxis, a goal to which each of the groups is committed. In this sense, what could be understood as a process of fragmentation can be seen as a period of intense contextualized study that deepened the CRT project of exposing the connections between race and law from a variety of perspectives. These efforts also have broadened the CRT project by bringing more people to the table who understand and see the connections between their and others' subordination and who might join coalitions and the CRT project of fighting against racial oppression and all other forms of subordination. This move from "color" to consciousness informed by the understanding and appreciation of difference arguably allows the multidimensionality of oppression to be attacked from a number of vantage points, ventures, and enterprises.

VII. CLASSCRITS?

Nevertheless, several scholars including critical race scholars themselves have criticized CRT scholarship for its focus on the words, discourse, and discursive patterns that support race, gender, and sexual consciousness as opposed to the material determinants of these social sys-

245. Iglesias & Valdes, *supra* note 37, at 1263; Valdes, *Ethnicities*, *supra* note 104, at 1095.

246. These include publishing essays from every conference and workshop resulting in published symposia of LatCrit scholarship, securing coordinators and funding for future conferences several years in advance, incorporating LatCrit into a not-for-profit corporation, establishing the website www.latcrit.org, securing organizational NGO status for the purposes of participating in international foray, founding CLAVE, a peer-reviewed periodical, and establishing numerous programs including a Student Scholar program. See Iglesias & Valdes, *supra* note 37, at 1325.

tems of subordination.²⁴⁷ Specifically these scholars, in a variety of ways, have called for analyses of the class system in U.S. society and the way in which race, gender, and other forms of oppression mutually construct and are constructed by it.²⁴⁸ Although these calls may critique CRT for ignoring “material factors,” which Delgado defines as “issues that turn on tangible events in the social or physical world,”²⁴⁹ they more often refer to and include 1) calls for exploring the economics of race, a call that narrows the concept of materiality to ideas about the economy as a significant determining factor in racial outcomes, or 2) calls for specifically exploring the class system as the product of economic relations and economic ordering—the product of the production and distribution of goods and services.²⁵⁰

While much of CRT scholarship seems focused on discourse, race as a function of ideas, and race as culture, individual CRT and LatCrit scholars have consistently focused on the class/materialist elements of race, such as John Calmore’s focus on housing,²⁵¹ Enrique Carrasco’s focus on development,²⁵² and Kevin Johnson’s focus on immigration;²⁵³

247. Harris, *supra* note 42, at 777-78 (suggesting that race-crits “return to the vexed question of the relationship between race and class” and noting that “[t]he current interest in theories of culture has all but crowded out materialist work on race and racism”); *see, e.g.*, Delgado, *Blind Alleys*, *supra* note 17, at 122.

248. *See, e.g.*, Delgado, *Blind Alleys*, *supra* note 17, at 125-28 (calling for CRT to return to the materialist traditions of the first generation of CRT scholars such as Derrick Bell). Delgado also calls specifically for an examination of the relationship between race and class. *Id.* at 151; *see also* Carbado & Gulati, *supra* note 150, at 1757 (suggesting that CRT use the insights being developed within the field of law and economics to analyze workplace discrimination); Harris, *supra* note 42, at 777-78. *See generally* Jennifer Hochschild, *Symposium: Going Back to Class? The Reemergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L. 99 (2005).

249. Delgado, *Two Ways to Think about Race*, *supra* note 17, at 2280 n.20 (defining material factors as those “that turn on tangible events in the social or physical world”).

250. I am defining class very broadly in order to leave open for discussion and later consideration new theories that better define the idea. At the same time, I am adopting the multiple meanings that I believe Delgado seeks to capture in talking about the material determinants of racism. For instance, though Delgado defines material factors as those “that turn on tangible events in the social or physical world[,]” he explains that he, at times, uses “the terms ‘material’ or ‘economic determinism’ as synonymous with ‘racial realism.’” at n.38. He encompasses the ideas of economic relations by suggesting that it is racial realist, referring specifically to Derrick Bell, who understands that “racism is a means by which our system allocates privilege, status, and wealth.” Delgado, *Blind Alleys*, *supra* note 17, at 123. Further, he captures what I consider in part class dynamics when he notes that racism serves “the ‘political and economic ends’ of ‘powerful whites.’” *Id.* at n.16 (citing Bell, *supra* note 65). These ideas are partially captured in his comments: “[W]hile text, attitude, and intention may play important roles in our system of racial hierarchy, material factors such as profits and the labor market are even more decisive in determining who falls where in that system.” Delgado, *Blind Alley*, *supra* note 17, at 123.

251. *See generally* Calmore, *supra* note 41; John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1948-49 (1999); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998).

252. Enrique R. Carrasco, *Critical Race Theory and Post-Colonial Development: Radically Monitoring the World Bank and the IMF*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1, at 366-75; Enrique R. Carrasco, *Opposition, Justice, Structuralism, and Particularity: Intersections between LatCrit Theory and Development Studies*, 28 U. MIAMI INTER-AM. L. REV. 313, 327-35 (1997); Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J.

while others have written one or more class-related articles.²⁵⁴ Further, LatCrit has periodically, but repeatedly, focused on class, economic inequality, and the economics of race in their conferences,²⁵⁵ as have CRT scholars in symposia such as the Washington and Lee Symposium “CRT and the Next Frontier.”²⁵⁶ In addition, promising new work in the area of class and race has emerged in law and in other fields.²⁵⁷ However, a systematic analysis of class, particularly as a product of economic ordering, as well as its relationship to race has not yet emerged, *even though critical race scholars have argued for years that the class system in the U.S. mutually constructs race, gender, and other forms of oppression.*

Below I briefly proffer a number of reasons that may explain why CRT and related scholarship has not yet developed a more systematic analysis of class. I then posit that the critical study of law and class or classcrits, while open to further definition, is necessary to examine the ways in which class mutually constructs race, further grounds analyses of racism, and guides antisubordination praxis.

A. Tendencies, Tensions and Fears as Obstacles to Critical Class Analysis

There are three central tendencies within CRT and related scholarship that may explain why this scholarship has failed to adequately engage in critical class analyses. Each tendency involves a tension between material/class and discourse-focused examinations. The discursive sides

INT’L L. 221, 221-45 (1994); Enrique R. Carrasco & Randolph Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT’L L. 539, 545-55 (1996).

253. Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 633-642 (1995). See generally Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration, and Immigrants*, 7 STAN. L. & POL’Y REV. 111(1996); Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997), reprinted in 10 LA RAZA L.J. 173 (1998); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. REV. 675 (2000).

254. See Kevin R. Johnson, *Roll Over Beethoven: “A Critical Examination of Recent Writing about Race,”* 82 TEX. L. REV. 717, 722-26 (2004) (responding to Delgado’s critiques in Delgado, *Blind Alleys*, *supra* note 17 and critiquing him for overlooking much scholarship that addresses the concerns he raises and exploring the plethora of articles that have a class/materialist focus).

255. Two of the eleven LatCrit conferences held thus far specifically focused on class and economic issues. See *LATCRIT: Latina & Latino Critical Theory*, <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/index.html> (last visited Oct. 22, 2006). These were LatCrit V titled “Class in LatCrit: Theory and Praxis of Economic Inequality,” and Latcrit X titled “Critical Approaches to Economic Injustice.” *Id.* See also Johnson, *supra* note 254 (listing numerous examples of the essays discussing the relationship between class and race).

256. Brown, *supra* note 146, at 1499.

257. See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 35-38 (2d ed. 2006); MASSEY & DENTON, *supra* note 161, at 4. Legal scholars too have begun to investigate these issues from a variety of perspectives. See generally IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS* (2005); A WOMAN’S PLACE, *supra* note 43; HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS (Jeanne M. Woods & Hope Lewis eds., 2005).

of these tensions, however, are complementary in ways that reinforce the discursive turn in CRT scholarship. The first tension lies in the inherent nature of the legal profession, which while structuring material conditions does so through language and discourse. The second tension lies in CRT's embrace of post-modernist theories, which focuses on discourse as a significant site of power, in part because humans primarily understand the material world through ideas and language.²⁵⁸ These theories, however, recognize that humans are material beings in a material world.²⁵⁹ The third tension is found in CRT's embrace of the idea that race is socially constructed, which given its development in CRT lends itself toward a focus on consciousness,²⁶⁰ even though consciousness is shaped by and shapes materiality. These tensions are compounded by additional political and academic issues that may further reinforce the tendencies toward discourse analyses as opposed to the materiality of economic relations, economic ordering, and class.

The first tension is implicated in the nature of law itself. Legal work primarily consists of manipulating language and discourse in the process of structuring arguments. Though these arguments are sometimes meant to effectuate particular material arrangements and may both unleash and justify the use of coercive power, these events are accomplished through legal discourse. This occupational feature may mean that legal academics in particular, who may be removed from the rough and tumble of legal practice, are more comfortable mining text, language, and discourses for their meaning, rather than tracking their material effects or responding with concrete strategies to a particular material event. Nevertheless, law through discourse structures material conditions in part by allocating and regulating resources. It decides who the winners and losers are, on what terms trade will be conducted and what kinds of property will be protected.

While many of these issues are explored as individual concepts through the traditional liberal legal discourse of contract, property, trade, and corporate law, or even welfare and poverty law; and are increasingly examined through the overlay onto law of the standard neo-classical eco-

258. See Shane Phelan, *(Be)Coming Out: Lesbian Identity & Politics*, 18 SIGNS: J. WOMEN IN CULTURE & SOC'Y 765, 768-69 (1993) (describing the poststructuralist and postmodernist project as one challenging and seeking to unravel the historicity of truth claims rather than engaging in argumentation about whether something is true or not). Phelan describes poststructuralism as being more modernist in tone, "retaining some measure of confidence in the Enlightenment ideas of reason and freedom while indicting modern Western societies for betraying these categories even as they ostensibly serve them." *Id.* at 768. In this sense it uses deconstruction or engages genealogy to note gaps between what the West says it is or promises and what it does. On the other hand, postmodernist such as Derrida seek "continually to disrupt modern categories even as they rely on them." *Id.* at 768. Phelan notes one can be both a poststructuralist and a post modernist but "no affinity necessarily exists between the two." *Id.*

259. John Lye, *Some Post-Structuralist Assumptions* (1996-97), <http://www.brocku.ca/english/courses/4F70/poststruct.html>.

260. Delgado, *Two Ways to Think about Race*, *supra* note 17, at 2285; Delgado, *Blind Alleys*, *supra* note 17, at 123.

conomic discourse as in the Law and Economics tradition, it might be helpful to begin to examine the web of historically-decided economic policies that constitute the background and hegemonic economic code of law. Litowitz describes this code, worldview or web of social policies as including “private ownership of property, employment at will, inheritance, freedom of contract, limited liability for business organizations, patriarchy, and a regime of negative rights that ensures that individuals must secure their own health care, day care, and other benefits.”²⁶¹ Here, one might add white supremacy as an economic imperative of the code.²⁶² And, one might question who and which social groups may have pushed and/or been best served by these policies and their combination. So for instance, while notions of private property may have a history that predates the founding of the United States, arguably the fact that the founding fathers belonged to the property owning class may be a significant factor in its being enshrined in the U.S. Constitution to protect such ownership. In any event, this web of policies, I believe, help to mark the boundaries of the reproduction of class within the United States that operates both independently and mutually with other subordinating structures to limit the material well being of many people including racial and other minorities. This code, perhaps to the chagrin of its author, provides us an entry into class.²⁶³

The focus on language and discourse as an inherent feature of modern legal work is reinforced by the post structuralism/modernism of CRT that suggests that power is located in discourses. That is, power is located in rule-governed discourses that shape the features of a society and individual identity and are constructed over time (historically deter-

261. Litowitz, *supra* note 68, at 540.

262. While this may seem like a political imperative rather than an economic one, it is not clear if these two things can be separated in the American social order. Slavery was a racialized economic system; it was both economic and political. See Matsuda, *supra* note 141, at 334; see also, Anthony Farley, *Accumulation*, 11 MICH. J. RACE & L. 51, 51 (2005) (suggesting that race and class are created in the same moment of primal accumulation in which the differences between the haves and the have-nots is marked on the body, marked racially). Slavery and Jim Crow later did not simply block access to equal services, but also to equal access to resources, jobs, and the like. See WOODWARD, *supra* note 32, at 7-16. Similarly Colorblindness may do the same by leaving intact and allowing white communities to build on the historical advantages locked in through slavery, segregation, and discrimination. See Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 33-34 (2003); reprinted in 12 VA. J. SOC. POL'Y & L. 197 (2004) (discussing the manner in which advantages get locked-in over time using the economic model that in part explains the advantages monopolies maintain long after the anticompetitive behavior has ceased). In addition, an easily managed or “efficient” workplace may require homogeneity in personnel, or in America, whiteness. See Carbado & Gulati, *supra* note 150, at 1762. Pleasing the affluent customer may mean hiring salespeople with whom this particular type of customer may be most comfortable. See generally *id.* In the United States, white people are proportionately more affluent than say black people.

263. Litowitz certainly rejects the notion of class in the Marxian sense as the fount of all oppression. See Litowitz, *supra* note 68, at 534. He also rejects the idea that law is an instrument of class. *Id.* But he more generally seems to reject notions of class because the modern economy has begun to “blur class divisions.” *Id.*; see also *infra* note 293-95 and accompanying text. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005) (making a similar point).

mined) through social action.²⁶⁴ Though these discourses appear as instruments of some sort of specific knowledge, to in fact reveal knowledge,²⁶⁵ there are multiple and overlapping discourses and all manner of people have some power to contest these discourses—these sites of power. This is so even though some people have more power to influence the content and development of discourse than others.²⁶⁶ For lawyers and non-lawyers alike, these insights might easily be seen as a description of law. Law appears as a specialized body of knowledge, that often establishes, or rather reveals the boundaries of appropriate action, and perhaps—though less apparent—thought. Further, just about anyone can bring a suit or contest the discourse, and it is clearly a site of power. It is a site of power not only because it is backed by coercion but also because the language of law as socio-historically developed, itself is socially meaningful and powerful—“I know my rights; this is my property.” At this level the post-structuralist description of discourse as power not only seems to describe law but also reinforces the centeredness of discourse in law.

Delgado captures this idea when he suggests that CRT scholars favor analyses that emphasize “texts, narratives, ideas, and meanings” because they understand these as giving rise to racial discrimination by conveying messages “that people of other racial groups are unworthy,” and thus locating racial power in discourse.²⁶⁷ He criticizes these types of analyses as leading writers to focus on and “analyze hate speech, media images, census categories, and such issues as intersectionality and essentialism.”²⁶⁸ But he argues that “while text, attitude, and intention may play important roles in our system of racial hierarchy, material fac-

264. Here I am drawing particularly on Michel Foucault’s work and understanding him as the central poststructuralist theorist. See MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF STORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., 2001); Litowitz, *supra* note 68, at 534 (describing this work in part); see also Roger Jones, *Post Structuralism, by Roger Jones*, <http://www.philosopher.org.uk/poststr.htm> (last visited Oct. 20, 2006) (describing Foucault as the central poststructuralist theorist).

265. Litowitz, *supra* note 68, at 534 (drawing on Michel Foucault’s and explaining the way in which discourses appear as instruments of knowledge and noting, “psychoanalysis favors the male experience (the Oedipal drama) and thereby marginalizes women, just as the discourse of medicine tends to medicalize the behavior of those who stand outside established social categories (e.g., homosexuals were considered ‘sick’)”). See generally FOUCAULT, *supra* note 264.

266. FRASER, *supra* note 210, at 154. The idea of multiple sites of power seems to be in some tension with the idea of a single hegemonic order. Litowitz, in arguing for a reconsideration of Gramsci’s theory of hegemony suggests that the critical legal studies in using Gramsci, never resolved the tension between Gramsci’s understanding of hegemony as a tool of the dominant economic class and other ideas of hegemony as a product of structure. See Litowitz, *supra* note 68, at 549. He rejects the idea that law reflects a dominant class and appears to reject the idea of class in general given this moment of advanced capitalism but he argues there is a dominant or hegemonic code that relates to economic issues socially constructed over time. *Id.* He suggests that someone fighting for welfare rights is not fighting against a class but rather a code, a worldview. *Id.*

267. Delgado, *Blind Alleys*, *supra* note 17, at 123.

268. *Id.*

tors such as profits and the labor market are even more decisive in determining who falls where in that system."²⁶⁹

The strong focus of post structuralism/modernism on discourse and CRT's embrace of it, however, may squeeze out other poststructuralist insights about materiality.²⁷⁰ So for instance, post structuralism understands human beings as "material beings, "embodied and present in the physical world, entrenched in the material practices and structures of their society -- working, playing, procreating, living as parts of the material systems of society."²⁷¹ Thus while humans may dream of crossing the Atlantic, and may do so by engaging materiality using a boat or plane, it is unlikely they can swim across it, even if they think they can. In this sense, the idea of discursive power does not negate the reality of material constraints, and equally important, it does not negate the reality of coercive power—violence—as a creator, consequence and tool of power. Coercive power is simply another axis of power in addition to discursive power.²⁷² And the idea of discursive power, itself, though said to reside in many places and posited as contested and contestable rather than as a "one-way imposition by a dominant" group,²⁷³ does not negate the idea of dominant groups or classes (which may have greater power to say what is authoritative). Rather, these dominant groups may be powerful and their views may be hegemonic, but they are neither monolithic nor are their views the only game in town.²⁷⁴ Further, the very notion of discursive power also points to lopsided or unequal relationships that are all too often the products and producers of unequal and in-egalitarian material relations.²⁷⁵ In this sense, post-structuralism may remind us that "it's more than the economy, stupid." But, it does not negate economic conditions even if human understanding of these conditions is mediated through language. Thus while post-structuralism's analyses of discourse may reinforce the centeredness of the discourse of law, it, in and of itself, need not preclude a focus on economic structures

269. *Id.*

270. *See generally* FRASER, *supra* note 210 (indicating a need for both).

271. *See* Lye, *supra* note 259. This is so even though they suggest that human beings can only appreciate the material world though ideas and language.

272. Litowitz, *supra* note 68, at 518-19.

273. *Id.* at 534; *see also* Jones, *supra* note 264.

274. Litowitz, *supra* note 68, at 550-51 (noting that postmodernists recognize that there are dominant groups and arguing that just because there are multiple discourses at the local level does not negate that there is a hegemonic discourse at the meta level of law). *See generally* Mutua, *Theorizing Progressive Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES* *supra* note 107 (discussing ideal American masculinity as hegemonic, but not the only idea of masculinity that exists in society); Patricia Hill Collins, *A Telling Difference: Dominance, Strength, and Black Masculinities*, in *PROGRESSIVE BLACK MASCULINITIES*, *supra* note 107, at 73 (noting that while there is a dominant hegemonic masculinity, all masculinities across racial, ethnic, and other groups contain hegemonic ideas such as, white men encounter a hegemonic masculinity that dictates what white men should be and do and black men encounter ideas that tell them what they, as black men, should be and do).

275. *See* FRASER, *supra* note 210, 11- 33 (noting that it is difficult to have dignity and respect for all identities in the absence of an egalitarian society).

and relations as decisive determinants of class status and significant features in the construction of race.

If the practice of law is centered on discourse and CRT's post structuralism emphasizes on examining discourse reinforces the tendency toward a focus on discursive maneuvers, then the development of CRT's basic premise that race is socially constructed, has sometimes been understood in ways to further bolster the discursive turn. Delgado argues that it is the idea of the social construction of race that is at the crux of the discursive turn. He suggests it leads to a focus on "race" instead of race.²⁷⁶ By this he means that CRT has tended to focus on defining race, thinking about how it works, theorizing its processes as located in "[i]deal factors -- thoughts, discourse, stereotypes, feelings, and mental categories[.]"²⁷⁷ rather than focusing on how race works in the real world, and the way it functions as an ordering principle in a world of power, resources, and privilege.²⁷⁸ The idea of race as a social construction suggests that race is not some immutable biological characteristic but rather a socio-historical process through which society assigns meanings to different types of human bodies.²⁷⁹ These meanings are unstable and changing but deeply structured over time not only by consciousness but also by material constraints, economic imperatives, institutionalized practices, and other social ordering features of society.²⁸⁰ That is, it is shaped by materiality as much as by consciousness. And yet, somehow the idea that race is socially constructed has developed in a way to suggest that race is simply a product of consciousness unrelated to materiality—a consciousness that seems to hover above and beyond social life and practice.²⁸¹

So, for instance, some CRT scholars see unconscious racism as the biggest obstacle to racial justice.²⁸² This is true to the extent that unconscious racism allows people to continue to act in racist ways while simultaneously believing that racism no longer exists. This may engender in them apathy or hostility to racial justice activism. But this view ignores the ways in which race is economically, socially, and institutionally grounded and reproduced even where individuals are present and consciously committed to eradicating racism. Others seem to suggest that as race is simply a product of consciousness and not real, that race con-

276. Delgado, *Blind Alleys*, *supra* note 17, at 1–36.

277. Delgado, *Two Ways to Think about Race*, *supra* note 17, at 2280.

278. THE LATINO/A CONDITION, *supra* note 1, at 17.

279. OMI & WINANT, *supra* note 26, at 55.

280. *Id.* at 56 (noting that race is a matter of both structure and cultural representation).

281. Much in Delgado's piece leads me to think his understanding of the social construction of race as an "idea" focused and as a product of consciousness is related to Lawrence's notion of "unconscious racism." Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, in CRT: KEY WRITINGS, *supra* note 1, at 235–57. I in some ways share this intuition, and thus see this idea as a quirky function of the development of the idea of social construction rather than something inherent.

282. Brown, *supra* note 146, at 1489–91.

consciousness should be eliminated as a strategy for addressing racial injustice. Instead, they emphasize spiritual transformation.²⁸³ While I am sympathetic to this type of thinking, it does not provide a theory about the process of transformation, given embodiment. That is, it does not contemplate the limitations and compromises that material (human) embodiment imposes on spiritual consciousness as manifested in the world or the way constraints are further materialized in social systems and institutional structures. Nor does it suggest the process for transforming them.²⁸⁴ In addition, to say race is not biological is not to say it is not real.²⁸⁵ Further, to say race is a social construction, again, is not to say that race is not real. Money is the preeminent social construction as a medium of exchange. No one seems to suggest that money is not real or rather that the consequences of having or not having money in the context of modern economies is somehow unreal.²⁸⁶ These ideas detach the consciousness of social construction from the materiality of social construction and they mistakenly uproot racism from its material basis as well as detach race from class.

Nevertheless the idea and prominence of racial consciousness or unconsciousness as developed within the idea of the social construction

283. See Robinson, *supra* note 238, at 155-58.

284. Here, the process of transforming these material constraints on consciousness or calling into existence a different reality requires something more than consciousness or thought but may well entail a combination of thought, speech, and action or action and speech that changes the conditions of consciousness. As such it might well require or be well served by race consciousness that produces the actions that would help dismantle the structural and material conditions that reinforce the conscious conceptions. See generally NEALE DONALD WALSCHE, *CONVERSATIONS WITH GOD: AN UNCOMMON DIALOGUE* (Book 1) (1996).

285. OMI & WINANT, *supra* note 26, at 55.

286. One can argue that money is a social construction. It is certainly not biological but it is a function of human interaction. Money is a medium of exchange. Further, expressions of money, such as the one-dollar bill and a twenty-dollar bill can be said to be the same, in the way that people, are viewed the same, as humans. That is, these bills are made out of the same sort of paper, with roughly equivalent amounts of ink, thus their value from this perspective is the same. However, people do not value the twenty-dollar bill the same as they do the one-dollar bill, nor do they say the bills have equal value. This difference is real, not as a matter of biology or substance, but is real because a zillion transactions every day make them real and make the difference between the bills real. This difference is buttressed not only a billion people believing that the difference between the dollar bills is real, and acting like they are different everyday (consciousness made real,) but is also buttressed and made real by a variety of systems and institutions such as the U.S. economy and the global economy, the federal reserve bank, the stock market, the real estate agent, and the grocery store down the street, etc.

In addition, people's belief systems about the dollar in general could rapidly change, leading to its abandonment as a system or medium of exchange. However, such an outcome would likely be precipitated by some enormous event, and not because a small group of people, marginal and outside the mainstream, with limited control over the production of money and its accumulation wished or believed it so. Additionally, the value or perception of say, twenty dollars does not remain the same over time, twenty dollars thirty years ago was more valuable. And finally, and more important to analysis of class to the extent that access to money is allowed to determine a person's access to status, goods and services, the systems by which it produced and allocated creates classes, races, genders etc., designed to perform both and different economic and psychological functions. Race is structural and made real in a similar way that money is. Further, capitalism, the system we now inhabit, guides this process buttressed and ordered in part by law and makes access to money in its various forms the key to accessing resources, the absence of which helps delineate class and race.

of race, further fortifies the discursive turn in CRT. This turn, to the extent it focuses on discourse, may occlude a focus on materiality and therefore on economic and class issues.

But political and other analytical pressures also exist that may have hindered the development of class analyses within CRT and strengthened the tendency toward the discursive turn. For example, hesitancy to take on class may result from fear of analyzing or critiquing capitalism, the reigning economic order, given the political environment that champions unfettered capitalism as a panacea for all ills despite its apparent tendency to concentrate wealth in the hands of a few. This tendency uninterrupted by policy decisions to curb it or disrupt its lopsided material distributions, has increasingly created and cemented vast economic inequalities in the social system, widening and hardening the gap between the rich and the poor.²⁸⁷ However, engagement with class issues as a potential critique of this situation may be seen as politically difficult and unpopular given the politics of triumphant which celebrate the failure of communism and conclude the inadequacy of Marxist analyses with their particular emphasis on class divisions.²⁸⁸

This fear may be bolstered by economic analyses which understand current economic arrangements as necessary and natural and which inform us everyday that the maintenance and creation of the rich are indispensable and beneficial to the rest of us, including the middle, working, and poor classes,²⁸⁹ while suggesting that policies which put the well-

287. The London Financial Times published a three-part series discussing growing economic inequality in the United States and the stagnation of wages. See Krishna Guha, Edward Luce, & Andrew Ward, *Anxious Middle: Why Ordinary Americans Have Missed Out on the Benefits of Growth*, FIN. TIMES (London), Nov. 2, 2006 (commentary) (part one of three); Krishna Guha, Edward Luce, & Alim Remtulla, *Seeking Shelter: Why Democrats are in Retreat From Their Free Trade Record*, FIN. TIMES (London), Nov. 3, 2006 (commentary) (part two of three); Alan Beattie, *Sans Safety Net, 'Creative Destiny' Spurs America*, Nov. 6, 2006 (commentary) (part three of three); see also Lawrence Summers, *The Global Middle Cries out for Reassurance*, FIN. TIMES (London), Oct. 30, 2006 (commentary); ROBERT PERUCCI & EARLY WYSONG, THE NEW CLASS SOCIETY 3-34 (1999) (suggesting that class mobility is stagnating); JEFF FAUX, THE GLOBAL CLASS WAR: HOW AMERICA'S BIPARTISAN ELITE LOST OUR FUTURE – AND WHAT IT WILL TAKE TO WIN IT BACK 49-75 (2006) (noting the increasing gap between rich and poor and commenting that while racism, sexism and other forms of oppression seem to be decreasing, class inequalities are growing); Robert D. Atkinson, *Inequality in the New Knowledge Economy*, in THE NEW EGALITARIANISM 52, 54-55 (Antony Giddens & Patrick Diamond eds., 2005) (discussing growing inequality that began in the late 1970's and explaining that this phenomenon covers not only inequitable distribution of income but also the distribution of jobs with the share of jobs with middle income also shrinking). The result is an economy that is crating a U-shaped job-market with more job increases found at the top and the bottom. *Id.*

288. Litowitz, *supra* note 68, at 534-5.

289. Recall for instance, President Ronald Reagan's supply-side economics, derisively termed "trickle-down economics," which put the rich at the center of tax-reduction for the so-called benefit of greater production. Marjorie E Kornhauser, *The Morality Of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 154-56 (1994). The rich, the theory suggested would take the money saved from lower taxes and invest it, stimulating the economy and therefore providing overall growth and benefits that would trickle down to the rest of us. *Id.* Instead, the rich got richer and the United States deficit soared, later restraining investment in social spending because the deficit had to be reduced. *Id.*; see, e.g., Susan Pace Hamill, *An Evaluation of Federal Tax Policy*

being of the vast majority humanity at the center of economic ordering and development are destructive. And it may be further bolstered by the legal code of economic policy choices, described earlier, that protects the regime of “private ownership of property, employment at-will, inheritance, freedom of contract, limited liability for business organizations, patriarchy, and a regime of negative rights that ensures that individuals must secure their own health care, day care, and other benefits.”²⁹⁰

At the same time, a hesitancy to take on class may arise from deep within CRT itself. Race in America cuts across class. So for instance, the working class is and has historically been divided by race.²⁹¹ But class also divides race,²⁹² a fact CRT recognizes in its antiessentialist notions, which call for racial solidarity and unity as a political commitment rather than as an essential fact. However, a class analysis may nonetheless require race critics to acknowledge their own class standing and interest as part of an educated elite. This interrogation might suggest among other things, that their interest in being and remaining a part of this elite class is in tension with the empowerment of the racialized underclass, which empowerment is both the producer and product of a radically transformed social order. Said differently, in order for the masses of racialized underclasses to live well, the current system which privileges the educated elite will need to be transformed. Empowerment of these classes is both the prerequisite and desired outcome of this transformation. Seen from another perspective, race critics may not look at class because they are less affected by the oppressive mechanisms of class, even as these accompany racial oppression.

There may also be a number of other analytical obstacles to CRT taking on class analyses. For instance, Litowitz argues that central insights of Marxism (as the most important theory of class relations) are no longer adequate explanations of or salient factors in advanced capitalism

Based on Judeo-Christian Ethics, 25 VA. TAX REV. 671, 729-734 (2006) (providing brief discussions of trickle down economics and explaining trickle down theory, noting that there is no reliable proof that tax cuts for the rich will stimulate growth and explaining that although George W. Bush calls himself a Christian that his tax policies fail to meet a Christian ethics that would require those who benefit the most from society to contribute—as part of sacrifice—more for its upkeep and requiring that revenues raised be sufficient to ensure vulnerable people an opportunity to live up to their God given potential); see also Audrey Farlane, *The New Inner City: Transformation, concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 4-5 (2006) (discussing recent city urban planning goals of attracting a more affluent population on the theory that they will bring needed resources to the city by which poorer communities will benefit but finding that the poorer communities disappear, get relocated and do not benefit from this focus).

290. Litowitz, *supra* note 68, at 549 (referring to the code also as a worldview and explaining that “social reform involves subversion of a dominant rationality”).

291. See, e.g., Herbert G. Gutman, *Black Coal Miners and the Greenback-Labor Party in Redeemer, Alabama: 1878-1879*, *The Letters of Warren D. Kelley, Willis Johnson Thomas, “Dawson,” and Others*, 10 LAB. HIST. 506, 506 (1969); Herbert G. Gutman, *Reconstruction in Ohio: Negroes in the Hocking Valley Coal Mines in 1873 and 1874*, 3 LAB. HIST. 243, 243-44 (1962). See generally ROEDIGER, *supra* note 116.

292. I owe this line of argument to Robert Chang.

where class lines have become blurry.²⁹³ For example, he poses the following situation and question. "A female computer consultant for IBM speculates on the stock market at night and owns a studio apartment that she rents to a janitor. To what class does she belong?"²⁹⁴ While a definitive answer may not arise under traditional Marxist theory of class, rethinking class in light of modern theories, current practices, and concrete economic developments may provide a sophisticated analysis of this scenario.²⁹⁵ Equally important however, is that the demonstration of blurry class lines does not render class as an economic feature or an analytical or political tool non-existent. In fact critical race analysis may be helpful in this regard. So for instance, race, Latinos, blacks, as groups, as political projects, as analytical categories are "blurry"—in-essential, non-monolithic, unstable, socially constructed, and difficult to define. Yet, they exist because we create and recreate them structurally, politically, intellectually and discursively. Though a slightly different process is at work in the case of class, and perhaps gender, these social processes and phenomenon exists at multiple levels.

And finally, CRT may have failed to adequately engage class analysis because, as Angel Harris suggests, we may simply have lost the language for talking about class given the declining currency of Marxist theory.²⁹⁶ Or it may be that in light of the law and economics tradition, CRT scholars believe it necessary and are reluctant to master another field such as economics. In any case, this failure is puzzling given CRT's suggestion that class mutually constructs race on the one hand, and on the other, given its success in contributing to the examination of other subordinating systems, such as gender oppression, (intersectionality)²⁹⁷ and potentially gay, lesbian, and queer oppression (multidimensionality).²⁹⁸

B. *Why ClassCrits?*

My thoughts on what class is and what a critical class analysis might reveal are provisional. However, it appears important for CRT to engage and develop a critical class analysis because mapping out the different economic classes, the power relations between them, and the way law operates on them, as it has in the context of the systems of race, gender, and sexuality is crucial to understanding the ways in which class mutually supports these other systems. In addition, a class analysis may further ground examinations of racism and racist practices and potentially guide CRT's antistatist praxis.

293. Litowitz, *supra* note 68, at 534.

294. *Id.* at 534; see also FRIEDMAN, *supra* note 263.

295. For new ideas about class, see, e.g., PERUCCI & WYSONG, *supra* note 287, at 3-34; FAUX, *supra* note 287, at 49-75 (discussing the existence of an international elite class).

296. Harris, *supra* note 42, at 777.

297. See *supra* note 18.

298. See *supra* note 19.

Classes arguably arise out of the division of labor and the stratification of society in producing, distributing, and perhaps even in consuming goods and services.²⁹⁹ A critical class analysis, then, presumably not only interrogates such concerns as supply and demand, wages and productivity and ultimately how goods, services, wealth, and surplus are created and allocated, but also interrogates the power relations and power differentials between different economic groups in society and the ways they are being maintained or changed. From a critical perspective, particularly in the context of CRT, there is a special concern about oppressive class relations and ways to eliminate them as well as a focus on context. That is, a critical class analysis rejects abstract notions of efficiency, insisting instead on inquiries as to who the players are, who the beneficiaries are, whose needs are accommodated,³⁰⁰ and whose needs are not, why some allocations are deemed efficient and others not, and, which is skeptical of claims of neutrality and efficiency where the crystallized protections of a privileged group status have not been investigated in the given context. In this vein, critical class theory might have something to say or to ask about the groups produced in the modern social economic processes and the current moment in which segmented joblessness and stagnating wages for the overwhelming majority of the population exist in the face of increasing productivity, a growing economy, staggering profits, and incomprehensible executive pay as mediated by the corporation and justified by an array of people institutionally and otherwise placed.³⁰¹

In addition, a class analysis may further ground examinations of racism and racist practices because it focuses on the economic allocations of material resources accumulated over the last several hundred years, much of which has been racialized. It is unlikely that these racialized allocations (whether productive or distributive) will be eliminated without addressing the structural and economic foundations of class. Nor is it clear that class and the economic harms of lower class status can be eliminated without addressing both the material and psychological seductions embodied and structured by race. Ultimately, the best way to address these issues may not simply be calling for the edification and respect of different groups but the difficult work of building coalitions to demand concrete economic and material changes for those oppressed by race and class as well as those oppressed by class across race. Four

299. These are relatively typical elements in the definition of class. See FRASER, *supra* note 210, at 17 (making a similar point).

300. See, e.g., Martha T. McCluskey, *Illusion of Efficiency in Worker's Compensation "Reform,"* 50 RUTGERS L. REV. 657, 666-67, 716-50 (1998) (unraveling the neoeconomic rhetoric of efficiency versus redistribution distinction makes redistribution claims seem suspect).

301. James Bernstein, *Q&A: Working Harder and Taking Home Less*, NEWSDAY, Aug. 29, 2006; Rex Nutting, *Bernanke Overstates Wage Growth: Earnings are not Catching up with Productivity, Government Figures Show*, MAKETWATCH, Jul. 19, 2006; see also Steven Greenhouse & David Leonhardt, *Real Wages Fail to Match A Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006.

questions raised in the context of Hurricane Katrina might exemplify these points.³⁰²

In the wake of Hurricane Katrina, many commentators questioned whether the government's slow, seemingly disinterested response and inadequate rescue of the thousands of mostly African American people stranded in the flooded city of New Orleans was the result of racism.³⁰³ That is, they wondered whether the government's pitiful response was not just evidence of incompetence but rather occurred because the victims were black.³⁰⁴ This is a typical race consciousness question and race questions are increasingly formulated in this manner.³⁰⁵ It gets at what Rory calls the sadism of the American social order. It is about the motivation and lack of it of white Americans, white officials providing justice to black Americans. It is about conscious and unconscious racism. It is about the current and momentary intent of individuals, about the intentional conduct of current players. It is often countered by efforts to shame the perpetrators, but has the effect of making invisible those affected by such policies.³⁰⁶ This shaming, in turn, reinforces calls for what Fraser has called a politics of recognition, a politics that advances the edification and respect of different positioned groups.³⁰⁷ A politics of recognition focuses on cultural solutions, which might include the celebration of a subordination group's culture or heroes such as in black history month, Martin Luther King Day, or advocate for participation in gay parades? But a politics of recognition, while necessary, may not address the structure of racial segmentation, stratification, and caste.

Assuming the legitimacy of the first question, a second question nonetheless arises. It is: Why did so many black people stay behind or find themselves stranded or left behind in New Orleans? Presumably, these people did not stay behind because they were black but rather because they were poor. They lacked the means required to leave New Orleans and to sustain themselves while away from their homes.³⁰⁸ Why they were so poor that they could not leave in the face of a serious hurri-

302. H.R.J. Res. 437, 109th Cong. (2005); Elizabeth Fussell, *Understanding Katrina: Perspectives from the Social Sciences* (2005), <http://understandingkatrina.ssrc.org/Fussell/> (detailing arguments highlighted here). For example, 27.3% of New Orleans households did not have cars, compared to 9.4% of the U.S. population as a whole. *See id.* *See generally* MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* (2006).

303. DYSON, *supra* note 302, at 17-33 (explaining the ways in which race played a role in the failure of the federal government to respond to the Katrina hurricane victims and noting that malicious intent may not have been involved but indifference as part of a southern, national, and historical script where black grief and pain is involved are among the factors at work).

304. *Id.*

305. This may be the result of an understanding of racism as largely the product of intentional individual action, a concept that ignores race as a caste system and a limited concept of race that is promoted by colorblindness ideology. *See* Harris, *supra* note 42, at 750-52.

306. Delgado, *Two Ways of Thinking about Race*, *supra* note 17, at 2295.

307. FRASER, *supra* note 210, at 11-66.

308. DYSON, *supra* note 302, at 5-6 (discussing poverty in New Orleans and noting that one in four people in New Orleans lacked access to a car).

cane when most others in the area were able to leave, in the richest country in the world, is the class question. Though this question may ultimately implicate American sadism, it has much more to do with what Rorty calls American selfishness.³⁰⁹ That is, it is no doubt about economics, but it is primarily about the policy choices and practices that structure the production and maldistribution of resources that render some groups well off and others much less so.³¹⁰

The third question was why the majority of the poor people in New Orleans appeared to be overwhelmingly black when they constitute only a little over a third of the metropolitan area of 1.3 million people.³¹¹ These are the questions of class and race, the way class and race are related and have developed over time through structural elements, and policies developed throughout the United States and in elements and policies specific to Louisiana.³¹² Unraveling this question would presumably demonstrate the way in which racism is a co-constituent and feature of the economic order in that it further delineates and allocates certain economic functions and distributions to particular racialized and classed groups. As such, race itself is a system for allocating resources but one that is part and parcel of, or intertwined with the class system, even as it operates independently and relatedly as a belief system that provides a ready justification for the racialized results of various distributions, as well as providing cohesion to the overall system. Race provides cohesion or stability, in part, by seducing the more privileged in the class delineated by race (white working class v. black working class) to support the system in order to maintain both material and psychological privileges.³¹³ From this perspective, race arguably developed as part of the U.S. economic system of slavery, to legitimate both it and other forms of exclusion, and then was used, consciously and institutionally for

309. See generally RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998).

310. See generally *id.*

311. See *New Orleans Demographics, Population (LA)*, CityRating.com, <http://www.cityrating.com/citystats.asp?city=New+Orleans&state=LA> (last visited Oct. 21, 2006) (discussing the metropolitan area with a population of 1.3 million and a black people constituting 37.5% of the population); see also Dominguez, *supra* note 28 (discussing the term of "third world" as applied to hurricane victims and discussing who was seen and unseen in this diverse metropolitan area). Other questions might include whether it was only poor blacks stranded by Hurricane Katrina. Though the majority of those stranded in New Orleans seemed to be black, were there others? Were there poor whites also affected, and if so why were they less visible? And who might be served by the invisibility of poor whites? For instance, as Dyson notes, some of the regions hardest-hit by Katrina are suffer from extreme poverty. DYSON, *supra* note 302, at 5. The include Mississippi as the poorest state in the nation and Louisiana the second poorest. *Id.* Further, more than 90,000 people in these areas as well as parts of Alabama where Katrina hit made under \$10,000 a year. *Id.*

312. DYSON, *supra* note 302, at 1-14 (discussing race and poverty and explaining that those left behind in New Orleans had been socio-economically left behind years ago). That is, they suffered from poverty and New Orleans in particular like many urban other urban areas in the US, suffered from concentrated poverty. *Id.*

313. See, e.g., BELL, *supra* note 2, at 8 (citing EDMUND S. MORAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 8 (1975)) (discussing how the development and maintenance of a poor black subclass enabled and enables poor white to identify with wealthy whites).

years to structure, perpetuate, and legitimate the resulting order of what bell hooks calls the “white supremacist capitalist patriarchy.”³¹⁴ That racism can be addressed without addressing the economic class configurations that structure race is doubtful. Similarly, the kind of mass-movement needed to challenge dominant—economic-class³¹⁵ power would require dealing with the racial issues that divide those who must work for their living as opposed to those, along with those with specialized skills, who live off the work of others.³¹⁶

And finally, there is the question of the evacuation order, a policy that seemed blind to the classed realities of poverty in New Orleans and yet help to make visible the racialized maldistribution of resources in New Orleans. Though the government was said to have had an evacuation plan for New Orleans that recognized that over a hundred thousand people might be stranded and included government efforts to locate and move people out of the city who were unable to do so themselves, this was not the evacuation plan carried out. Rather, the evacuation plan, bungled no doubt, consisted primarily of an order for people to vacate New Orleans, an order that while recognizing that some people might get stuck, assumed that most people had adequate and enough wealth to evacuate. It was a policy and plan based on assumptions of adequate wealth where for many no such wealth existed and in a country where poverty levels and gaps between the rich and the poor, though ignored, are increasing. That a policy of assumed wealth often disadvantages a racialized population reflects the way that classed policies have racial impact.

In a similar way, consider the famous case of *San Antonio Independent School District v. Rodriguez*.³¹⁷ Here the Supreme Court upheld a school financing system that allowed one district’s schools to be vastly under funded as compared to another.³¹⁸ The under-funded school district consisted mostly of Mexican Americans.³¹⁹ The Court’s decision did not rely on race but rather on wealth and assumptions of adequate

314. bell hooks, *KILLING RAGE: ENDING RACISM* 78 (1995).

315. See, e.g., Manning Marable, INTRODUCTION: BLACK STUDIES AND THE RACIAL MOUNTAIN, in *DISPATCHES FROM THE EBONY TOWER: INTELLECTUALS CONFRONT THE AFRICAN AMERICAN EXPERIENCE* 1, 19 (Manning Marable ed., 2000) (explaining a transformationist idea as one seeks to “transform the existing power relationships and the racist institutions of the state, the economy and society,” and noting that this requires “the building of a powerful protest movement, based largely among the most oppressed classes and social groups, to demand the fundamental restructuring of the basic institutions and patterns of ownership within society[]”).

316. Here I am relying on Jeff Faux description of the global elite class as comprising those with specialized skills, those who control large corporations and those who live off their capital earnings as opposed to living off of their work. See FAUX, *supra* note 287, at 64.

317. 411 U.S. 1 (1973).

318. *Rodriguez*, 411 U.S. at 5-6.

319. *Id.* at 12.

wealth.³²⁰ The effect was that the racialized class of poor people would continue to be so because they would attend inferior schools that would render inferior jobs and thus maintain them as a relatively poor racialized group. In this sense, race crits as lawyers should analyze class because law makes decisions on the basis of wealth that have racial implications and makes decisions on the basis of race that have wealth and class implications.

These last three questions relating to race, class, and race- and class-based policies and laws, may also better guide CRT's antisubordination praxis. That is, it may counsel the kind of activities that are more effective in eliminating both racial and class subordination. These activities may be those that do not simply call for the respect of subordinated groups but seek to challenge, change, or transform the social arrangements that structure the subordination itself. Fraser argues that the valuation and respect of different groups is more likely in an egalitarian society, a society where significant material inequalities between groups do not exist.³²¹ She contends that though a politics of recognition, which call for respect of differently positioned groups is important, a "politics of redistribution" that seeks to change the processes and conditions that create and structure the devaluation of differently-positioned individuals and groups is a more effective strategy for accomplishing the edification of different groups in a pluralist society.³²² Rorty agrees, noting that sadism may be more effectively undermined by policies and activities that attack the selfish maldistribution of resources that create classes and help to racialized groups.³²³ The difference in strategy may be the difference between creating an outcry to force an incompetent and potentially racist politician to resign his post after the hurricane or celebrating the cultural mix needed to create a rich culture such as New Orleans, in distinction to creating a movement to push for policies such as new and affordable housing built on higher-ground, plans to locate, track and help return poor evacuees back to the city, improved health care, adequate living wages, greatly expanded public transportation system and/or increased credit or other opportunities to buy cars, etc. Surely the first is helpful, but the latter is indispensable.

CONCLUSION

I have suggested that critical race theory rose in response to, and as a challenge to the ascendance of a colorblind ideology, an ideology that seeks to ignore the structural, persistent and current manifestations of

320. I owe the insight of "assumed wealth" to Leslie Bender & Daan Braveman, editors of *Power, Privilege and Law*. See POWER, PRIVILEGE AND LAW, *supra* note 1, at 381-98 (discussing Braveman's analysis of *San Antonio Independent School District v. Rodriguez*).

321. FRASER, *supra* note 210, at 27-33.

322. *Id.*

323. See generally RORTY, *supra* note 309.

racism that inure from the social historical process of race formation in the United States. The goal of colorblind ideology, while ostensibly to promote equality as symmetry among the races, in fact cements the privileges of whiteness. CRT's insights about colorblindness, as well as a number of its other themes and methodologies result in part from a process of conflict inspired growth which provided CRT scholars the opportunity to experience the meaning and impact of their insights as part of their development. These conflicts also however, in some ways spur the development of CRT related scholarship. This scholarship while potentially fragmenting the movement has in fact contributed much to the theoretical project of CRT. This scholarship has expanded the CRT knowledge base of different groups, historical experiences, it has expanded CRT's knowledge around different kinds of oppression, and it has aided CRT in the development of new theories. In doing so this scholarship has also strengthened CRT's commitment to coalition building and antistubordination praxis.

Classcrits becomes another frontier for CRT. The expectation is that classcrits will expand CRT knowledge about another type of subordination and set of power relations that, like gender and sexuality, is differently constructed than race, even as it mutually reinforces race. In addition, classcrits becomes another way, in the face of the expansion of colorblind ideology, to get, in part, at the materiality and economic foundations of race. That is, while colorblind advocates continue to attempt to reduce race to who did what, the question reappears in the form of why the poor are disproportionately black or why blacks are disproportionately poor. And though a cultural reply that blames the victim is expected, the tools will be developed to challenge these replies in ever more sophisticated economic and class terms. And finally, though strategies that attempt to overcome white cultural domination and promote black and other non-white edification continue, these efforts will be complemented by coalitions built across race and across types of oppression to challenge the material, classed and economic structures and resource allocations that shape them.