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Twenty Years of Critical Race Theory: Looking Back to Move Forward

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Twenty Years of Critical Race Theory: Looking Back To Move Forward

KIMBERLÉ WILLIAMS CRENSHAW

This Article revisits the history of Critical Race Theory (CRT) through a prism that highlights its historical articulation in light of the emergence of post-racialism. The Article will explore two central inquiries. This first query attends to the specific contours of law as the site out of which CRT emerged. The Article hypothesizes that legal discourse presented a particularly legible template from which to demystify the role of reason and the rule of law in upholding the racial order. The second objective is to explore the contemporary significance of CRT's trajectory in light of today's "post-racial" milieu. The Article posits that CRT emerged between the pillars of liberal racial reform and Critical Legal Studies and that other conditions of its possibility included the temporal, institutional, and ideological nature of race discourse in the mid-eighties. Turning to the contemporary period, the Article posits that the post-racial turn presents conditions that are both parallel to and distinct from those that prevailed during CRT's formative years, and that the challenge of a contemporary CRT is to synthesize a transdisciplinary critique and counter-narrative to the post-racial settlement.

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Twenty Years of Critical Race Theory: Looking Back To Move Forward

KIMBERLÉ WILLIAMS CRENSHAW*

I. INTRODUCTION

This Article revisits the history of Critical Race Theory (CRT) through a prism that highlights the relevance of its institutional articulation in light of contemporary discourses on race and racism.¹ As with most narratives of origins, this one is animated more by contemporary challenges than by the simple rituals of telling and receiving stories from the past.² The

* Professor of Law, Columbia University Law School and University of California at Los Angeles School of Law. Co-Founder, African American Policy Forum. I have benefitted greatly from numerous comments and observations from colleagues both past and present, including George Bisharat, Paul Butler, Devon Carbado, Sumi Cho, Neil Gotanda, George Lipsitz, Cynthia Muldrow, Alvin Starks, Barbara Tomlinson, and the participants of the AAPF Social Justice Writers Retreat. Mack Eason, Michelle Pram, and Victoria Kwan provided able research assistance and Jennifer Lentz, Amy Atchison, Vicki Steiner, and John Wilson provided invaluable support in uncovering archival documentation. Very special thanks to Gary Peller and Luke Charles Harris who willingly relived the 1980s through countless conversations and recollections, and to Angela Onwuachi-Willig who organized the 20th Anniversary celebration of the Critical Race Theory Workshop hosted by the University of Iowa Law School where an earlier version of this Article was presented as a keynote presentation.

¹ Throughout this Article I refer to Americans of African descent using the terms “Black” and “African American” interchangeably. I capitalize “Black” because “Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982)). This issue of naming Americans of African descent has long had political overtones. See W.E.B. DUBOIS, 2 THE SEVENTH SON 12–13 (1971) (arguing that the “N” in Negro was always capitalized until, in defense of slavery, the use of the lower case “n” became the custom in “recognition” of Blacks’ status as property; that the usage was defended as a “description of the color of a people;” and that the capitalization of other ethnic and national origin designations made the failure to capitalize “Negro” an insult). Some who grapple with this issue take the position that white must also be capitalized if Black is, however, this seems to presume a greater parallelism between these racial designations than their histories suggest. Of the myriad differences is the fact that while white can be further divided into a variety of ethnic and national identities, Black represents an effort to claim a cultural identity that has historically been denied. Of course the increasing recognition of interethnic differentiation among Americans of African descent may at some point overtake this claim, and whiteness is sometimes regarded as a singular cultural group rather than an amalgam of historic ethnicities, but the case for arriving at some sort of symmetry in what the two designations mark seems unlikely for the foreseeable future.

² I have reviewed related elements of this narrative elsewhere. See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1364 (2002) [hereinafter Crenshaw, *Critical Reflections*]; see also *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY: THE KEY WRITINGS*] (reviewing the emergence of CRT as a mutual engagement with liberal legal theory and CLS); Sumi Cho & Robert Westley, *Critical Race*

spectrum of issues that will be engaged herein are framed through two central inquiries. This first question attends to the specific contours of law as the site out of which CRT emerged. The second objective is to explore the contemporary significance of CRT's trajectory in light of today's "post-racial" milieu.

The first question of "why law" is seldom asked, notwithstanding the contemporary trajectory of CRT's travels across disciplines. Today, CRT can claim a presence in education,³ psychology,⁴ cultural studies,⁵ political science,⁶ and even philosophy.⁷ The way that CRT is received and

Coalitions: Key Movements that Performed the Theory, 33 U.C. DAVIS L. REV. 1377, 1377, 1381 (2000) (drawing attention to the broader context of student struggles over integration at Berkeley and other law schools in subsequent years). While these narratives foreground the antiracist activist tradition out of which early CRT emerged, Richard Delgado has traced the origins of CRT to the institutional purging of the white left and their subsequent influence on the first generation of CRT academics. Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1508 (2009). For additional narratives, see Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006); Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247 (1999).

³ See Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, in *CRITICAL RACE THEORY IN EDUCATION: ALL GOD'S CHILDREN GOT A SONG* 11, 18 (Adrienne D. Dixson & Celia K. Rousseau eds., 2006) (discussing the relationship between race and educational inequality). See generally *FOUNDATIONS OF CRITICAL RACE THEORY IN EDUCATION* (Edward Taylor et al. eds., 2009) (a collection of works applying Critical Race Theory as a tool to explore the racial and cultural politics of education); *RACE IS . . . RACE ISN'T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION* (Laurence Parker, Donna Deyhle & Sofia Villenas eds., 1999) (collecting studies and commentaries that articulate an overview of Critical Race Theory in education).

⁴ See Glenn Adams & Phia S. Salter, *A Critical Race Psychology Is Not Yet Born*, 43 CONN. L. REV. 1355 (2011) (arguing that "Critical Race Psychology" must critically consider methodology, identity consciousness, and application of a race-conscious lens to the field of psychology as a whole in order to counteract colorblind conceptions of the discipline). See generally *CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW* (Gregory S. Parks et al. eds., 2008) (exploring critical race theory and psychology in the context of the legal system); *Symposium on Behavioral Realism*, 94 CALIF. L. REV. 945 (2006) (discussing implicit bias and behavioral realism in education and the law). For more discussion on the Critical Race Realism school of thought, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1591–92 (2005) ("The upshot is a call for a new school of thought called 'behavioral realism,' in which legal analysts, social cognitionists (with emphases in implicit bias and stereotype threat literatures), evolutionary psychologists, neurobiologists, computer scientists, political scientists, and behavioral (law and) economists cooperate to deepen our understanding of human behavior generally and racial mechanics specifically, with an eye toward practical solutions."); and Gregory Scott Parks, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y 683, 708, 712–13 (2008) (recognizing a contemporary trend towards integrating law, social science, and public policy—what Parks terms "New Legal Realism"—and its contiguous relation to Critical Race Realism).

⁵ See Imani Perry, *Cultural Studies, Critical Race Theory and Some Reflection on Methods*, 50 VILL. L. REV. 915, 918–19, n.11 (2005) (applying the lens of cultural theory and the theoretical framework of Critical Race Theory to sketch out a structural analysis of racial themes and patterns in law and culture).

⁶ See Barbara Luck Graham, *Toward a Critical Race Theory in Political Science: A New Synthesis for Understanding Race, Law, and Politics*, in *AFRICAN AMERICAN PERSPECTIVES ON POLITICAL SCIENCE* 212 (Wilbur C. Rich ed., 2007) (collecting essays exposing the hidden racial dimensions of politics in the United States, including the ideological and methodological threats from whiteness within the discipline of political science).

⁷ See generally CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* (1998) (criticizing Western philosophy for its lack of attention to issues of race and exploring the role

mobilized in other disciplines varies, but it is clear that CRT has occupied a space in the canon of recognized intellectual movements that few other race-oriented formations have achieved. Given that many of the basic insights of CRT grew out of other disciplinary traditions, one wonders whether there is a temporal, disciplinary, or institutional explanation from which to understand how and why CRT emerged where and when it did.

The question takes on added significance when one considers the long if disjointed tradition of scholars, students, and other actors setting forth trenchant critiques of how the various disciplines framed and legitimized racial power within the academy and in society at large. W.E.B. Du Bois, for example, critiqued the disciplinary practices of history in his seminal *Black Reconstruction in America: 1860–1880*.⁸ Sociologist Oliver Cox exposed the whiteness of sociology by the mid-twentieth century.⁹ Joyce Ladner delivered yet another salvo against the disciplinary practices of sociology in the 1970s with her provocatively titled collection, *The Death of White Sociology*.¹⁰ Robert Guthrie published a scathing critique of psychology in *Even the Rat Was White*.¹¹ More recently, the sociologists Tukufu Zuberi and Eduardo Bonilla-Silva have challenged empirical methodologies¹² and the incomparable Toni Morrison's *Playing in the Dark* became an instant classic in literary criticism.¹³ These and other texts from a variety of fields have contested the terms by which the academy has disciplined knowledge about race. Indeed, critiques of the academy's role

of race in standard areas of philosophy: metaphysics, epistemology, ethics, applied ethics, social, and political philosophy); *see also id.* at xiv (discussing the failure of western philosophy to consider issues of race); Charles W. Mills, *White Ignorance*, in RACE AND EPISTEMOLOGIES OF IGNORANCE 11, 13, 15, 19 (Shannon Sullivan & Nancy Tuana eds., 2007) (exploring the epistemology of white ignorance and the ways in which such ignorance—the lack of knowledge or incorrect knowledge—is maintained).

⁸ *See The Propaganda of History*, in W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: 1860–1880 (Free Press 1998) (1935) (detailing the uniformity of ideology among the vast majority of historians that Blacks were ignorant, unfit to govern, and that Reconstruction inflicted a grievous harm upon whites in the South).

⁹ *See generally* OLIVER CROMWELL COX, CASTE, CLASS, & RACE: A STUDY IN SOCIAL DYNAMICS (1948). Cox criticized sociologists Robert Park for naturalizing notions of fundamental racial difference rather than foregrounding the social construction of racial difference, and Gunnar Myrdal for locating American racial dynamics within abstract, transhistorical dispositions or attitudes. *Id.* at 463–97.

¹⁰ JOYCE ANN LADNER, THE DEATH OF WHITE SOCIOLOGY (1973) (examining and challenging the ways in which sociology has distorted black history and identities).

¹¹ ROBERT V. GUTHRIE, EVEN THE RAT WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY (2d ed. 1998) (documenting the historical connections between different aspects of psychology and race, including “scientific” measures of race and racial difference such as aptitude tests and the exclusion of black psychologists within the discipline).

¹² WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (Tukufu Zuberi & Eduardo Bonilla-Silva eds., 2008) [hereinafter WHITE LOGIC, WHITE METHODS] (collecting essays discussing how supposedly objective methodologies import certain ideological presumptions that elevate and naturalize contingent racial dynamics in all aspects of social science research).

¹³ TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 9 (1992) (criticizing the heavily racialized roles African-Americans have been given in literature by white authors, and the degree to which the construction of classic literary virtues of the American hero relies on a subservient “other”).

in establishing the epistemic foundation and political legitimacy for racial hierarchy have circulated within the academy for years.¹⁴ Although these critiques smoldered, it is perhaps fair to say they never quite caught fire as intellectual movements within their respective disciplines.¹⁵ What was it that ignited CRT as a movement in law? How is it that certain pre-conditions for a critical intellectual movement actually developed into one? I want to explore these questions through various angles, taking up the possibility that a unique confluence of temporal, institutional, and political factors set the stage out of which CRT emerged.

¹⁴ See generally STANFORD M. LYMAN, RACE RELATIONS AS SOCIAL PROCESS: SOCIOLOGY'S RESISTANCE TO A CIVIL RIGHTS ORIENTATION, IN RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 370 (Herbert Hill & James E. Jones, Jr. eds., 1993) (documenting the transformation of sociology's activist orientation to one of "objectivist" social science); CHARLES W. MILLS, THE RACIAL CONTRACT 3 (1997) (explaining how philosophical academia's recognition of race as a political power structure has been limited by the academy's dismissal of race as a social construct); MILLS, BLACKNESS VISIBLE, *supra* note 7 (discussing the dynamic of academic philosophy and how the conceptual and theoretical "whiteness" of a discipline can become a self-fulfilling prophecy, based partially on the fact that philosophy as a discipline is considered a race-less and universal study of the human condition); MORRISON, *supra* note 13 (discussing the marginalization of black contributions in literature); THE "RACIAL" ECONOMY OF SCIENCE: TOWARD A DEMOCRATIC FUTURE (Sandra Harding ed., 1993) [hereinafter "RACIAL" ECONOMY OF SCIENCE] (collecting essays addressing the Eurocentric institutions and assumptions associated with Western science which in practice distribute the benefits of science disproportionately along "racial" lines); GEORGE W. STOCKING, JR., RACE, CULTURE, AND EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY (1968) (addressing racialism in anthropology and critiquing the view of history as a science because of biased history-telling); CHARLES A. VALENTINE, CULTURE AND POVERTY (1968) (challenging the idea of a "culture of poverty" from an anthropological standpoint, which Valentine argues enables the creation of ineffective and failing public policy); William Darity, Jr., STRATIFICATION ECONOMICS: CONTEXT VERSUS CULTURE AND THE REPARATIONS CONTROVERSY, 57 U. KAN. L. REV. 795 (2009) (comparing a cultural determinism approach to economic explanations of inequality, which focuses on eradicating the lingering cultural specter of slavery by changing Black cultural practices; to a contextual approach, which focuses on cultural practices as reactive to context, signaling defects and injustices in the social structure); Laura Pulido, *Reflections on a White Discipline*, 54 PROF. GEOGRAPHER 49 (2002) (encouraging geographers who document racial outcomes to begin crossing the boundary between critical race theorists who view race as a fundamental social relation and those who frame such outcomes as aberrational).

¹⁵ This is not to say that these projects had no traction. Many of these critiques—and the scholars articulating them—influenced thinking about race within disciplines and within society at large. W.E.B. Du Bois, for example, made significant inroads both within traditional disciplines and within public discourse. See, e.g., Elijah Anderson, *Introduction*, in THE PHILADELPHIA NEGRO (W.E.B. Du Bois ed., 1996) (arguing the Du Bois's groundbreaking study represented the first true example of American social scientific research, preceding the work of the Chicago School by at least two decades). Du Bois went on to become the editor of the N.A.A.C.P.'s *Crisis* magazine from 1910 to 1934, and has been identified as the father of "militant journalism." For analysis on the relationship between black intellectuals and the Civil Rights Movement, see Asafa Jalata, *Revisiting the Black Struggle: Lessons for the 21st Century*, 33 J. BLACK STUD. 86, 94 (2002) (noting that the emergence of black studies helped lay the ideological foundation for the Civil Rights Movement because it developed a collective consciousness and "validated a vision of the future that would inform the African American political and cultural identity into the twentieth century" (quoting ELIZABETH RAUH BETHEL, THE ROOTS OF AFRICAN-AMERICAN IDENTITY: MEMORY AND HISTORY IN ANTEBELLUM FREE COMMUNITIES 194 (1999))). For literature on racial justice activism within the academy, see ASIAN AMERICANS: THE MOVEMENT AND THE MOMENT (Steve Louie & Glenn K. Omatsu eds., 2001) (chronicling the Asian American experience of the Civil Rights Movement and other periods); CARLOS MUÑOZ, JR., YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT (1989) (tracing the role of student activism in the emergence of the Chicano Movement).

The question raised herein is one that has been asked of social movements more broadly, particularly the Civil Rights Movement. In reflecting on the origins and trajectory of the Montgomery Bus Boycott, historian Aldon Morris acknowledged that sociologists and historians were not able to predict or explain how or why this particular boycott sparked a mass movement while dozens of other efforts either failed to gain traction locally or media attention nationally.¹⁶ Morris draws attention to numerous factors that made Montgomery the touchstone of the Civil Rights Movement including the respective roles of cultural institutions and the media, the existence of an activist infrastructure, and the galvanizing force of charismatic leadership.¹⁷ An important overarching factor that Morris examines is “frame alignment,” the notion that the movement was buoyed and pushed forward by a rhetoric that created a broad consensus on the relevant frame. That frame organized the actions, rhetoric, and aspirations of countless individuals into a singular movement against racial injustice. The correction to this racial injustice was intervention in the social and legal arena to bring about new relationships premised on equal citizenship.¹⁸

Attending then to my first level query, this concept of frame alignment will be used to understand how, why, and when CRT emerged as an intellectual movement, but with nuance that stands the concept on its head. One might say that what nourished CRT and facilitated its growth from a collection of institutional and discursive interventions into a sustained intellectual project was a certain dialectical *misalignment*. Within the context of particular institutional and discursive struggles over the scope of race and racism in the 1980s, significant divergences between allies concerning their descriptive, normative, and political accounts of racial power began to crystallize. This misalignment became evident in a series of encounters—institutional and political—that brought into play a set of “misunderstandings” between a range of individual actors and groups. Although all of the players would have seen themselves as fully embracing the normative commitment to “racial equality,” institutional conflicts over issues such as the integration of elite law faculties, the prevailing

¹⁶ Morris’s argument that the Civil Rights Movement was able to overthrow the southern Jim Crow regime because of its organized, rational, and successful use of mass nonviolent direct action persuasively shifted previous notions of movements as spontaneous, non-rational, and unstructured. Aldon D. Morris, *A Retrospective on the Civil Rights Movement: Political and Intellectual Landmarks*, 25 ANN. REV. SOC. 517, 524–25 (1999).

¹⁷ *Id.* The Black church was able to connect its massive base to a protest tradition and collective action through music and worship. The Montgomery Improvement Association, led by minister Martin Luther King, Jr., as well as television, radio, and the Black press played a major role in keeping the Black community connected and informed. *Id.*

¹⁸ *Id.* at 535; see also David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 477–78 (1986) (discussing the concept of “master frames” and how the Civil Rights Movement created a master frame generating cycles of protest).

construction of merit, and the viability of intellectual projects centered on race brought what might have otherwise been viewed as marginal differences between allies into sharp relief. Early CRT was occupied by efforts to create an inventory of these “sharp reliefs,” theorizing the tensions between competing frames as well as interrogating the different interventions and rhetorical claims that they produced. This process in turn created the conditions for the emergence of a particular articulation of racial power, one that eschewed the reigning frames that worked to reduce racism to matters of individual prejudice or a by-product of class.

CRT was not, however, simply a product of a philosophical critique of the dominant frames on racial power. It was also a product of activists’ engagement with the material manifestations of liberal reform. Indeed, one might say that CRT was the offspring of a post-civil rights institutional activism that was generated and informed by an oppositionalist orientation toward racial power. Activists’ demands that elite institutions rethink and transform their conceptions of “race neutrality” in the face of functionally exclusionary practices engendered a particularly concrete defense of the status quo. These defenses in turn produced precisely the apologia for institutionalized racial dominance that critics of the dominant thinking on “race relations” had voiced both historically and in more recent struggles over the terms of knowledge production in the academy. These institutional struggles presented post-reform critics with the hands-on opportunity to create an affirmative account of racial power and to mark the limits of liberal reform. How the first generation of Race Critics came to understand these limits and to create space to generate a fuller account of racial power in law and society are key dimensions of the CRT story.

This movement dimension of CRT is probably the least engaged aspect of its original formation and perhaps the most at risk in efforts to define, brand, and market CRT. Specifically, the view of CRT as a stable project sometimes denies the extent to which CRT was and continues to be constituted through a series of dynamic engagements situated within specific institutions over the terms by which their racial logics would be engaged. Thus, what is in play here is less of a definitive articulation of CRT and more of a socio-cultural narrative of CRT. I build here on the socio-cultural perspective as articulated, for example, by Hazel Markus and others.¹⁹ They note that the classic sense of the individual in psychology presents a vision of self-contained units filled with “stuff”—i.e., personality, intelligence, preferences, etc. The authors critique this

¹⁹ See Hazel Rose Markus & Shinobu Kitayama, *The Cultural Psychology of Personality*, 29 J. CROSS-CULTURAL PSYCHOL. 63 (1998) (although most conceptions of personality in academic psychology are rooted in a model of the person as independent, in other cultures personality is experienced and understood as behavior that is characteristic of relationships with others in particular social contexts).

view noting that the individual is never pre-constituted, but is made through dynamic interaction with institutions and with others.²⁰ Similarly, CRT is not so much an intellectual unit filled with natural stuff—theories, themes, practices, and the like—but one that is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era. In the same way that Kendall Thomas reasoned that race was better thought of as a verb rather than a noun,²¹ I want to suggest that shifting the frame of CRT toward a dynamic rather than static reference would be a productive means by which we can link CRT's past to the contemporary moment.

So, was there something special about law as a discursive field that made it a particularly fertile ground for the synthesis of the ideas that would become “critical race theory”? As I will argue throughout, I think the answer is a qualified “yes.” In short, the key feature of the story rests not on the uniqueness of the critiques themselves, but on the rapid unraveling of liberal reform and the rule of law as guarantor of racial progress.

My second and perhaps most urgent objective is to posit that a dynamic understanding of the temporal, institutional, and disciplinary emergence of CRT provides a particularly robust prism for engaging today's “post-racialism.” Emerging in the wake of a monumental shattering of the political glass ceiling, a new center of gravity is taking hold, one that foregrounds a particular post-racial stance as racially pragmatic and normative.²² With deep parallels to an earlier embrace of formal equality as *the* measure of racial justice, the post-racial pragmatism not only eschews the oppositionalist stance toward racial power, but it also recruits racial justice constituencies to participate in normalizing and even celebrating a morbidly unequal status quo.²³ Thus, as racial justice advocacy comes under increasing pressure from colorblind victories in

²⁰ *Id.* at 67–69.

²¹ Kendall Thomas, Comments at Panel on Critical Race Theory, Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990) (quoted in Charles Lawrence, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 943 (2008)).

²² On the relationship between the election of Barack Obama and the emergence of “post-racialism,” see discussion *infra* notes 191–93.

²³ See, e.g., Ian F. Haney Lopez, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807 (2011) (examining the rhetorical appeal of “colorblindness” to liberals and the shift from a progressive demand for colorblindness to a reactionary one). For related discussion on the way that distortions of Shirley Sherrod's excerpted speech caused a national outcry and resulted in her forced resignation, see *Fox News' Long History of Race-Baiting*, MEDIA MATTERS, July 27, 2010, available at <http://mediamatters.org/research/201007270001> (examining how Sherrod was just one in a long line of victims of Fox's reverse-racism ideology) and Stephanie Condon, *Are Liberals Too Concerned With Being “Colorblind”?*, CBS NEWS, July 22, 2010 (noting that liberals' concern with colorblindness has resulted in them “ceding the debate to the right” and, in Sherrod's case, has resulted in reactive pandering in isolated incidents).

both the legal and political arenas, lawyers, researchers, and advocates find themselves pushed back into their own end zone. Not only have officials changed the rules of doctrinal and political engagement over race, post-racialism has potentially changed the makeup of the teams. Racial justice offense, reset by the terms of post-racialism, has in some quarters become a status quo defense.

For CRT, the moment presents multiple challenges, but also opportunities. As I will argue below, certain dimensions of this moment rehearse dynamics that produced CRT in the 1980s. Then, as now, racial constituencies were confronting doctrinal and political retreats that severely limited the scope of civil rights advocacy. Then, as now, both liberal visions of race reform and radical critiques of class hierarchy failed in different ways to address the institutional, structural and ideological reproduction of racial hierarchy. Then, as now, the collapse of racial barriers convinced many advocates and laypersons alike that fundamental transformation was at hand. Then, as now, racial progress was associated with an accommodationist orientation to the terms of racial power rather than a sustained collective contestation of it.

These continuities, sobering to be sure, exist alongside others that suggest possibilities for a reconstitution of a Critical Race project. Today, like before, critical masses of thinkers continue to attend to the contemporary operation of race, producing literature that links specific institutional dynamics through which race is produced to the broader structures of racial power that continue to rationalize them. In much the same way that students and young scholars came to understand more fully the discursive terrain of race in the context of specific institutional struggles over integrating the faculty and curriculum in elite institutions, the re-embodiment of colorblindness in post-racialist discourse presents similar possibilities across the social terrain today. The opportunity presented now is for scholars across the disciplines not only to reveal how disciplinary conventions themselves constitute racial power, but also to provide an inventory of the critical tools developed over time to weaken and potentially dismantle them. Beyond the academy, the opportunity to present a counter-narrative to the premature societal settlement that marches under the banner of post-racialism is ripe. In short, the next turn in CRT should be decidedly interdisciplinary, intersectional, and cross-institutional.

II. MOVEMENT ORIGINS AND POLITICAL FORMATION

A. *The Clearing*

In the summer of 1989, twenty-four scholars of color answered a call

to attend a “New Developments in CRT” workshop at the University of Wisconsin.²⁴ Meeting oddly enough in a convent, they all had agreed to submit something written as a ticket for admission. It was not at all clear, however, that this would be an event worth lining up to attend. After all, the title was a bit misleading. The “New Developments in CRT” was premised on the assumption that there was already something old. But prior to the moment that the invitation was drafted, there really was no CRT as such. The name was made up. It represented more of a possibility than a definitive project.²⁵ Although the terms did make sense in light of the group’s aspirations, the billing suggested that there was a “*there there*” that wasn’t really there yet.

The committee that sent that letter and the invitees that they solicited represented a motley crew of minority scholars who populated the backdoor speakeasies at the American Association of Law Schools (AALS) and Critical Legal Studies (CLS) annual gatherings. These speakeasies were usually hotel rooms and other small enclaves where a certain cohort congregated, drawn by word of mouth, to discuss the events and dynamics transpiring on the main stage. The group might be described as intellectual nomads, folks who were attracted to both liberal antidiscrimination and Critical Legal Theory discourses at a time when the two traditions were connected only at the margins. The organizers had all gravitated in some way or another toward the environs of CLS: among them was an Asian American law professor who had attended the very first CLS conference about a decade earlier, and three others who had first approached CLS as students at Harvard Law School during the late 1970s and 1980s. That group was, respectively, Neil Gotanda, Stephanie Phillips, Terri Miller, and this Author. Joining this group were Richard Delgado and later Linda Greene, both linked to the project through earlier integration struggles at Harvard, and who were by then professors at the host site, Wisconsin Law School.

We were all veterans, in one way or another, of particular institutional conflicts over the nature of colorblind space in American law schools. Among the twenty-four participants who attended the first workshop, fully a third had been directly involved in the protracted and very public protest over race, curriculum, and faculty hiring at Harvard Law School six years

²⁴ The original participants were: Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Kimberlé Crenshaw, Harlon Dalton, Richard Delgado, Neil Gotanda, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Stephanie Phillips, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams. FRANCISCO VALDES & JEROME M. CULP, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 30 (2002).

²⁵ Crenshaw, *Critical Reflections*, *supra* note 2, at 1361 (discussing the formative process of “naming” Critical Race Theory).

earlier.²⁶ Adding to that number were several others who had gravitated toward CLS conferences and summer camps, attracted by its critical stance against hierarchy, but often frustrated by the currency of arguments that cast doubt on the viability of race as a unit of analysis or the utility of race consciousness in deconstructing hierarchy. The Workshop was, metaphorically speaking, a clearing to which we had arrived, each bearing something of a travelogue of a journey through the uncharted terrain of the post-civil rights landscape. Partly because of our struggles within liberal environments like law schools and within radical environments like CLS, we sought like-minded souls who wanted to begin the conversation beyond the points where we so often got stuck. We did not know exactly where the project would go, but we did know that we wanted to move beyond the non-critical liberalism that often cabined civil rights discourses and a non-racial radicalism that was a line of debate within CLS.

This gathering was thus underwritten by specific institutional and organizational struggles over how racial power would be articulated in a post-civil rights America. There were by this time many fights, both within the academy and in society at large, over how far and to what ends the aftershocks of white supremacy's formal collapse would travel. These tensions were evident in struggles ranging from the raw contestations over schools and public resources in the public sphere to the more refined debates about "diversity" in the walled-off worlds of the nation's editorial rooms and faculty lounges. Among the many tremors at the fault lines of race reform and retrenchment were contestations that stand out as defining moments because of their unique role in both synthesizing the multiple strains of racial politics of that moment, and serving as a point of departure for series of related events. The eruption that served as a point of departure in CRT's trajectory was the institutional struggle over race, pedagogy, and affirmative action at America's elite law schools.

The time was 1982. The setting was the Dean's office at Harvard Law School. A law school dean²⁷ with solid civil rights credentials²⁸ sat face-

²⁶ While this protest was one of the first, protests such as this were neither confined to Harvard nor to the 1980s. See WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 13 (2008) ("In 1990, students at over forty law schools across the country boycotted their classes in order to protest the dismal record of hiring faculty of color in elite law schools. Since that time, the racial demographics of faculty, as well as students, at elite law schools have changed little."); see also Cho & Westley, *Critical Race Coalitions*, *supra* note 2, at 1395-56 (discussing the 1988 campus-wide protest at UC Berkeley and the 1989 nation-wide protests both sponsored by the Boalt Coalition for Diversified Faculty).

²⁷ James Vorenberg served as Dean of Harvard Law School from 1981 to 1989. *Deans of Harvard Law School*, HARVARD LAW SCH., <http://www.law.harvard.edu/library/special/research/hls-deans.html> (last visited Mar. 22, 2011). Prior to this position, Vorenberg was a professor teaching courses on criminal law, the government lawyer, and the legal profession, and was Associate Dean of Harvard Law School. *Vorenberg Named Next HLS Dean*, HARV. L. REC., Feb. 13, 1981, at 15.

to-face with a small delegation representing Harvard's Black Law Student Association (BLSA). Years had passed since the Civil Rights Movement had brought down the white-only signs across America's formally segregated institutions. Any remaining battles over segregation and white supremacy seemed worlds away from the genteel environs of Harvard Law School. The ship that the Dean captained had sailed smoothly through the unrest that had disrupted other institutions and there was no immediate reason to assume that anything but calm seas lay ahead. The Dean had one problem though. The school over which he presided had a faculty of more than sixty, yet only one tenured faculty member was a person of color.²⁹ The virtual shut out of people of color had not always been quite so extreme at Harvard. The School suffered a 100% reduction in its tenured minority faculty³⁰ when Derrick Bell left the school the preceding spring, frustrated that the school had not managed to hire additional people of color.³¹ Regrettably, from the School's perspective, the pool of minority candidates who were qualified to join the Harvard club was just too shallow to pluck out minority professors on demand. There were a couple of potential candidates that the Dean was keeping his eye on, but recruiting these few highly successful lawyers was a long-term strategy at best. The dilemma was simply put: those who were able were not willing and apparently those who were willing were not able.³² Gradualism was thus dictated by the circumstance. The dismal number of minority faculty would eventually increase as the growing number of elite law graduates acquired the requisite credentials to compete for positions at Harvard and other elite law schools.

Across from the Dean sat several students who, like the Dean, also had a problem. Many had come to the law school in hopes of pursuing careers in social justice advocacy, a trajectory that was in keeping with their histories of community activism and social protest. Some had also been

²⁸ Lewis J. Liman, *James Vorenberg: Quietly Preparing to Take Over at the Law School*, HARV. CRIMSON (Mar. 2, 1981), available at <http://www.thecrimson.com/article.aspx?ref=237556>. Dean Vorenberg was a member of the National Board of Directors of the NAACP's Legal Defense Fund (LDF) for twenty-eight years. *Deaths, James Vorenberg*, N.Y. TIMES, Apr. 15, 2000, at A13. Jack Greenberg notes that he worked with Dean Vorenberg on civil rights matters and persuaded him to join the LDF's board. Jack Greenberg, *In Memoriam: James Vorenberg*, 114 HARV. L. REV. 1, 1, 5 (2000).

²⁹ Adam S. Cohen, *Law School Dispute: Blacks' Boycott Creates Press Frenzy*, HARV. CRIMSON (Sept. 13, 1982), available at <http://www.thecrimson.com/article.aspx?ref=225003> (stating that at the time the article was written, Harvard Law School had fifty-eight white men, one black man, and one white woman in its tenured positions).

³⁰ See Laura Taylor, *Prof. Bell Named U. of Oregon Law Dean*, HARV. L. REC., Mar. 14, 1980, at 1, 14.

³¹ DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* 42, 44-46 (1994).

³² See Abby D. Phillip, *Race Sparked HLS Tension*, HARV. CRIMSON (June 1, 2008), available at <http://www.thecrimson.com/article.aspx?ref=523668> ("Vorenberg held fast to Harvard's longstanding position that it could not find qualified tenure-track faculty members because the pool of such scholars was limited.").

exposed to ethnic studies and other disciplines in which the basic premises of institutional authority were open to critique, especially in contexts in which racial marginality seemed at play. They had hoped to resume such studies in Derrick Bell's courses, especially "Constitutional Law and Minority Issues."³³ Yet from the students' perspective, Bell's departure left the school with gaping holes in the curriculum.³⁴ "Constitutional Law and Minority Issues" had simply been dropped from the curriculum, and efforts to encourage the school to offer the course and to recruit scholars of color to fill this and other curricular gaps had gained little traction.³⁵

As the students saw it, the course was an essential component of a basic legal education that Harvard was failing to deliver.³⁶ Equally urgent for the students was the dearth of minority law professors at the school and the inadequate attention given to the legal problems facing racial minorities more broadly. For the students, the problems were linked: greater minority representation on the faculty would likely increase the attention to a range of issues that were currently marginal in the school's curriculum.³⁷ Moreover, as students entering into a profession in which race was likely to play a significant role in their career trajectories, exposure to lawyers who had not only acquired legal expertise in fighting racism but who had also experienced its dynamics individually and institutionally was a critical

³³ Taylor, *supra* note 30, at 13.

³⁴ See Wanda Payne, *Bell Toasted by 200 at Farewell Tribute Dinner*, HARV. L. REC., Nov. 26, 1980, at 13.

³⁵ Taylor, *supra* note 30, at 3, 13. In an earlier meeting with the administration, the Vice-Dean and Chair of the curriculum committee indicated that the committee had simply forgotten about the course. See Press Release, Third World Coalition, *Desegregating Harvard Law School: Chronology Leading to the Boycott* (Jan. 1983) (on file with author). The School's failure to establish regular offerings of Federal Indian Law, Immigration Law, and Women and the Law were joined in the controversy. The result was that a wide array of student groups joined together to pressure the faculty to revise the School's hiring and curricular priorities. Included in the Third World Coalition (TWC) were the Harvard Black Law Students Association (BLSA), La Alianza, the American Indian Law Students Association, the Asian Law Students Association, and the Arab Law Students. Dave Horn, *Third World Coalition Renews Support for Course Boycott*, HARV. L. REC., Sept. 17, 1982, at 1. The Affirmative Action Coalition included those groups plus the Women's Law Student Association, the Lawyers Guild and the moderate Law Student Council.

³⁶ The dissatisfaction with the scope and content of legal education was not at all limited to the TWC groups but was shared across a range of student groups. Many of these sentiments were reflected in what came to be called "The Little Red Book," otherwise known as *Legal Education and the Reproduction of Hierarchy*, self-published by Duncan Kennedy in 1983. As Kennedy described the project:

The general thesis is that law schools are intensely political places, in spite of the fact that they seem intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be. The trade school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand, all these are only a part of what is going on. The other part is ideological training for willing service in the hierarchies of the corporate welfare state.

DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY*, at i (1983).

³⁷ Letter from Ibrahim Gassama & Cecelie Counts to *Washington Post* (July 29, 1982) (on file with author).

component of any meaningful preparation for the careers they hoped to pursue.³⁸ The students thus urged the Dean to schedule the course and to use the search for someone to teach it as an initial step in recruiting full-time professors to integrate the law school.

As they faced each other, it was apparent that the Dean had a real dilemma on his hands. The students were clearly articulate, comfortable, and confident. The Dean could at least be satisfied that Harvard was creating a strong cohort of minority students primed for entry into the corporate machinery of America. With the brass ring so close at hand, surely these students could be captured by basic reason. The truth of the matter was that the course they sought quite simply was not part of the core mission of the law school and there was no sense of urgency to staff it. More importantly, given the perpetual “pool problem,” there were very few people of color qualified to teach at Harvard Law School. Those were the basic facts as Dean James Vorenberg saw them. But being law students, perhaps he mused that it would be far more effective to lead them to these conclusions through Socratic dialogue rather than to declare these facts outright. Thus inspired, he methodically interrogated the group at the conclusion of their presentation with a series of lawyerly challenges. He began his curricular inquiry with “what is “so special” about a course on “Constitutional Law and Minority Issues” that could not be learned through the basic course in constitutional law in combination with perhaps a placement in legal services.³⁹ On the question of recruitment, the Dean parried with a reference to a white civil rights attorney and queried, “[W]ouldn’t you prefer an excellent white professor over a mediocre Black one?”⁴⁰

For a moment, both the students and the Dean sat in silence as the students tried to make sense of what had just happened. The Dean may well have taken the students’ momentary speechlessness to signal that his point had struck a chord, but he would have been wrong. It was merely the calm before the storm.

The Dean’s Socratic efforts notwithstanding, all hell broke loose at Harvard Law School. Within the next two years, Harvard would become the scene of acrimony unlike any time since the student takeovers during

³⁸ Letter from Irma Tyler Wood to Dean James Vorenberg, Harvard Law School (Mar. 9, 1982) (on file with author) [hereinafter Wood Letter].

³⁹ Crenshaw, *Critical Reflections*, *supra* note 2, at 1348.

⁴⁰ Horn, *supra* note 35, at 3. It was at this point that Jack Greenberg’s name initially surfaced in the context of finding someone to teach the course. This likely led to the perception among students that Dean Vorenberg initially approached Greenberg who in turn invited Julius Chambers to join him. However, all parties involved in that negotiation reported that the initial offer was directed to Chambers. It is unclear what difference it would have made had students been made aware of this narrative. In any event, the Dean’s initial postulation of an “excellent white” over a “mediocre Black” struck a particularly sour note that was difficult to un-ring, particularly when the failure to vet any of the potential full-time scholars of color was placed along side of it.

the Vietnam War. The long, carpeted halls with conspicuous “Quiet” signs would be taken over by chanting students, the sacred faculty library would be invaded by a sea of “Desegregate Now!” t-shirts, and even the Dean’s inner sanctum would suffer the indignities of students standing on his desk. Worse still for an elite institution where even a hiccup finds its way into the mainstream press, this embarrassing “scene” would be broadcast for the nation to witness.⁴¹ The students were acting out, it seemed, and the spark seemed to be a battle over an obscure course and the departure of one African American professor.

No doubt the Dean surely would have had no reason to predict that his conversation with students would have spun so far outside of the walls of Harvard Law School. First, he clearly had the upper hand in framing the debate. The dominant discourse on race and merit at the time was completely consistent with the notion that the standards for entry into law teaching were indeed colorblind, and that the so-called pool problem was simply the unfortunate consequence of meritocratic and fully defensible academic standards.⁴² Few scholars and advocates questioned the blanket assertion of a null set of qualified minority law professors.⁴³ Given how shallow the pool was, the absence of minority law professors at elite institutions such as Harvard failed to trigger a serious internal dialogue about the possibility of unfair exclusion.⁴⁴

If the school’s institutional reliance on qualifications and merit was not enough to naturalize the nearly complete absence of minority law professors in the building, then surely the fact that the winds of racial retrenchment were beginning to blow in the direction of less rather than more “diversity” would have reinforced the conclusion that Harvard risked little in refusing to compromise its standards in order to increase the number of minority faculty. Institutions like Harvard had never been

⁴¹ Media coverage of the Harvard controversy was wide, negative and from the student’s perspective, distorted. See discussion *infra* notes 64–67.

⁴² See Phillip, *supra* note 32 (discussing Harvard Law School’s traditional position that the pool of minority faculty members available for hiring was inadequate).

⁴³ See BELL, *supra* note 31, at 42 (discussing the difficulties faced by minority applicants in the face of traditional law school hiring practices).

⁴⁴ This was in contrast to the likely inferences drawn from blue-collar jobs where similar claims were subject to disparate impact review. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 979–80 (1982) (detailing the ways in which judges failed to apply rules of disparate impact to elite institutions). Pointing to another institution’s failure to interrogate the terms of elite exclusion, Duncan Kennedy responded to a *New York Times* editorial that weighed in on the course controversy without mentioning the broader struggle over institutional standards. Kennedy wrote: “Your editorial seems to me to be a good example of your general tendency to regard elite educational institutions as sacrosanct—beyond the scope of the criticism you occasionally level at our other establishments.” See Letter from Duncan Kennedy to the *N.Y. Times*, Aug. 30, 1982 (on file with author). *Id.* A few months earlier, *The Times* printed another editorial that decried the decision of the *Law Review* to initiate an affirmative action policy for editorship, calling Harvard a “bastion of meritocracy” and the *Law Review* an “enclave about to give way” under the strain of such a policy. See Margot Slade & Eva Hoffman, *A Law Review Reviews its Ethics*, N.Y. TIMES, Mar. 1, 1981, at E7.

viewed as the bastions of discrimination like other law schools that were on the frontlines in the segregation wars.⁴⁵ In fact, by that point in time, Harvard typically enrolled a large class of students of color, a fact that demonstrated to some its willingness to bend the rules of meritocracy enough to diversify its student body.⁴⁶

Notwithstanding its robust policies to advance student diversity, the school drew a line in the sand when it came to faculty, maintaining a firm commitment to “merit.”⁴⁷ Yet as the students saw things, there was nothing magical or intrinsically compelling about the typical standards offered to justify the virtual absence of faculty of color. A degree from an elite law school, membership on a law review and a Supreme Court clerkship were not the exclusive criteria for identifying candidates who were likely to make substantial contributions both to the educational mission of the school and to the broader goals of advancing legal knowledge.⁴⁸ Instead, the traditional criteria were increasingly viewed as an informal and unjustified preference for the social cohort to whom these opportunities were overwhelmingly distributed: white and male candidates.⁴⁹ This perception was reinforced when the law school hired

⁴⁵ The University of Texas, for example, was prominently featured in the battles over the desegregation of higher education. Refusing to permit any African Americans to enroll in the Law School in the 1950s, the State of Texas, under a court order to remedy this denial of educational opportunity to Blacks, opened a hastily constructed law school in the basement of the capital, taught by part-time lawyers. The Supreme Court rejected this response as insufficient and ordered officials to register African Americans in its flagship law school. *Sweatt v. Painter*, 339 U.S. 629 (1950). Less than fifty years later, the Fifth Circuit repudiated the School’s efforts to defend its diversity program as a remedy to this specific history of race discrimination. *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

⁴⁶ For the five years before the boycott, Harvard Law School’s full-time enrollment was roughly made up of about 13–14% students of color and on average enrolled a higher percentage of minorities during this period than did other Ivy League and top law schools, including New York University Law School, Cornell Law School, and University of Pennsylvania Law School. A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1978 (1979); A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1979 (1980); A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—1980–81 (1981); A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—1981–82 (1982); A.B.A., SEC. OF LEGAL EDUC. AND ADMISSIONS, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES—FALL 1982 (1983).

⁴⁷ Harvard’s relatively aggressive recruitment of minority students was not matched by a similar commitment to recruit faculty, leading student protestors to note that if *Bakke* justified using race as a factor in admissions, then surely Harvard could consider race as a factor in employment. *See, e.g.*, Donald Christopher Tyler & Cynthia Muldrow, Letter to the Editor, *Goal of a Boycott at Harvard Law*, N.Y. TIMES, Aug. 20, 1982, at A26.

⁴⁸ *See* Third World Coalition Statement on Criteria (on file with author).

⁴⁹ The gross maldistribution of a credential does not necessarily undermine its relevance but at minimum, it casts doubt on institutional claims of equal opportunity. The case hardens when the institution itself constructs the maldistribution and subsequently hoists the credential as justification for the exclusionary hiring practices that result. Even this presumes that the standards are objectively constituted and applied, a proposition that has been called a “laughable exaggeration in the claims often made for the meritocratic purity of existing arrangements.” *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action*, 1990 DUKE L.J. 705, 718 (arguing that “law school faculties apply a

ten white males in the midst of the escalating crisis over hiring and curricular reform.⁵⁰

Student pressure to offer Bell's course had similarly reached a boiling point. A student petition of more than 500 (mostly white) student signatures had been presented to the Dean in the fall. Pressing further, BLSA asserted that there were "many Black professors who would lend their brilliance, dedication and experience and empathy to the course and to Harvard Law School," and urged the Dean not to "succumb to the dichotomous belief that the choice to be made (was) between a Black professor who would do a mediocre job and a white professor who would do an outstanding job."⁵¹ After presenting the Dean with a list of thirty candidates, the students awaited the Dean's progress in finding someone who had "experienced the unique invidiousness of race in America."⁵²

While standing firm in resisting the students' affirmative action demands, the School apparently conceded that Harvard's failure to teach any discrimination course at all was untenable. Thus, at the very end of the spring term and in the midst of the fallout over the all-white, all-male hires, the Dean finally announced that a three-week mini-course on civil rights litigation would be offered in the January intersession.⁵³ Although offered in response to the student demand for Bell's course, the staffing of the course would not provide an avenue for integrating professors of color into the fulltime faculty at Harvard. Instead, the mini-course would be taught by two respected and very busy civil rights lawyers—Julius Chambers, a well known Civil Rights attorney, and Jack Greenberg, Executive Director of the NAACP-LDF.⁵⁴

pedestrian, often philistine cultural standard in judging white male resumes, interviews and presentations" and "that they serve it up with a powerful seasoning of old-boyism and arbitrary clique preference *as between white males*").

⁵⁰ Horn, *supra* note 35, at 13. A coalition of student groups characterized the hires as "an insult . . . to the entire law school community" and linked the action to the "all white, all male composition of the current Appointments Committee." In a direct challenge to the overarching framing of the criteria as obviously neutral, the groups asserted that "[the] pattern of not hiring more faculty who are non-white and non-male convinces us, and the world, that white skin and maleness are de facto teaching qualifications for HLS." See Letter from American Indian Law Students' Assoc., Civil Rights Action Committee, Harvard Lawyers Guild, Harvard Black Law Students' Assoc., La Alianza, Third World Coalition, and Women's Law Association to Professors Steward and Dean Vorenberg (Apr. 26, 1982) (on file with author).

⁵¹ Wood Letter, *supra* note 38.

⁵² See Letter from the Harvard Black Law Students Association to James Vorenberg, Dean of Harvard Law School (Mar. 9, 1982) (on file with author).

⁵³ In May of 1982, Dean Vorenberg informed the Third World Coalition that Julius Chambers and Jack Greenberg would be teaching a winter-term course, "Racial Discrimination and Civil Rights." *Id.*; see also Martin S. Goldman, *Behind the Harvard Boycott*, 11 STUDENT L. 18, 19 (1983) ("Vorenberg shocked the BLSA when he raised the possibility that he might invite two men to teach the course—Julius L. Chambers, a black attorney, and Jack Greenberg, a white lawyer who directs the NAACP Legal Defense and Education Fund.").

⁵⁴ See Dave Horn, *Charges Fly Over BLSA Course Boycott*, HARV. L. REC., Sept. 10, 1982, at 3 (reporting that according to Vorenberg, only Chambers was originally asked to teach the course but Chambers asked Greenberg to assist him because he did not believe he could devote himself to the

The students rejected the Dean's resolution as an inadequate response on a number of fronts.⁵⁵ First and foremost, the recruitment of two civil rights lawyers for a three-week course did nothing to desegregate Harvard's faculty, but instead operated to confirm the Dean's provocative framing of the pool problem. As Derrick Bell subsequently argued, many students may have agreed that an "excellent white" was preferable to a "mediocre Black," but they decisively repudiated the implicit message that none of the thirty law professors forwarded to the Dean were sufficiently qualified to be lifted out of the ghetto of mediocrity.⁵⁶

On the curricular front, the students were utterly dissatisfied with both the length and scope of the course. A three-week mini-course did not provide the sustained consideration of the issues the students had hoped to address, nor did packing the entire treatment into a concentrated and exclusive time slot provide a wide enough footprint to thoroughly engage and integrate the lessons of the course into their learning and advocacy. Bell's course had invited students into a semester-long exploration of the subject matter and the students were not prepared to settle for anything less.

This objection led somewhat naturally into a more substantive one: the course that the Dean offered and the course that the students sought were simply not the same. While civil rights litigation was indeed an important addition to the curriculum, it was no substitute for an analysis of how law helped constitute the very racial structure that antidiscrimination law aimed to regulate.

The students' insistence on hiring faculty who had lived the life they would teach about was ostensibly framed as a demand for role models, but on a more fundamental level, it raised epistemological questions about "perspective" that would constitute central themes in the subsequent articulation of CRT.⁵⁷ Some critics of the students understood these demands to be contrary to the notion that knowledge is objectively discoverable apart from the self, and thus they argued that the demand for a professor of color to teach the course was intellectually flawed. Yet in the maelstrom over the students' insistence that perspective matters, other commentators took issue with the idea that all subjectivities are irrelevant

course in its entirety); see also JACK GREENBERG, *CRUSADERS IN THE COURTS: LEGAL BATTLES OF THE CIVIL RIGHTS MOVEMENT* 542 (2004).

⁵⁵ See Letter from the Third World Coalition to the Harvard Law School Community (May 24, 1982) (on file with author); Third World Coalition, *Desegregating Harvard*, *supra* note 35; Press Release, Third World Coalition, Harvard Law School Students Picket Against Racism (Dec. 28, 1982) (on file with author).

⁵⁶ See Derrick Bell, *Op-Ed.*, Harvard Law School Black Student Boycott 3 (Aug. 3, 1982) (unpublished manuscript) (on file with author) ("[N]o one can disagree with the dean's preferences, but obviously, the black students define excellence and mediocrity very differently than their dean.").

⁵⁷ See Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 *NAT'L BLACK L.J.* 1 (1988).

in determining qualification for teaching. Although prominent voices in the civil rights community lifted up the frame of “reverse racism” to lambast the students’ insistence on perspective, other commentators offered both soft and hard defenses of the students’ argument.⁵⁸

Perhaps surprisingly, commentators who considered themselves civil rights traditionalists weighed in—not to critique the Law School’s failure to rethink its reliance on exclusionary practices—but to critique the law students for reintroducing race as a criterion of merit. Reflected in their failure to question whether the criteria were functionally fair and race neutral was a narrow understanding of the institutional arrangements that were destined to reproduce racially disparate outcomes. As the Third World Coalition argued, the standard criteria that the law school endorsed were predicated on attendance at elite law schools, admission to law review, and clerkships for a prestigious judge—arguably arbitrary criteria that were grossly maldistributed along racial lines. It was entirely unsurprising that candidates of color would not readily emerge from a pool they had largely been prohibited from entering.

What was surprising was that that “pool problem” would be readily accepted outside of Harvard’s walls without a serious interrogation of how and to what ends the pool was constituted. Absent in the public discourse was any caution against relying on the same processes for defining merit that helped to create the nearly all-white law school in the first place. In the aftermath of what was, in some sense, a social revolution against the previous racial order, it might be expected that a critical review of the practices and institutional values that had made the institution virtually all white before the collapse of white supremacy would have been more than appropriate. But Harvard administrators adopted an evolutionary approach to pool-watching. Their commitment to integrating the faculty was realized by remaining ever vigilant to see what surprising candidates might crawl out of the pool rather than rethinking the fundamental question of how the pool was populated in the first place.

Part of that reluctance to rethink criteria for faculty recruitment was premised on a firm conviction about what the school did and did not do, a conviction that seemed to change little in the face of the social transformation that the Civil Rights Movement had underwritten. The very

⁵⁸ See Christopher Edley, Jr., *The Boycott at Harvard: Should Teaching Be Colorblind?*, WASH. POST, Aug. 18, 1982, at A23 (“Race remains a useful proxy for a whole collection of experiences, aspirations and sensitivities” and thus “for some subjects, the courses will probably be different, and certainly be perceived as being different, when taught by a white rather than a black.”); see also Morris Freedman, *Black Students and Black Teachers at Harvard Law*, WALL ST. J. (Midwest Ed.), Aug. 31, 1982, at 22 (arguing that “it might precisely be argued that only certain persons can properly teach certain subjects at certain times and places” and concluding that “[a]s all of us may allow ourselves to be taught about the nature of minority or obscured cultures from the inside of these cultures . . . I think we must yield to the Harvard black students their point to be taught certain things, at least at this time, by someone who has lived his way into that knowledge.”).

fact that there was no standard course on discrimination, immigration, Indian law, and women and the law well into the 1980s indicated how sluggish legal education had been to address the seismic shifts that had taken place in the preceding decades. The fact that law was a major site of contestation around these issues, yet they remained marginal within legal education, only underscored how deeply elite legal training was tied to intellectual regimes that rewarded continuity with a troubled past rather than innovative thinking about new legal issues and constituencies. This preference, reflected in the Administration's specialized vision of elite education, changed relatively little as the school began to recruit growing numbers of students from historically underrepresented groups. Bringing diverse populations into the school was achievable but the Administration's limited conception of its institutional responsibility to these students was revealed in the constant struggle to schedule the courses that many of them demanded. Non-traditional students—Black students, Latino students, Asian and Native American students, female students, students interested in legal aid/legal services and others—organized to pressure the school to think beyond the limited menu of educational options that failed to address the social transformation that had prompted many of them to study law in the first place.

Their expectations were not groundless. There was reason to think that in the context of a new social regime, Harvard might thoroughly re-evaluate the content of the curricula and the new communities and values it might serve. After all, as noted above, the school was far from a bastion of conservative resistance to integration; it had stepped up its recruiting of minority students in the 1970s, and some of its faculty were engaged in efforts to bring about social change elsewhere. The Dean himself was on the board of the premier civil rights litigation organization, the Legal Defense Fund. Yet underlying the School's inability to think beyond the pool problem was a failure to bring these commitments inside the institution's everyday practices and norms, a failure to re-evaluate the givens and non-negotiables with an eye toward rethinking those dimensions of law school practice that were forged in, consistent with, and facilitated by formalized inequality.

It was at least remotely possible to imagine that aspects of legal education that had easily co-existed with and even normalized racial subordination might be reviewed with a skeptical eye whether or not the institution itself formally practiced segregation. The wholesale failure to consider the interests of underserved communities, the failure to interrogate the gaping contradictions between the formal commitment to the rule of law and the realities of racial dictatorship through much of the nation's history, the failure to reward innovative legal theories or to explore the reformist potential of legal advocacy—all these features of the pre-civil rights elite legal education might have been viewed from a

position of skepticism given their collaborative role in normalizing broad scale societal stratification. That "excellence" and "merit" could be attached to legal thinking that consistently failed to take up some of the most complex legal problems in society was troubling enough during segregation's tenure, but to effortlessly reproduce these values in a post-segregation world seemed to undermine rather than enhance the claims of social progress.

Re-evaluating the role of legal education in such a light would have revealed the existence of several possible professors who were skilled at producing and teaching aspects of legal practice that were new to the curriculum. Yet in refusing the expectations of a new population of students, the School effectively held itself as the arbiter of what was important in legal training and what was not, whose legal problems would be served by Harvard Law School and which interests would not.

Obviously, a different conception of what interests and constituencies the Law School would serve would have created a different "pool" of people qualified to teach there. The School, however, was stubbornly attached to its traditional view of merit and its particular mission. Its insistence on viewing the crisis through the prism of the pool was a repudiation of the students' larger demands that it rethink its foundational assumptions about how to prepare a new generation of students for the careers that they there were planning to pursue. Indeed, the Law School's commitment to preparing students for elite service in American's corporate apparatus was sometimes defended by faculty as a badge of personal honor. For instance, in one of several student-faculty fora on faculty integration, students demanded that the School revise its curriculum to offer more in the field of legal aid/legal services. A distinguished faculty member analogized such demands to asking the men at Massachusetts Institute of Technology to teach students how to fix toasters.⁵⁹

While these basic criticisms of Harvard's response more or less held the coalition together there were of course ideological differences among the students that varied in substance and intensity. As Bell noted, there were themes in the student uprising that reflected longstanding tensions between mainstream civil rights strategies and the opposing preferences of some segments of Black communities.⁶⁰ Sometimes framed in terms of the

⁵⁹ Steve Cowan, *Students and Faculty Pack Open Forum*, HARV. L. REC., Mar. 11, 1983, at 15.

⁶⁰ Derrick Bell, *A Question of Credentials*, in *BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE* 467, 469 (Werner Sollers et al. eds., 1993) (arguing that the students asserted that the two appointees were "too committed to the civil rights goals of the 1950s to effectively delineate contemporary racial issues in the law for black students"). The sharp debate over the normative and political commitments of civil rights lawyers was particularly evident in the internal battle over school desegregation. See Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

tension between liberal integrationism and radical nationalism, aspects of this long simmering debate were voiced in allegations that civil rights organizations were wedded to liberal orthodoxies that were out of line or inconsistent with Black self-determination.⁶¹ Given that Bell had sounded this theme in his controversial *Serving Two Masters*,⁶² it was not entirely unexpected that this argument would surface along with the related question of whether a white or an African American should lead the country's leading civil rights organization.⁶³ These debates were not at all new, as both critics and supporters of the students noted. Nonetheless, these additional points became the focal point of the mainstream repudiation of the students' actions, a fact that prompted some of the supporters and even Coalition members to regard the inclusion of such rhetoric to have been a tactical mistake.

All together, these themes established the parameters of the conflict between liberal notions of discrimination, framed around bias and colorblindness, and an emerging sensibility that comprehended such problems in terms of institutionalized racial power. If bias and discrimination constituted the *lingua franca* of liberal conceptions of the race problem, then objectivity and colorblindness were its natural—if not immediate goals. Liberals and conservatives may have disagreed about the scope and defensibility of exceptions to this conception of equality, and as the case at Harvard shows, even liberals might draw lines differently depending on the context (for example, student admissions versus faculty recruitment). At the end, they shared a notion that a world free of race “bias” constituted the promised-land rather than any substantive measure of racial participation in institutions across the social terrain. Colorblind merit was thus presumptively race neutral, and it was the students' demand

⁶¹ See Muhammad Kenyatta, President, Harvard Black Law Association, Letter to the Editor, WALL ST. J., Sept. 13, 1982 (arguing that “[f]or many years the distinction has been blurred between the orthodox liberal agenda and the autonomous aspirations of Afro-Americans”).

⁶² Bell, *Serving Two Masters*, *supra* note 60.

⁶³ See Letter from Muhammad Kenyatta to Julius Chambers (May 13, 1982) (on file with author) (concluding his rehearsal of the basic chronology and reasoning behind the boycott with the additional criticism of Jack Greenberg for refusing to relinquish leadership of the LDF). While Kenyatta's inclusion of this issue was not amplified in any of the correspondence of the Third World Coalition and was offered as an aside even in his own letter, reporters and commentators seized on the passage as proof of the racism underlying the students' actions. Although many students and supporters abjured on that matter, some supporters as well as critics incorporated the discussion into their positions. See Derrick Bell, Op-Ed., *Question of Credentials*, submitted to Washington Post, Aug. 3, 1982 (unpublished) (on file with author) (arguing that virtually all of the civil rights organizations were “led by members of the minorities the organization was established to serve”); see also Randall Kennedy, *On Cussing Out White Liberals: The Jack Greenberg Affair*, NATION, Sept. 4, 1982, at 169, 171 (asserting that arguments over the appropriateness of a white person leading a the LDF were “widespread and deep rooted” but questioning whether “all this justifies] the students' wholesale rejection of Greenberg”). This debate might be understood as a flashpoint in the broader tension between integrationist and nationalist orientations in Black political thought. For a detailed mapping of the tension between these two orientations, see Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 763–811.

for a specific share of the teaching positions at Harvard that was framed as discriminatory.

As events unfolded, it became apparent that the struggle was not solely between the students and the Administration, but between the students and the media as well. The media's framing of the controversy was not simply a product of sloppy reporting, but a marker of the pre-existing tropes in mainstream civil rights discourse that were readily mobilized to narrate the students' race consciousness as racism pure and simple. The protest was initially framed by Dean Vorenberg in a letter informing the student community about the new course and the fact that BLSA and the Third World Coalition were boycotting it.⁶⁴ Framing the students' response to the School's failure to recruit a full time minority scholar to teach the course, the Dean put the matter thusly: "[T]o boycott a course on racial discrimination because part of it is taught by a white lawyer, is wrong in principle and works against, not for, shared goals of racial and social justice."⁶⁵ The frame of reverse discrimination, intimated in the Dean's letter, became increasingly shrill as the media amplified the story.⁶⁶ The

⁶⁴ Media coverage of the course boycott began in July after Dean Vorenberg mailed a series of letters to all returning students. These letters included one written by Muhammad Kenyatta—the President of HBLSA—explaining the organization's intent to boycott the course, as well as letters from Vorenberg, Chambers and Greenberg, all responding to Kenyatta's letter. For a reprinting of these letters, see *The Greenberg-Chambers Incident, Harvard Law School, 1982–83*, in WERNER SOLLORS ET AL., *BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE* 457–67 (1993). Returning student Ruth Marcus was working with the *Washington Post* that summer and, upon receiving the letters, wrote a *Post* article stating that the students were boycotting the course because Greenberg was white. Ruth Marcus, *Minority Groups Assail Course at Harvard Law*, WASH. POST, July 26, 1982, at A5. The mainstream media repeated and amplified that frame, producing harsh criticism of the boycott from several quarters. See, e.g., *A Misguided Protest by Blacks at Harvard*, N.Y. TIMES, Aug. 17, 1982, at A26; Letter to the Editor, *Blind Pride at Harvard*, N.Y. TIMES, Aug. 11, 1982, at A22; Daniel Q. Haney, *Harvard Students Protest Racial Makeup of Law Faculty*, PHILA. INQUIRER, Jan. 6, 1983, at A06; Nick King, *Minority-Hiring Fight at Harvard*, BOS. GLOBE, Nov. 17, 1982, at 1; *Law Class at Harvard Is Boycotted*, MIAMI HERALD, Jan. 6, 1983, at 5A; *Minority Students at Harvard Protest Boycott*, N.Y. TIMES, Aug. 9, 1982, at A9; *Students Picket Law Course in Rights Protest at Harvard*, N.Y. TIMES, Jan. 6, 1983, at A16.

⁶⁵ See Letter from Dean Vorenberg to Second and Third Year Students (July 21, 1982) (on file with author).

⁶⁶ See Marcus, *supra* note 64, at A5 ("Two minority student groups at Harvard Law School are urging classmates to boycott a race discrimination course, to be taught by one of the country's leading civil rights lawyers, because the lawyer is white"). The same story appeared in the *Philadelphia Inquirer* as *At Harvard, Minorities Urge Boycott of Bias Course*, PHILA. INQUIRER, July 27, 1982, at 4-A. Marcus failed to interview anyone involved in the boycott, leading to what students characterized as gross distortions in her story, however the *Post* and later the *Times* refused to run a clarification because such corrections were deemed to be non-newsworthy. See Third World Coalition, *Desegregating Harvard*, *supra* note 35. Students wrote several letters and gave numerous interviews to challenge the frame that Marcus activated but only a few were published. See Donald Tyler, *Setting the Record Straight at Harvard*, NAT'L LEADER, Sept. 16, 1982 (denying racial animus and highlighting the lack of good faith by Law School administrators); see also Tony Brown, *Harvard Tokenisms, and Chaos*, Compliments of the Washington Post, Syndicated Column, Sept. 7, 1982; Tyler & Muldrow, Letter to the Editor, *supra* note 47, at A26. Of the dozens of op-eds and letters to the editor that were published, two glaring omissions were op-eds submitted by respondents intimately familiar with the context of the story: Derrick Bell and Duncan Kennedy. See Bell, Op-Ed., *supra* note 63;

progression began with stories that highlighted race as the primary but not exclusive reason for the students' boycott and soon dispensed with the underlying battle over integration altogether. Pundits—including civil rights luminaries, joined the chorus of critics to declare the student actions to be racist, pure and simple.⁶⁷

B. *The Alternative Course*

Despite the students' disappointment over the Dean's response and the subsequent conflation of a complex political contestation into a simple narrative of reverse discrimination, this sequence of events proved to be enormously meaningful in the development of the intellectual project that the controversy helped spawn. Specifically, the Dean's decision and the narrowed parameters in which the ensuing controversy was framed helped to sharpen awareness of how conceptions such as colorblind merit operated to obscure the continuing patterns of racial power in presumptively race neutral institutions. It also set in motion a chain of events that would provide fertile ground for the emergence of CRT.

While the conceptual and political contours of the controversy have become more legible in hindsight, the dynamics unleashed by crossing this Third Rail in racial politics were profound revelations for many of the students who straightforwardly saw themselves as carrying forward the long-term project of race reform. Yet the doctrinal and ideological limits this post-civil rights generation encountered were not only the product of a receding commitment to structural change but also the consequence of the shifting sites of contestation. As the struggles over racial justice moved from buses and lunch counters to the gates of power and the logics that underwrote them, the "sturdy structure" of racial hierarchy became increasingly evident.

In the early 1980s, the codes by which the gradual retrenchment of race reform would be articulated were not easily decipherable. It was clear that the pace of reform had slowed, and ominous clouds were gathering. The Supreme Court had decided *Washington v. Davis*⁶⁸ six years earlier, but *Bakke*,⁶⁹ although an overall defeat, had left considerable room for civil

Duncan Kennedy, Letter to the Editor and Op-Ed. submitted to the *N.Y. Times*, Aug. 30, 1982 (unpublished) (on file with author).

⁶⁷ See Bayard Rustin, Letter to the Editor, *A Misguided Protest by Blacks at Harvard*, N.Y. TIMES, Aug. 17, 1982, at A26 (denouncing the student protest as "nothing more than blatant racism"); see also Carl T. Rowan, *Harvard Blacks Fail Bias Test*, PGH PRESS, Aug. 15, 1982 (characterizing the protest as "racist, anti-civil rights and anti-intellectual"). For the most pointed articulation of this frame, see *Point of Hue: Racism Hits an Unlikely Victim*, TIME, Aug. 23, 1982, at 48, available at <http://www.time.com/time/magazine/article/0,9171,925712,00.html>.

⁶⁸ *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disproportionate racial impact of a statute alone does not trigger strict scrutiny).

⁶⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (rejecting arguments that the State medical school's use of quotas was justified as a legitimate effort to provide services to underserved

rights advocates and sympathetic institutional actors to maneuver. While *Bakke* effectively took racial justice off the table as the foundation for affirmative action, diversity emerged as the vehicle that would effectively integrate people of color into institutions from which they had been excluded. Hope thus prevailed within the civil rights community that significant victories could still be squeezed out of a receding reformist agenda. Yet entire bastions of entrenched racial power were rendered off limits, clothed in the magical discourse of “merit” and “qualification.” Like the scene in *The Wizard of Oz* where the omnipotent voice warns, “pay no attention to the man behind the curtain,”⁷⁰ meritocratic discourse often blinded racial justice constituencies to its role as a mechanism of racial power. Thus it might have remained were it not for the Dean’s artless juxtaposition of the mediocre Black professor against the excellent white professor, and his challenge to students to recite what they might have learned had the very course that lay at the center of the controversy had been offered. The “Toto” that pulled the curtain to reveal the racial dynamics of this purportedly race neutral claim was the Alternative Course.⁷¹

Having pledged to boycott the Administration’s three-week course, the Third World Coalition decided to pursue an Alternative Course, both literally and figuratively. The unraveling of negotiations with the Administration and the controversy that ensued had provided a clear target for critique, but the nagging question about what to construct—in particular, how to create a learning opportunity that would replicate what Bell’s course would have provided—remained acute.⁷² Moving beyond protest and negotiation, the TWC decided to pursue an Alternative Course to present an “affirmative vision of what a course which purports to address the needs of their communities can and should be.”⁷³ The Alternative Course brought together the representational and substantive demands of the students in a vehicle that illustrated the twin goals of

populations, to integrate the profession and to remedy discrimination produced by other institutions but permitting the School to use race as one factor in admissions to pursue its goal of achieving a diverse learning environment); see also Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in the University of California v. Bakke Decision*, in *THE COLOR LINE: RACIAL AND ETHNIC INEQUALITY AND STRUGGLE FROM A GLOBAL PERSPECTIVE* Gwen Moore et al. eds., 1999) (arguing that “although *Bakke* was victory in that it made affirmative action programs constitutionally viable,” it also was “a defeat for the advocates of affirmative action” and that “it cast into the shadows a variety of social justice arguments for promoting equal access and the greater inclusion of the members of racial minority groups that continued to suffer the effects of historical and ongoing discrimination”).

⁷⁰ *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer, Inc. 1939).

⁷¹ See Brad Hudson, *TWC Offers Alternative Spring Course*, HARV. L. REC., Jan. 21, 1983, at 1.

⁷² The problem was particularly pressing for activist students in the third year. After dedicating much of their law school career to agitating for the course they were facing the prospect of graduating without having realized this most basic demand.

⁷³ See George Bisharat, *Third World Students Believe Harvard Law Is Symbol of Bias*, BOS. GLOBE, Feb. 19, 1984, at A.

recruiting minority professors who were not merely “duplicates” of current faculty members and amplifying their deepening critique of American legal education. Sounding notes that presaged an eventual interface with CLS, George Bisharat, one of the key organizers of the Alternative Course, explained that while the offering was being undertaken to counter the claim that Third World faculty do not exist, the underlying logics of legal education were also being contested.⁷⁴ Countering the orientation of traditional legal education, the course would advance

a concept of law as fundamentally political, not a set of abstract, neutral principles about which one can have purely “technical” expertise divorced from one’s social and political views and values. The latter image of the law is the one upon which the status and prestige of Harvard’s faculty (as all other law faculties) is built; it is also the image which legitimizes the American legal system’s consistent perpetration of injustices against people of color—which is the more important reason for the Third World coalition’s rejection of it.⁷⁵

Within this framework, the law would not be taken for granted as a technocratic institutional discourse in which lawyerly competence was being developed. Instead, the Course would diverge from traditional offerings in the area by placing litigation-oriented strategies in conversation with the broader political and social struggles of racially defined communities. Organizers similarly promised that the course would explore “how racism touches peoples that are both unified by their status as minority groups and diverse in their interests and goals.”⁷⁶ This signaled not only an interest in exploring race outside the context of the Civil Rights Movement, but also a commitment to interrogate the legal infrastructure of foreign policy that touched the lives of Third World people around the world.⁷⁷ The Alternative Course thus set the stage for a broader inquiry into the relationship between race and law, and for a critical interrogation of traditional legal education more broadly. These themes would be taken up and further developed by Critical Race Theorists.⁷⁸

⁷⁴ See Hudson, *supra* note 71, at 1 (quoting Bisharat, noting that “the goal of minority students is not just to attract minority duplicates of current faculty members” but “faculty whose experience is more representative of their people in general”).

⁷⁵ Bisharat, *supra* note 73.

⁷⁶ Hudson, *supra* note 71, at 15 (quoting Bisharat).

⁷⁷ Bisharat, *supra* note 73.

⁷⁸ The Alternative Course in 1983 has been mistaken for the much later development of Saturday School by Charles Ogletree. See, e.g., Delgado, *Liberal McCarthyism*, *supra* note 2, at 1512. At the time, there were only two faculty of color at Harvard and the death of Clyde Ferguson late that year left

To stage this Alternative Course, various student groups agreed to pool resources to invite those purportedly non-existent minority scholars to come to Harvard to offer lectures in the weekly series. Materials were drawn from Bell's book *Race, Racism and American Law*⁷⁹ and from readings suggested by the "visiting professors." Important allies in this effort—CLS professors like Duncan Kennedy, Morty Horowitz, Jerry Frug and a few others—agreed to provide independent study units for those wishing to take the course for credit. The Third World Coalition—principally Cecil McNab,⁸⁰ George Bisharat,⁸¹ Glenn Morris,⁸² Mari Mayeda,⁸³ Joe Garcia,⁸⁴ Ibrahim Gassama,⁸⁵ and this Author—reached out to legal scholars such as Richard Delgado,⁸⁶ Linda Greene,⁸⁷ Neil

only Christopher Edley. The Alternative Course was a TWC initiative that grew out of student frustration about the gradualist pace of integration. Ogletree joined the faculty in 1987.

⁷⁹ DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (2d ed. 1980) [hereinafter BELL, RACE].

⁸⁰ Cecil McNab received his B.A. in 1980 from the University of Southern California and received his J.D. in 1983 from Harvard University School of Law. Currently, he is in private practice in Los Angeles.

⁸¹ George Bisharat earned a B.A. in anthropology from UC Berkeley in 1975, an M.A. in history from Georgetown University in 1979, a J.D. from Harvard Law School in 1983, and a Ph.D. in anthropology and Middle East Studies from Harvard in 1987. Currently, he is a professor at the University of California Hastings College of the Law. *George Bisharat, Professor of Law*, UNIV. OF CAL. HASTINGS COLL. OF LAW, <http://www.uchastings.edu/faculty-administration/faculty/bisharat/index.html> (last visited Mar. 30, 2011); see also *George Bisharat: Professor and Commentator*, INST. FOR MIDDLE EAST UNDERSTANDING, <http://imeu.net/news/article005757.shtml> (last visited Mar. 30, 2011).

⁸² Glenn Morris received his J.D. from Harvard in 1983 and joined the Political Science Department at the University of California, Davis the same year. Currently, he teaches in the Department of Political Science at the University of Colorado, Denver. *Glenn T. Morris, Associate Professor, Department of Political Science*, UNIV. OF COLO. DENVER, http://www.ucdenver.edu/academics/colleges/CLAS/Departments/PoliticalScience/AboutUs/ContactUs/DepartmentDirectory/Pages/GlennT_Morris.aspx (last visited Mar. 30, 2011).

⁸³ Mari Mayeda received her B.A. from UC Davis majoring in history and her J.D. from Harvard 1983. Following a clerkship with Cruz Reynoso on the California Supreme Court, Mayeda became a partner in a civil rights law firm in Oakland and currently maintains a civil rights practice as a solo practitioner.

⁸⁴ Joe Garcia received his J.D. from Harvard in 1983 and later became the President of Colorado State University, Pueblo. He is currently the Lieutenant Governor of Colorado. Tom McGhee, *CSU-Pueblo Search Starts*, DENV. POST, Nov. 4, 2010, at B-04.

⁸⁵ Ibrahim Gassama, a 1984 graduate of Harvard Law School, worked for Transafrica upon graduation and continued his longtime activism in areas pertaining to human rights, foreign policy, and international economic development. Gassama participated in the recruitment and training of observers of elections in Haiti and South Africa, including South Africa's first all-race democratic election. Gassama is currently a member of the faculty at the University of Oregon School of Law. *Ibrahim Gassama, Professor of Law*, UNIV. OF OR. SCH. OF LAW, <http://www.law.uoregon.edu/faculty/igassama/> (last visited May 29, 2011).

⁸⁶ Richard Delgado received his A.B. from the University of Washington and his J.D. from the University of California at Berkeley in 1974. Currently he is a professor at the Seattle University School of Law. *Faculty Profiles, Richard Delgado*, SEATTLE UNIV. SCH. OF LAW, http://www.law.seattleu.edu/Faculty/Faculty_Profiles/Richard_Delgado.xml (last visited Mar. 30, 2011).

⁸⁷ Linda Greene received her B.A. from the California State University, Long Beach before receiving her J.D. from the University of California at Berkeley in 1974 and then became a civil rights attorney for the NAACP Legal Defense and Educational Fund in New York City. Currently, she is

Gotanda,⁸⁸ Charles Lawrence,⁸⁹ Denise Carty-Bennia,⁹⁰ Ralph Smith,⁹¹ John Brittain,⁹² and Haywood Burns⁹³ to join the effort. Each of these scholars visited the campus to teach an installment of the Alternative Course, to interact with students, and to provide living testament to the range of scholarship and knowledge that was being embargoed at Harvard's gates.

From the TWC perspective, the course was a stunning success. The Course drew more than 100 participants and provided students with frameworks to understand and articulate the complex context of the current institutional struggle and its relationship to broader dynamics pertaining to race and law. Not only did the Alternative Course make the effects of the gate-keeping real (the illustrative cover on our booklet featured Harvard law professors piling desks and bookshelves against people of color pushing in from the outside),⁹⁴ the course also provided the opportunity for a cohort of existing and future race scholars to become collectively

Evjue-Bascom Professor of Law at the University of Wisconsin Law School. *Profile of Linda S. Greene*, UNIV. OF WIS. LAW SCH., <http://www.law.wisc.edu/profiles/lsgreene@wisc.edu> (last visited Mar. 30, 2011).

⁸⁸ Neil Gotanda earned his B.S. from Stanford University, a J.D. from the University of California, Berkeley and an LL.M. from Harvard University. Gotanda is currently a professor at Western State University College of Law. *Faculty Profile—Neil Gotanda*, WESTERN STATE UNIV. COLLEGE OF LAW, http://www.wsulaw.edu/faculty_detail.asp?facid=4 (last visited Mar. 30, 2011).

⁸⁹ Charles R. Lawrence earned his B.A. from Haverford College and a J.D. from Yale. He taught at Stanford School of Law from 1986–1992 and currently teaches at Georgetown School of Law. *Charles R. Lawrence*, GEORGETOWN LAW, http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=281 (last visited Mar. 30, 2011).

⁹⁰ Denise Carty-Bennia received her B.A. from Barnard College and her J.D. from Columbia in 1973. Carty-Bennia joined the faculty of the Northeastern School of Law as an Associate Professor in 1977 and became a professor at the school in 1980. *Northeastern University School of Law, Black Law Students Association, Awards: Denise Carty-Bennia Memorial Bar*, NORTHEASTERN UNIV. SCH. OF LAW, http://nuweb3.neu.edu/slsw/students/blsa/awards_carty-bennia.html (last visited Mar. 30, 2011).

⁹¹ Ralph R. Smith received his B.A. from Loyola Marymount University in Los Angeles before receiving his J.D. from the University of California, Los Angeles in 1972. He became a faculty member of the University of Pennsylvania Law School, where he taught from 1975–1997. He is currently a leading figure in philanthropy and serves on the boards of a number of charitable foundations. *Ralph R. Smith*, FORBES.COM, <http://people.forbes.com/profile/ralph-r-smith-j-d-/48795> (last visited Mar. 30, 2011); see also *Ralph Smith*, THE ANNIE E. CASEY FOUND., <http://www.aecf.org/AboutUs/LeadershipMgmtTrustees/Smith.aspx> (last visited Mar. 30, 2011).

⁹² John C. Brittain earned both his B.A. (1966) and J.D. (1969) from Howard University. Brittain taught at the University of Connecticut Law School for twenty-two years, served as dean of the Thurgood Marshall School of Law at Texas Southern University, and is currently a tenured professor of law at the University of the District of Columbia, David A. Clarke School of Law. *Professor John C. Brittain*, UNIV. OF D.C., DAVID A. CLARKE SCH. OF LAW, <http://www.law.udc.edu/?JBrittain> (last visited May 29, 2011).

⁹³ Haywood Burns earned his B.A. from Harvard and his J.D. from Yale University. Burns served as general counsel to Martin Luther King's Poor People's Campaign and was one of the founders of the National Conference of Black Lawyers. Burns then went on to serve as Dean of the Law School at Queens College. Karen Arenson, *W. Haywood Burns, 55, Dies; Law Dean and Rights Worker*, N.Y. TIMES, Apr. 4, 1996, at D21.

⁹⁴ Graphic on file with author.

immersed in a developing canon of critical discourses and scholarly texts.⁹⁵

Haywood Burns opened the series with a survey of U.S. courts' treatment of Blacks, Native Americans and Asian Americans. Diverging from the more standard line that drew sharp dichotomies between past and present, Burns called for a more sophisticated understanding of the way race continued to play out in modern contexts. Subsequent presenters amplified these themes across a variety of legal issues including Federal Indian Law (Robert Coulter); "colorblind" Constitutional Law (Neil Gotanda); Voting Rights (Lizette Cantres); and the legal origins of race and discrimination (John Brittain).⁹⁶

The long-term traction that the Course generated was partly grounded in the collective engagement with particular texts that became part of the CRT canon. Central among them was the principle textbook for the course, *Race, Racism and American Law*. Bell's textbook and his overall product were especially important in setting the foundation upon which CRT was built. Bell's entire body of work encouraged an emerging cohort of critical thinkers to place race at the center of scholarly inquiry, a license that had not yet been granted by the legal academy. Bell's work revealed how liberal, rights-oriented scholarship had been preoccupied with the task of reconciling racial equality with competing values such as federalism, free market economics, institutional stability, and vested expectations created in the belly of white supremacy, such as seniority.⁹⁷ Bell sought to critique the liberal constitutional frame within which race scholarship was disciplined, uncovering the ways that these investments were not separate values to be balanced against the quest for racial equity but were themselves repositories of racial power.

Along with Bell's foundational text, the course was informed by other work that eventually became part of the CRT canon such as Delgado's *Imperial Scholar*⁹⁸ and an early iteration of Charles Lawrence's *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.⁹⁹ Delgado had shaken up the constitutional law establishment by framing their internal conversations about race as imperialistic and white, conducted as though scholars of color had made no contributions to the

⁹⁵ Several of the Alternative Court faculty who eventually became leading figures in CRT along with student participants such as Mari Matsuda and this Author forged theoretical and personal ties that were sustained by repeated encounters in the immediate aftermath of the boycott. This sustained interaction formed a critical mass of academics that that eventually culminated in the CRT Workshop.

⁹⁶ See Steve Cowan & Andrea Hartman, *TWC Alternative Course Opens to Student Plaudits*, 76 HARV. L. REC., Feb. 11, 1983, at 1.

⁹⁷ BELL, RACE, *supra* note 79, at 39–44.

⁹⁸ Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) [hereinafter Delgado, *Imperial Scholar*].

⁹⁹ Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter Lawrence, *The Id*].

discourse that merited engagement.¹⁰⁰ In Lawrence's now-classic critique of *Washington v. Davis*, he married traditional doctrinal analysis to an account of unconscious bias grounded in psychology. In so doing, Lawrence advanced a burgeoning tradition of borrowing conceptual tools from other disciplines to interrogate the foundational conceptions of race that informed legal discourse.¹⁰¹ Denise Carty-Bennia, one of the first African American female law professors, provided a compelling vision of the rhetorical politics surrounding minority scholarship that circulated within the legal professoriate. In both her presentation in the course and her advice "off line," Carty-Bennia decoded the various "raps" on minority scholarship that framed the work as non-traditional (which much of it was) and presumptively disqualifying (which was the crux of the debate).

For young scholars, Bell, Delgado, Lawrence, and Carty-Bennia modeled an orientation towards race work that transcended current paradigms in search of new discourses and possibilities. Their articulation of such critical frames within the traditional parameters of legal education linked up with the academic and activist traditions out of which many students in the Third World Coalition emerged.¹⁰² These formative engagements reinforced the possibility that race projects need not be contained and constrained by conventional expectations and that indeed, the authorized points of departure in legal analysis more often imported with them a rationalizing orientation toward racial domination rather than a critical one. This intimate exposure to groundbreaking scholarship reinforced and deepened a sense that a new and more integrated sensibility was emerging, one in which the regulatory frames of "race relations" and "racial prejudice" were being overwritten by the mutually constitutive frames of law and racial power.

¹⁰⁰ Delgado, *Imperial Scholar*, *supra* note 98, at 573–74.

¹⁰¹ Lawrence, *The Id.*, *supra* note 99, at 330–32.

¹⁰² Virtually all of the students who were actively involved with the Coalition and the boycott came to Harvard with a solid background in activism. Kenyatta had been a civil rights activist in the 1960s and was harassed by the COINTEL program. *See infra* note 103. Mayeda, Bisharat, and Crenshaw all report extensive exposure to social justice activism as children of activist parents. Several participants involved in the boycott traced their activism to high school and college. Mayeda worked in the United Farm Workers in California; Cecelie Counts protested for Black Studies and other curricular demands in East Orange before moving on to protest the Vietnam War and governmental and corporate support for colonialism in Africa. Gassama was deeply involved in the democratic struggles in Sierra Leon, an involvement that extended throughout his law school career and beyond. Many students connected their activism to curricular dimensions of racial justice. Mayeda was directly exposed to admissions and curricular struggles in the battle over ethnic studies at San Francisco States while another (McNab) was involved in efforts to provide educational alternatives for high risk teenagers and girls in Los Angeles. Still others pursued coursework in ethnic studies and related fields where available: Counts and Crenshaw both took majors in Africana Studies, Mayeda studied in Asian American Studies (Mayeda reports that there was no ability to major in Asian American studies at UC Davis). Bisharat attended to questions of power and the Third World as he pursued a Ph.D. Anthropology and Middle East Studies before matriculating to Harvard. *See* Correspondence with TWC Organizers (on file with author).

The boycott and the subsequent course not only drew attention to the limited scope of institutional reform, but it also cast light on contemporary flashpoints of long-term tensions within Black political thought about how to frame and engage racial power. Strategic disputes within the Black community were longstanding and sometimes intense as the political and rhetorical differences between luminaries such as Booker T. Washington and W.E.B. Du Bois, Walter White and A. Phillip Randolph, and Thurgood Marshall and Martin Luther King, Jr. have made clear. As it turned out, what was sometimes framed as an intra-racial, temporal, or institutionally specific set of conflicts were in fact none of these. Given the fairly familiar terms through which the Harvard conflict was framed, the only new thing about the boycott was the re-articulation of these tensions in another generation, with a wider cast of racialized "Others" and at another site of contestation.

The terms of the institutional conflict were always relatively easier to comprehend than the conflict between the students and those members of the civil rights "old guard" who denounced the boycott altogether. Stepping away from the specter of out and out ideological conflict within the civil rights constituency, it was possible to frame the controversy as an intergenerational conflict between cool strategic reformism versus hot-headed ideological posturing. In this telling, the controversy boiled down to basic differences between those who favored a lawyerly stance of deliberate, reasoned demands, backed up when necessary by litigation, versus those who were more interested in elevating and interrogating race and racism as an ideological project. At the most reductionist level, the tension was framed in terms of a certain pragmatism, a notion of *learning* the game in order to *play* the game, versus an identity-driven performance of racial pride, a posturing that was reckless, immature, and ultimately counterproductive.¹⁰³ To at least some of the old guard, the former vision was the hallmark of orderly integration, best achieved through the selection of students who would master the institutional expectations and carefully manage their racial particularities so as to affirm the possibility of a fully assimilated future. The latter was the nightmare of those in the civil rights community who worried that their hard work and sacrifice would turn to naught through the "bad behavior" of irresponsible youth demanding

¹⁰³ Carl Rowan invoked this frame in his condemnation of the "youngsters" at Harvard who were apparently being led astray by their apparent leader, one whose name suggests an "obviously Islamic mind-bent." Here the youth in question was Muhammad Kenyatta, the president of BLSA. Kenyatta was in fact a middle-aged, Baptist minister, a veteran of the Civil Rights Movement, and a victim of COINTELPRO, the FBI's program to subvert and destroy the Civil Rights Movement through targeted threats that were falsely attributed to allies and rivals. See *Kenyatta v. Moore* 623 F.Supp. 224, 226 (D.C. Miss. 1985) ("Kenyatta became a target of F.B.I. investigation in the latter part of 1967 when one or more of the defendants caused his name to be placed on the F.B.I. 'Rabble Rouser List,' later called the F.B.I. 'Agitator Index.'").

unreasonable accommodation to their special needs.¹⁰⁴

While to a certain extent, strategic differences are almost always at play where there is conflict among erstwhile allies, this understanding of the conflict as one involving strategy versus ideology elides what to students appeared to be a problem of misrecognition. At least some part of the students' dismay over the reactions of the civil rights old guard was a perception that they had simply failed to recognize in the School's response the same kind of resistance to race reform that had long been the first reaction of managers and administrators throughout the history of civil rights agitation. The misrecognition was disappointing in large part due to the old guard's faith in the Administration's commitment to a gradualist vision of integration. The gradualist take on integration was traditionally contested by the old guard in other contexts but in the face of a liberal institution with formally neutral standards, it was inexplicably accepted as legitimate. Moreover, the notion that the students were engaged only in ideological struggle understates the sense in which students were indeed "in litigation" against an institutional defendant. This failure to recognize the school as "a defendant" led to other misrecognitions.

For instance, in the same way that the Legal Defense Fund rejected Texas's creation of the Texas State University for Negroes School of Law as a transparent strategy to maintain their segregationist policies in the face of expectations that they educate Blacks,¹⁰⁵ so too did the TWC recognize that Harvard's mini-course was a minimalist effort to meet student demands while sustaining their exclusionary hiring policies. In the same way that lawyers and activists failed to heed the pleas of Southern moderates who preached moderation in the face of civil rights demands, so too were students undeterred by hardline commitments to the gradualist pace of integration at the nation's top law schools. In the same way that civil disobedience prompted claims that integrationism violated white civil rights, so too did the students' "disobedience" in boycotting the course generate claims that their behavior constituted reverse discrimination. To the TWC, the issue was not then their "misbehavior" but the old guard's misrecognition, a strategic misalignment grounded in the failure of key allies to recognize elite institutions as sites of racial harm. To students, the embrace of direct action to create the kind of inclusive environment they sought was more consistent with the goals of racial justice than the wholesale pass given to elite institutions that defended their institutional complexion through the discourse of merit and standards.

¹⁰⁴ See, e.g., Carl T. Rowan, *Bad Behavior at Harvard*, WASH. POST, Aug. 20, 1982, at A15.

¹⁰⁵ See *Sweatt v. Painter*, 339 U.S. 629 (1950); see also Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 L. & SOC. INQUIRY 507, 510 (2006) (describing the TSUN School of Law as "cobbled together in order to fend off *Sweatt* and the NAACP's integration challenge").

It might be useful at this moment to revisit the questions posed at the outset of this article, namely, how was it that the struggles over the terms by which racial power would be understood and contested in a post-reform institutional setting wound up being a foundational moment in the formation of CRT? Most broadly, the controversy revealed that there was a realm of racial power that lay outside the regulatory boundaries of antidiscrimination law and the broader liberal repertoire on race. This "remainder" of racial power was located not at the margins of traditional forms of racial subordination but in some ways at the very center of liberal institutions that were otherwise lined up in favor of "racial reform." Within this recognition lay a font of contradictions and unrecognized convergences. For example, although liberals and conservatives tended to differ in their support of "affirmative action," there was comparatively less daylight between them on their fundamental commitment to notions of merit. While liberals may have differed with conservatives on whether these notions should be modestly revised to advance the pace of change, they were in some senses closer to each other than they were to the emerging cohort of racial justice advocates who contested the very terms upon which "merit" was defined. For them, framing such criteria as "objective" merely sanitized the racial power that was at play in determining what counted, whose interests would be privileged, and what mechanisms would serve them.

It was not just a difference in objectives and frames that emerged here, but moreover, a sense that there was a deep contradiction that ran throughout the liberal response to the student demands for more "Third World" professors. Typical of this contradiction was Carl Rowan, who first lambasted the students for reverse discrimination, and then later, upon learning the fuller backdrop of the controversy, excoriated Harvard President Derek Bok for using merit as a specious argument to defend the complexion of America's elite institutions.¹⁰⁶ But key to the students' argument was that the discourse around merit was not simply a ruse or somehow false, but that it was the functional embodiment of particular values and practices that reflected the limited scope of what the law school perceived its mission to be. In this sense, the standards were neither objective nor universal. Instead, they were tied to performance within an institution that had been either agnostic toward or supportive of Jim Crow.

A different institutional history would have generated different projects that would in turn have invited alternative conceptions of merit.

¹⁰⁶ Compare, e.g., Rowan, *Harvard Blacks Fail Bias Test*, *supra* note 67 (declaring the "lunacy" of Harvard Black students who failed to realize that "[m]any black people of my generation have faced death in defense of the idea that people are to be judged on their own merits"), with Carl T. Rowan, *Shameful Arithmetic at Harvard*, CHI. SUN-TIMES, Aug. 27, 1982 (decrying Bok's "surprisingly pathetic list of excuses as to why so few minority professor are appointed").

This entire line on difference effectively reversed the “off limits” question of whether and how experience shapes intellectual work and whether race should matter or simply be regarded as an unfortunate fact of social life that would eventually just “wither away.” It embraced the idea that no institution was left untouched by racial power. Thus to justify law school policies that effortlessly maintained its current configuration in the name of “tradition” or some other putatively objective value threatened to carry into perpetuity the foundational exclusions upon which it was built.

Merit, therefore, couldn’t be interrogated without attending to its social construction and social construction could not in turn render social identity meaningless, as Rowan initially had suggested. In sum, one could not sustain an argument for affirmative action against the reverse discrimination/lowering standards line without at the same time addressing the racial preferences built into the existing standards. Liberal defenders of affirmative action like Rowan seemed caught in the contradiction of defending a race-blind notion of merit alongside a color-conscious departure from it. This contradiction was the Achilles heel of affirmative action advocacy that would weaken the rationale for such programs as the attack on affirmative action metastasized into a full on assault by the conservatives.

C. *Emerging Race Discourse Among the “Crits”*

Why did CRT emerge out of law, and perhaps not some other discipline where similar pressures were percolating? Aldon Morris asked this question of the Civil Rights Movement and suggested that movements are made possible when certain frames line up—when the activists, leaders, dominant institutions, and elites share a particular understanding and mode of representation about the nature of a problem.¹⁰⁷ Frames were indeed important in the emergence of CRT as well, but rather than quickening solely through discursive alignment, CRT came to life in the cracks between alignment and misalignment. Early Race Crits were situated in a dialectical loop, attracted to and repelled by certain elements of liberal civil rights discourses, and at the same time, attracted to and repelled by certain discursive elements within CLS.¹⁰⁸ CRT grew as a repertoire of discursive moves and projects that marked specific engagements over race in both liberal and radical spaces. Emerging from the anteroom of both discourses, the CRT Workshop became the drawing

¹⁰⁷ Morris, *supra* note 16, at 534–35.

¹⁰⁸ See Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333, 347–48 (2006) (describing this ambivalent stance).

room where the further development of these ideas took place.¹⁰⁹ To flesh out the dialectic engagement between race scholarship and the left, we have to spend some time in the scenes of CLS's past.

As the co-editors of *Critical Race Theory: The Key Writings that Formed the Movement* argued in its introduction, CRT emerged not only as a critical intervention in a particular institutional contestation over race but also as a race intervention in a critical space, namely CLS.¹¹⁰ In the mid-1980s, CLS was the place to be for progressive, left wing, and other non-conformist law folks.¹¹¹ CLS conferences were a mix of heavy theory, whimsical aspiration, dramatic performances, and other remnants of 1960s counter-culturalism. For a range of left-leaning people of color in the legal academy looking for an ideological home, CLS was attractive. For veterans of the Harvard affirmative action wars, Crits had supported both the curricular and faculty recruitment demands of student activists, leading in turn to friendships and mentoring between the faculty and students.¹¹² For progressive-leaning law students and professors, CLS was a professional space where oppositionalist sensibilities that were carried over from the waning days of social justice activism could be articulated and

¹⁰⁹ Crenshaw, *Critical Reflections*, *supra* note 2, at 1364. Importantly, while the separate space did provide an opportunity to clarify the substantive connections that constituted the race-crit project, for at least some of the principal organizers, the Workshop was not seen as a break from CLS as much as an effort to fortify the content of the race turn in CLS. Others with less of a history with CLS or more ambivalence about the CLS movement were presumably less likely to see CRT as an extension of CLS. Race Crits with a history in CLS continued to attend CLS workshops and summer camps, interacting within the broader movement as a loose but recognizable formation. The eruptions that attended the emergence of race eventually settled into a loose sort of pluralistic inclusion with Race Crits having a clear stake in the discursive space of CLS. A parallel model in this regard was the Fem-Crits who met regularly, especially in California and in New England. Some feminist scholars continued to understand the project as residing under the CLS umbrella while others were more ambivalent. These connections frayed as subsequent generations came into these projects after the active organizing dimension of CLS declined in the mid-1990s.

¹¹⁰ See *CRITICAL RACE THEORY: THE KEY WRITINGS*, *supra* note 2, at xxii–xxiii.

¹¹¹ Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515, 1516 (1991).

¹¹² Several Harvard faculty associated with CLS not only supported student efforts to launch the Alternative Course, but also attempted to refocus the public debate on the institutional dynamics that reproduced the multiple hierarchies against which the students were protesting. See, e.g., Duncan Kennedy, Letter to the Editor, *supra* note 66 (denouncing the *Times* editorial as “unfair and misleading” and asserting that “Harvard is a case study in the working of institutional racism”). Not surprisingly, the controversy that filled the pages of the national newspapers also brewed behind the scenes, with CLS faculty leading efforts to push for fuller faculty engagement with the students’ overall critiques of legal education. For example, TWC’s Cecil McNab addressed the faculty at one of its regular meetings, indicting the faculty not only for its failure in the area of minority recruitment but on the overall irrelevance of legal education at Harvard. Resisting efforts by the Dean to table the discussion, CLS Professors Jerry Frug and Morty Horowitz insisted on addressing the issues raised, and were subsequently joined by Professors Edley, Tribe, and Scott in calling for a formal faculty meeting. *TWC Calls for Student-Faculty Forum*, 76 *HARV. L. REC.* Feb. 3, 1983, at 1. The Dean prevailed in tabling the issue, but sympathetic faculty continued to throw institutional and ideological support behind the effort.

understood.¹¹³ Most importantly, CLS's critique of law's neutrality seemed to make perfect sense for any serious student of race in American society.¹¹⁴ Within CLS spaces, conversations about law and social power started steps ahead of where similar conversations began in other spaces. There were, of course, serious debates about how to frame and understand the structures of power in which we were all embedded, but these debates were, at least formally speaking, a normal feature of CLS discourse.¹¹⁵

In the context of these ongoing dialogues, there were loose factions within CLS roughly corresponding to various ideological leanings, but also crosscut by informal identity groups. Thus, while there were the white male heavies, feminists, the emerging race crits, the "after-identity" crits, there were also allegiances between and among these groups in terms of individual sympathies (or allergies) to neo-Marxism, post-modernism, liberal integrationism, radical feminism, leftist Black nationalism and the like. As I note elsewhere "intellectual and political alliances were discernable but not static, structured in some ways by the historical markers that embodied power, yet sometimes disrupted and reconfigured by the debates immediately at hand."¹¹⁶ Thus, feminists who were otherwise split by their intellectual allegiances to post-modernism or dominance paradigms might converge to critique a specific expression of male power; white males—themselves an aggregation of disparate intellectual adherents—might themselves split in response to feminists or emergent race theorists; and so on. It was in the midst of this rich and deeply politicized discursive space that elements of a critical *race* sensibility began to take shape.

One tenet of CLS was the idea that illegitimate power should be contested in intimate as well as public spaces, here as well as there, where one works and where one lives.¹¹⁷ Thus, CLS was a place where contestation over various dimensions of power transpired. These conversations sometimes developed into loose formations in somewhat of a sequential fashion—a set of critical observations might percolate in informal conversation or find expression as critiques launched from the

¹¹³ Tushnet, *supra* note 111, at 1515 n.2 (discussing CLS as a "location" where people of differing political views can "come together for political education, sustenance, and activity").

¹¹⁴ *See id.* at 1518 (stating that a central tenet of CLS is an understanding that "law is politics").

¹¹⁵ Open and frank exchange was the hallmark of CLS and for some of us, it was a refreshing alternative to the polite but stilted conversations in other formations where agreement was taken as a matter of faith and disagreement was taken to heart. While it was true that not all comers had quite the constitution for such direct exchange across all the issues, those who welcomed the opportunity for direct engagement included neophytes as well as "the heavies." As Kennedy recalls, "This straight talk was in a context of commitment and hope for a transformation of our common professional space, and it included not just frankness but also commitment to talking through rage toward reconciliation." KENNEDY, *supra* note 36 at 216.

¹¹⁶ *See* Kimberlé Crenshaw, *Post Script: Reflections on a Twenty Year Old Concept*, in FRAMING INTERSECTIONALITY 221 (Helma Lutz et al. eds., 2011).

¹¹⁷ Tushnet, *supra* note 111, at 1526.

floor of conferences or summer camps. The emergence of a central topic of debate along with a loose formation of protagonists who were advancing the discourse would mark a “turn” in CLS. These “turns” would in some ways set the stage for yet another.

As a graduating 3L, I started coming around during the gender turn, when the feminists associated with CLS—“Fem-Crits” as they were called at the time—began to take on law, legal education, and even the “white male heavies” on questions pertaining to sex, work, family, institutional power, male culture, and the like. The debates were interesting, provocative, and often hot, but at least from my vantage point, they seemed to remain all in the family. The “race turn,” however, seemed hotter, harder, and messier than the gender turn.¹¹⁸

Race approached center stage in CLS during the 1985 Fem-Crit conference¹¹⁹ where a small group of fellow-traveling people of color agreed to lead a working session on race.¹²⁰ Taking seriously the CLS commitment to workplace engagement, we organized our session around the provocative question: “what is it about the whiteness of CLS that keeps people of color at bay?”¹²¹ This was long before “whiteness studies” came on the scene, so the challenge posed by the question—to think about race not within the traditional terms of uplifting the “Other,” but through interrogating racial power from the inside out—was to some a discordant, uncomfortable and even shocking experience. Several of the usually

¹¹⁸ This observation is influenced by the fact that by the time this Author encountered CLS, some of the early engagements around gender had already occurred. However they compare, it is certain that the gender turn was not in any sense easy. As Menkel-Meadow reveals in her narration of the CLS gender turn, many of the engagements were quite vexed. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education Or the Fem-Crits Go to Law School*, 38 J. LEGAL EDUC. 61 (1988). It was the commitment to precisely this kind of frank engagement that many who were engaged with CLS understood the project to entail.

¹¹⁹ The 1985 conference was coordinated by four “Fem-Crits” in Boston: Clare Dalton, Mary Joe Frug, Judi Greenberg, and Martha Minow. In placing their own stamp on CLS, the Fem-Crits developed a yearlong planning process involving study groups across the country, and other innovations that reflected a feminist approach to organizing. See *id.* at 65. One innovation involved the simultaneous scheduling of small group sessions all on the same topic. This approach facilitated the entry of new or marginal conversations (about gender, race, etc.) by providing few options for those who were less engaged by those topics to opt out. It was through this format that minority crits entered the stage.

¹²⁰ The participation of the “minority crits” in the Fem-Crit conference was prompted by Regina Austin who in a letter to several women of color wrote that “there are a number of topics that minority female lawyers and law teachers might want to discuss with the men folk and with nonminority crits.” Austin’s call for minority participation was thus gendered from the onset as she acknowledged being “spurred to action by Muhammad Kenyatta’s piece in the latest issue of *Law & Inequality* which is entitled “‘We, Black Believers’: Momma’s Doubts About the E.R.A.’ The piece purports to explain the ambivalence of black women regarding the passage of the equal rights amendment. I was somewhat put aback by the fact that the message was coming from a less than authentic voice.” See Regina Austin, Letter to Stephanie Phillips, Aug. 28, 1984 (unpublished letter on file with author). Austin’s letter marks the fact that gender was not a mere afterthought in the early stages of what would become CRT, but was both substantively and institutionally part of its foundation.

¹²¹ Crenshaw, *Critical Reflections*, *supra* note 2, at 1355–56 (detailing efforts of CLS members of color to bring about an internal dialogue about CLS).

erudite and cool CLSers became angered by the framing of the debate leading one to denounce the session as simple “Mau-Mau-ing” that threatened to tear the organization apart.¹²²

Clearly there was in some quarters a deep resistance to the race turn as a discursive project within CLS, a resistance that was initially surprising given the movement’s ideological commitments against illegitimate hierarchy and the practical ways that CLS allies had supported the Harvard campaign. On one level, the disciplinary impulse to shut down the conversation seemed somewhat out of proportion to the nature of the inquiry being raised. While this was not the first time that race had emerged as an explosive topic on the Left, it would hardly seem that a handful of minority law professors staging what was a recognizable move within the CLS discursive repertoire could pose a threat of a 1960s type meltdown of the organization.¹²³ Equally mystifying was the similarity between the vehemence of the opposition’s repudiation of the race intervention and the shrill response of the liberal mainstream to the TWC’s challenge of Harvard’s business-as-usual approach to faculty integration. That efforts to politicize the naturalization of whiteness in both liberal and radical spaces would generate such an emotional response raised further questions about the ideological investments of some of our radical allies with respect to race.

One possible line of explanation was simple: our Left-leaning colleagues who objected to the race turn may have simply held liberal to moderate views on race. This might be taken to imply a range of stances. For instance, they may have seen racial hierarchy as a reflection of bias rather than infused in the everyday operation of every institutional space; they may have elevated the past as the source of contemporary hierarchy over the present; and they may have located these dynamics “out there” rather than inside CLS, and thus saw them as best addressed as social problems rather than institutional ones. As such, their support for greater

¹²² The origin of the term “Mau Mau” references the 1952–60 Kenyan uprising against British Colonial rule, particularly by Kikuyu insurgents. See DAVID ANDERSON, *HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE* 1–9 (2005). In Western literature and discourse, the term “to mau mau” eventually came to reference the use of aggressive, intimidating, or harassing political tactics in the context of racial conflict. See, e.g., TOM WOLFE, *RADICAL CHIC & MAU-MAUING THE FLAK-CATCHERS* 124–25 (1970). In other words, the phrase invokes a decidedly negative association with people of color who challenge racial power through threatening and aggressive tactics.

¹²³ Several observers surmised that the hostile reaction reflected anxieties about the potential replay of the contested and sometimes physically threatening environment that white radicals of the 1960s encountered with Black Nationalists. See KENNEDY, *supra* note 36. Although some members of the CLS movement were certainly active in the student activism that predated the shift to Black Power discourses, it was never entirely clear that the concerns about the destructive potential of this call to interrogate race was the product of personal experience or a sentiment passed on and shared among whites as a cautionary tale. See Peller, *Race Consciousness*, *supra* note 63, at 835 (describing the “near-total rejection” of Black nationalist understandings of racial power by whites and the role this rejection played in excluding nationalism from mainstream American discourse).

integration at the law school need not imply a more critical take on racial power nor a tolerance for open contestation around race “at home.” What was permissible or even admirable in shaking up elite law schools may not necessarily be a good thing for CLS.

Absent a robust frame through which the institutional and dynamic dimensions of racial power could be captured and discussed, what remains is simply the individual realm of good faith, common political commitments, and lack of personal bias. Within such a narrowed terrain of engagement, the fact that some resisted what they heard to be a demand for such a performance was understandable.¹²⁴ The fact that they could intuit no other way to engage a discourse centered on racial power hinted that despite the sophisticated analysis of hierarchy that circulated in CLS, some of our radical colleagues were not particularly radical in their understanding of race.

This controversial engagement over race at the Fem-Crit conference captured one of many reactions to the pending race turn in CLS.¹²⁵ There were in fact a range of responses and other sites upon which the drama

¹²⁴ Taking up this line in explaining the tensions between the various factions, Kennedy observed:

Cultural and radical feminists who were interested in coalitions with white men were also committed to confronting them very hard about their whole gendered mode of being, and minorities were no less committed to getting the issues of unconscious racism and silencing on the table. The old white male heavies were no less committed to avoiding what many of them saw as the worst aspect of seventies leftism: the tendency of nonsectarian white male radicals to just shut up and take race and gender denunciation without daring to talk back. The whole idea of “process orientation” was to surface this kind of conflict. It was often very painful for all concerned, partly because everyone felt that CLS should be a “refuge,” and everyone got mad that it wasn’t.

KENNEDY, *supra* note 36, at 217.

¹²⁵ To the extent that highlighting this particular misalignment fatally obscures the fact that there were other reactions and contests around race in CLS, it is important to be clear. The most vehement objections were as described, expressed as a fear about tearing the organization apart. Other reactions merged with an emerging critique of identity politics that then became articulated as the essentialist critique of the CRT project.

There were other less hostile responses, but some of those were expressed by mere non-engagement. As Carrie-Menkel Meadow set forth in her history of the Fem-Crits, there was a sense that after the gender turn, some of the “heavies” just wanted to get back to the real theory. See Menkel-Meadow, *supra* note 118. Duncan Kennedy also observed that some who saw both of these turns less enthusiastically than others just drifted away. See KENNEDY, *supra* note 36. Others remained and engaged, yet even within this group there were a variety of orientations to a critical race project.

Beyond the substantive questions of what is a *critical* race project (an issue around which even those who had written about race differed) there were just different levels of comfort in participating in direct internal engagement on racial power. This is not to say that there was epic resistance across the board, or that there was a total absence of racial engagement. To the extent then that this inference contributes to David Trubek’s framing of these contestations as “mythic” then it should be corrected. See David Trubek, *Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends*, 43 CONN. L. REV. 1503 (2011). But it would be rather curious indeed to suggest that there was no inter-racial tension and struggle among and between thesis advisors, mentors and friends. In fact, there was struggle, however friendly, and these substantive debates were sometimes difficult but also helpful in defining the Critical Race project.

ultimately played out. There were, for instance, splits among and between white male heavies and some of the younger white male Critics on CRT.¹²⁶ Some continued to engage the issue in writing¹²⁷ and in institutional settings¹²⁸ while others contested the terms of the project from the floor of CLS gatherings¹²⁹ and sometimes in writing.¹³⁰ An intersecting dynamic was playing out in law school hiring and faculty politics where it eventually became clear that among CLS-inhabited schools, there were some that were remarkably friendly to scholars in the emerging field, some that were receptive, and at least one site where the experiences of leading CRT scholars created the perception that it was a “no-fly” zone for CRT.¹³¹

¹²⁶ Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1491 (2011) (describing how, despite the fact that major CLS members such as Duncan Kennedy, Mary Jo Frug, and Gary Peller embraced the kind of “critical identity projects” at the heart of the emerging Race Crit movement, a “significant cohort of critics either did not engage with the race discourse at all, or reacted negatively”).

¹²⁷ See Kennedy, *Cultural Pluralist*, *supra* note 49, at 705 (arguing against what he termed the “colorblind meritocratic fundamentalism” espoused by theorists like Randall Kennedy and calling “an expansion of our current commitment to cultural diversity affirmative action” because “law schools are political institutions” and as such should “abide by the general democratic principle that people should be represented in institutions that have power over their lives”); Peller, *Race Consciousness*, *supra* note 63, at 758 (highlighting the suppressed analytics associated with Black Nationalism and calling on progressives to re-envision certain critical formulations of the paradigm as a more defensible approach to racial justice than colorblind integrationism). Alan Freeman of course had already written the classic article, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

¹²⁸ David Trubek, Director of the Institute for Legal Studies at Wisconsin Law School, provided seed money for the first Critical Race Theory Workshop. See Crenshaw, *Critical Reflections*, *supra* note 2, at 1359 (describing the involvement of and financial support provided by Trubek for the first CRT workshop).

¹²⁹ Many of the central tensions within CLS were named and well-understood within the community of participants acquainted with CLS discourse even though they were not framed as such in the written literature. For example, as Tushnet notes, the debates between “rationalists” and “irrationalists” never quite emerged in the literature in the way they are framed in his mapping of CLS, yet they are recognizable lines of argumentation. See Mark Tushnet, *Some Current Controversies in Critical Legal Studies*, 12 GERMAN L.J. 290 (1991). Essentialist and other critiques of CRT are similarly recognizable to various participants immersed in the debate. On this note, however, Tushnet’s point that “any map of positions” within CLS distorts what people actually say and think by imposing an order to assist others who seek a general orientation to the discussions. Nonetheless, providing that sort of orientation seems useful, even if doing so does make discussions within CLS appear more orderly than they actually are bears noting. *Id.* at 290

¹³⁰ See, e.g., Mark Tushnet, *Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (critiquing “narrative jurisprudence” in the works of Derrick Bell and Patricia Williams as reflecting a “flawed understanding of the relation between stories and law”). *But see* Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 14, 15 (1992–93) (critiquing Tushnet’s argument, and in particular, his focus on Critical Race theorists).

¹³¹ In 1986 Stanford was the site of a controversy involving Derrick Bell. See DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* 115–16 (1994) (discussing how the law school administration, responding to student complaints about Bell’s purportedly unorthodox treatment of Constitutional Law, set up a series of lectures by other Constitutional Law professors “to insure that [Bell’s] students would gain from the lectures what they were missing in [his] course”). Bell learned of the lecture series not from the administration but from a group of BLSA students who read a statement protesting the series at the inaugural lecture. The series was subsequently cancelled. See Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 ST. JOHN’S J. LEGAL COMMENT. 667, 668–69 (2009) (“Even though

Within these various sites and contestations a more nuanced critique of emerging CRT scholarship began to take shape. On one hand, as Peller recounts, a pre-existing critique of instrumentalist class analysis underwrote a somewhat parallel framing of early CRT work as *racialist*.¹³² In this sense, early CRT work that framed the law as a simple exercise of underlying race power was vulnerable to critique as just another base-superstructure argument. Somewhat more oppositional was a critique of some of the work as essentialist, and that the emergence of narrative in the growing canon were flights of racial fantasy. This critique emerged most forcefully in response to Patricia Williams's now-classic account of being racially profiled "shopping while Black" in New York. Critics challenged the frame of race as a container for the story, querying how "race" possibly could hold together the story of an elite African American woman's encounter at a swanky New York store with say, an everyday encounter of an African woman somewhere in Central Africa?¹³³ Packaged within this claim was the idea that for race to have any explanatory force in the context in which it was invoked, it should presumably find a fixed expression across space and time.

These engagements around the race project presented an interesting puzzle; there was clearly no need to assert some naturalizing or transhistorical content to race to understand it as a dynamic process in which law played a significant role. This much seemed rather obvious from the well-rehearsed debates about the role of law in producing hierarchy. Class was clearly not a natural or transhistorical phenomena, yet however hard or soft one's position was on how to frame law's role in constituting class relations, its materiality seemed beyond contestation. Thus, Race Crits began to search for language and frames to build a project

Professor Bell had not really deviated from the normative relevancy paradigm . . . the Dean arranged for a series of lectures to supplement or enhance Professor Bell's course."); Tom Philip, *Law Dean Apologizes to Black Prof*, SAN JOSE MERCURY NEWS, Nov. 21, 1987, at 1B (describing negative student and administration reactions to Professor Bell's Constitutional Law class and the Dean's decision to offer alternative lectures).

¹³² See Peller, *Race Consciousness*, *supra* note 63, at 836; see also CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 2, at xxiv (discussing the limitations of an "instrumentalist" account of law).

¹³³ One of the earliest critiques of "essentialism" within CLS discourses was deployed against Patricia Williams's description of a discriminatory encounter with a store clerk in Greenwich Village. Williams's story of "shopping while Black" profiling prompted pushback on a number of fronts. Williams wrote a story about the experience and affixed it to the storefront. She then wrote an essay of her experience for a law review. As the story about the story circulated within CLS-CRT circles, some anti-essentialist critics queried how race could possible constitute a generative frame given the instability of race across the social field. As if to echo this response the editors of the review told Williams that they did not publish unverifiable events. After numerous revisions the review removed the name of the store, altered Williams's narration of the event and removed any references to race. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-51 (1991); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987). The episode became a touchstone in the debate over Critical Race scholarship and the myriad publishing conventions that discipline discourse about race.

that was conversant with this sensibility.

D. *The "Sounds of Silence"*

Several of the fledgling Race Crits who had staged the intervention at the Fem-Crit conference agreed that the discussion should not be laid to rest either by fears that a sustained interrogation of race would destabilize CLS or by assumptions that such an undertaking was insufficiently tied to the intellectual agenda of the movement.¹³⁴ The opportunity to introduce race as both a discourse about the racial politics within the movement as well as an intellectual project that warranted sustained interrogation within a CLS framework came with the next CLS conference. The theme of the "Sounds of Silence" conference, co-sponsored by UCLA, USC, and Loyola law schools, was framed to highlight the institutional and discursive mechanisms that policed the boundaries of racial discourse both within CLS and within the legal academy more broadly.¹³⁵ There, for the first time, scholars of color took the central stage of the CLS conference and voiced some of the standard lines of contestation that would eventually become the prevailing themes of CRT. In addition to addressing the silencing conventions of legal publishing,¹³⁶ and calling for epistemological re-centering of legal subjectivity,¹³⁷ scholars of color took up what was quickly becoming a dominant debate within CLS: the critique of rights.¹³⁸ The debate spawned several articles and has been framed as

¹³⁴ Letter from Kimberlé Crenshaw to Regina Austin, Richard Delgado and others (inviting them to join a discussion with several other participants of the Fem-Crit conference to develop a strategy to center this debate at the upcoming CLS conference) (Aug. 3, 1986) (on file with author); see also Crenshaw, *Critical Reflections*, *supra* note 2, at 1356–58.

¹³⁵ Key organizers from UCLA included CLS "heavy" Rick Abel, Fem-Crits Christine Littleton Carrie Menkel-Meadow and Fran Olsen, emerging Race-Crits Richard Delgado, Neil Gotanda, Isabel Gunning and this Author, and allies such as Jose Bracamonte, Larry Lawrence and Leon Letwin. The eventual format of the conference was partly influenced by the Fem-Crit conference both in terms of its plenary plus breakout formats and the substantive orientation toward the topic of race. While it was agreed that race would be the conference theme, there was some difference of opinion on how the theme would be addressed. For example, as Neil Gotanda reported, at the early meetings, there were initially no plans to interrogate the fall-out from the prior conference. For the minority crits who facilitated those sessions, it was difficult to imagine how to proceed with a conversation about race "out there" without addressing race "in here." See Neil Gotanda, Memoranda on CLS Race Conference (Nov. 1986) (on file with author). As the plans took shape, the committee incorporated focal points suggested by minority crits, which resulted in the plenary that led to several early publications, and "guest" appearances by notable scholars Renaldo Acuna, bell hooks, and Cornel West. The conference represented the first functional embodiment of the race turn.

¹³⁶ Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440–47 (1987) (arguing that CLS silences minorities).

¹³⁷ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325–26 (1987) [hereinafter Matsuda, *Looking to the Bottom*] (arguing that grounding the discourse in the perspective of actual victims of racial oppression would reframe the CLS movement and help it to address the standard critique of CLS as over-idealized and inaccessible).

¹³⁸ Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1341–42 (arguing that the CLS critique of legal consciousness overlooked the relationship of racism to hegemony); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L.

the central tension between the emerging Race Critics and key players within the CLS movement.

The so-called rights critique was actually a multifaceted debate that included hard and soft lines on both sides. In some contexts, the critique was about the utility of rights discourse, framed primarily in terms of the indeterminacy of law more broadly,¹³⁹ and the dangers of articulating demands in the rhetoric of law rather than the language of needs.¹⁴⁰ Still other iterations of the critique took on a more psychoanalytic spin that highlighted the role of rights discourse in sustaining a political imaginary of alienation and disempowerment.¹⁴¹ Such imaginaries not only reinforced the belief that “things pretty much have to be the way they are” but also undermined the possibility of authentic connection and intersubjectivity that was essential for transformative collective action. For many rights critics, rigorous deconstruction—trashing—was the analytic tool of choice to unlock the possibilities that remained entrapped within the confines of legal consciousness.¹⁴²

Contesting these criticisms were scholars who disclaimed the presumed over-reliance on rights, but instead regarded rights discourse as a strategic rhetoric necessary to engage the state in resisting and dismantling racial power.¹⁴³ While some Race Critics emphasized the saturated nature of racial power by critiquing the notion that there was some space outside legal discourse from which to resist, others challenged the idea that it was rights consciousness rather than racial power that created the alienating imaginaries that undermined coalition.¹⁴⁴ Advancing the notion that white race consciousness was itself a pillar of social hierarchy, critics of the

REV. 401, 404–06 (1987) [hereinafter Williams, *Alchemical Notes*] (arguing that the CLS rejection of rights theory ignores “the degree to which rights-assertion and the benefits of rights have helped blacks, other minorities, and the poor.”).

¹³⁹ Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1371–82 (1984) (arguing that because rights, like law more generally, are indeterminate, they can provide “only momentary advantages in ongoing political struggles”).

¹⁴⁰ *Id.* at 1386 (“It is not just that rights-talk does not do much good. In the contemporary United States, it is positively harmful.”).

¹⁴¹ Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (characterizing rights discourse as “alienating” and the “schema” of legal rights as intended to “make the reproduction of [this] alienation a condition of group membership”).

¹⁴² See Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230–31 (1981) (arguing for rigorous trashing as the means to disrupt legal consciousness and open up possibilities for a re-imagined social order). In fairness to Freeman, it should be noted that he took this position in discussing the correct “path” for legal scholars, and not for some larger audience that might include the civil rights community.

¹⁴³ See, e.g., Dalton, *supra* note 136, at 440 (“The failure or refusal to develop a positive program and the dismissive critique of rights discourse are perhaps the most significant theoretical divides between classic CLS and progressive people of color.”).

¹⁴⁴ See, e.g., Williams, *Alchemical Notes*, *supra* note 138, at 405 (“In a semantic, as well as a substantive sense, then, I think that CLS has ignored the degree to which rights-assertion and the benefits of rights have helped blacks, other minorities, and the poor.”).

rights critique argued that trashing whiteness could be at least as effective as trashing rights in setting the pathway toward progressive futures.¹⁴⁵

Of course, no summary can give full expression to the depth and nuance of the debate. The published versions are merely artifacts of a sustained debate that was as much about the formal topic itself as it was about different ways in which racially-situated groups engaged and understood the other. This subtext often found its way into off-stage exchanges where the critique of rights sometimes struck CRT folks as manifesting a certain naiveté about race, and the defense of rights struck some CLS types as a manifestation of naiveté about law. Where some rights critics may have seen transformative possibilities in stepping outside of legal imaginaries, some Race Crits on the other hand saw an anemic understanding of racial power.

The “Sounds of Silence” was a site where many of these themes were deliberately corralled and engaged both in plenary sessions and in smaller subgroups. In this sense, the conference was a precursor to the eventual emergence of the CRT workshop both substantively and institutionally. It marked the first time within CLS that scholars of color met formally as a caucus to talk explicitly about common scholarly interests and critiques.¹⁴⁶ This caucus in turn created a space for white CLSers to meet to discuss whiteness presumably without fear of “mau maung.”¹⁴⁷

The conference was an important transitional moment. It moved to center stage a variety of debates about race both within CLS and also within the academy more broadly.¹⁴⁸ The conference clarified that an emergent collective existed that occupied a unique intersection, a space both within and between CLS and liberal race discourses. We were of course aligned with CLS in terms of its overall orientation toward the institutionalized reproduction of hierarchy. Yet it was in the moments of contestation over the racial contours of this commitment that efforts to further refine the race turn in CLS became a viable intellectual project.

¹⁴⁵ Crenshaw, *Race, Reform and Retrenchment*, *supra* note 1 (arguing the white race consciousness is a key pillar of social hierarchy).

¹⁴⁶ Crenshaw, *Critical Reflections*, *supra* note 2, at 1358.

¹⁴⁷ *Id.* at 1358–59.

¹⁴⁸ The conference also presented the occasion for a preview of one of the first sustained critiques of CRT scholarship. Randall Kennedy attended and began to articulate what would eventually emerge in the *Harvard Law Review* as a critique of Derrick Bell, Mari Matsuda, and others. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1745–49 (1989) (arguing that critical race theorists have not proven their claims of racism in the legal academy and fail to support persuasively their claim that legal academic scholars of color produce a racial brand of valuable scholarship). Ironically, Kennedy’s critique led to greater notoriety for CRT, including Jon Weiner’s *Law Profs Fight the Power*, THE NATION, Sept. 4, 1989 (favorably reviewing the scholarship that Kennedy criticized).

E. *Creating the CRT Workshop*

Although the first convening of the CRT Workshop marks the formal inauguration of CRT, there was a pre-workshop formation that often gathered in hotel rooms and in other offline spaces before, during and after professional conferences, specifically, CLS and AALS. These speakeasy spaces were organized by word-of-mouth invitations to CLS-leaning people of color and were places where the group could discuss and sometimes vent about the politics and the dialogues taking place on the public stage. News about developments in the law school world generated intense conversation, particularly when the topic turned to the sometimes-lonely circumstances of many people of color who were the only non-white faculty in their law schools. People attracted to this space began to gain familiarity with each other and looked forward to finding opportunities to connect.

Equally important, these informal gatherings provided a mirror from which to see that our viewpoints were not singular, but were, in important ways, shared. These informal exchanges hinted that there was a “there” there—something more than a simple repertoire of oppositionalist positions that we occupied within a variety of liberal and critical debates about race. With this recognition, it was only a matter of time before the “speakeasy” format would give way to an organized strategy to help define our emerging sensibilities.

That opportunity finally came when a critical mass of minority scholars who had been active in CLS came together for an extended time period at the University of Wisconsin. CLS veterans Stephanie Phillips, Teresa Miller, Neil Gotanda and this Author joined with the recently hired Richard Delgado to form an organizing committee to plan a convening on “New Developments in Minority Scholarship.”¹⁴⁹ David Trubek, at the

¹⁴⁹ The coming together of this critical mass at Wisconsin was not mere happenstance. This condition of possibility was the product of the Wisconsin Law School’s professional leadership both in terms of faculty integration and scholarly innovation. Stephanie Phillips, Terri Miller, and this Author were all in residence at the University of Wisconsin Law School at that time. The first two were current Hastie Fellows and this Author was in residence as a past Hastie and Visiting Fellow at the Institute for Legal Studies. Neil Gotanda was a key collaborator and frequent guest at law school. Richard Delgado and Linda Green had joined the faculty in a noteworthy effort by the University of Wisconsin Law School to recruit scholars of color en masse. This strong presence of minority scholars owes much to Professor Jim Jones, the architect of the Hastie Fellowship, one of the most influential models in creating a pipeline for underrepresented scholars to gain access to teaching jobs in the academy. While Jones was not associated with CLS, he nonetheless lent his support to the project as part of his overall commitment to professional development of minority scholars. His pivotal role in establishing a workable approach to affirmative action created an environment at Wisconsin that surely carried weight in the law school’s hiring strategies. More widely known than Wisconsin’s role in diversifying the legal professoriate was the Law School’s reputation as the home of the law and society tradition, most closely associated with legal historian Willard Hurst. Hurst was the center of a paradigm-shifting nucleus of scholars whose work set the stage for the birth of the Law and Society Association and Critical Legal Studies, both projects in which the Institute’s Director, David Trubek,

time, Director of the Institute for Legal Studies at Wisconsin and a co-founder of CLS, was amenable to the proposal and agreed to provide institutional support for a four-day summer retreat. With the alignment of a working concept and institutional resources, the first CRT Workshop became a reality.¹⁵⁰

How then did we arrive at a convent with the twenty-four people who attended the first CRT workshop?¹⁵¹ First, we reached out to the usual suspects—the folks who had organized and been key players in the unfolding discourse on race within CLS. Added to this core group was another set of scholars who occasionally turned up at CLS events, and a slightly larger group of scholars whose scholarship suggested an ideological and epistemological orientation toward the project. To identify others, we asked questions that by today's lights seem almost incomprehensible, namely, who were the scholars that were demonstrably open to engaging a race project that was left of the liberal center? Some characters we knew and others we simply cold-called after reading their work.¹⁵²

We borrowed a lot of different strategies to create the workshop. One of us had traveled with CLS to Germany and returned with ideas about how to facilitate a certain kind of intellectual exchange designed to draw out specific connections and common themes among potentially congruent projects.¹⁵³ Also influential were Martha Fineman's feminist workshops that sought to develop a methodology orientated toward building the field

played a leading role. Thus, Wisconsin's role institutionalizing CRT seems fitting in light of the school's history in facilitating innovation outside the boundaries of conventional legal education.

¹⁵⁰ Crenshaw, *Critical Reflections*, *supra* note 2, at 1359 (describing the involvement of, and financial support provided by, Trubek for the first CRT workshop).

¹⁵¹ The first CRT workshop was held on July 8, 1989 in Madison, Wisconsin. See, e.g., Angela Onwuachi-Willig, *Celebrating Critical Race Theory at 20*, 94 IOWA L. REV. 1497, 1497 (2009).

¹⁵² John Calmore, for example, had written an article on housing and segregation that resonated with our work, yet as his response revealed, cold calling out of the blue didn't always generate the most welcoming response. Calmore's response was memorable, both because of his initial skepticism, framed as "Who are you people? I don't do that kind of stuff," and his subsequent confirmation that in fact, he did "do that kind of stuff." Calmore arrived at the clearing and became a CRT standard bearer with his trenchant and brilliantly conceived articles. See, e.g., JOHN O. CALMORE, CRITICAL RACE THEORY, ARCHIE SHEPP, AND FIRE MUSIC: SECURING AN AUTHENTIC INTELLECTUAL LIFE IN A MULTICULTURAL WORLD (1992).

¹⁵³ CLS participated in an international conference in 1986 at which this Author presented an early iteration of a CRT critique of antidiscrimination law and the critique of rights. Entitled "German and American Traditions in Social Jurisprudence and Critical Legal Theory," the conference represented one of many subsequent interfaces between CLS in the U.S. and potential counterparts in Europe. An edited collection of the conference papers was subsequently published. See CHRISTIAN JOERGES & DAVID M. TRUBEK, CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE (1989). This book was reissued in 2011 with the addition of contemporary commentary. David M. Trubek et al., "Critical Legal Thought: An American-German Debate" *An Introduction at the Occasion of its Republication in the German Law Journal Twenty-Five Years Later*, 12 GERMAN L.J. 1 (2011), available at http://www.germanlawjournal.com/pdfs/FullIssues/Vol_12_No_01.pdf.

of feminist legal theory.¹⁵⁴ As organizers, we wanted to get beyond the standard conference model of participants presenting their current works-in-progress. The point was to identify common threads that ran through all of the work and to synthesize those into a mosaic of ideas that would constitute an initial mapping of CRT. Recognizing that authors may be too close to their work to make such links themselves, we assigned others the task of presenting the argument and integrating the various themes into a broader frame. This strategy produced three different levels of analysis for any given work that in turn broadened the content that was available to synthesize into a whole. The participants not only received direct feedback on their conceptualization and methodologies, but as a group, we were able to link our projects together within an emerging ideological frame. The project thus grew into its name: Critical Race Theory.

It might be easy to underestimate the learning process and group negotiation that engaged the early participants in CRT. Forging connections into something greater than the sum of its parts involved exceptional labor, intellectual creativity, and considerable patience. In our second workshop, for example, it was clear that there was a critical, theoretical backdrop that some participants had mastered and that others wanted to learn.¹⁵⁵ Patricia Williams and Kendall Thomas created seminars with titles such as: “Liberalism and its Critics”; “Post-Structuralism and the Concept of Race”; “Race and Political Economy”; and “Intellectuals, Race, and Power.” The topics of our sessions reveal our efforts to become conversant with a set of critical texts and a range of analytical tools. We became students of each other, and learned to respond to, and sometimes fight against, the concepts that were being mobilized to discipline or deflate the CRT project.¹⁵⁶

III. WHY LAW? ASSESSING CRT’S CONDITIONS OF POSSIBILITY

These were the formative years of CRT, a period of uncertainty, excitement, and contestation. There are, of course, other important

¹⁵⁴ Martha A. Fineman started the Feminism and Legal Theory Project in 1984 at the University of Wisconsin Law School. The project eventually moved to Emory University Law School in 2004, where it continues to foster interdisciplinary examinations of law and policy topics particular to women. *The Feminism and Legal Theory Project*, EMORY LAW, <http://www.law.emory.edu/academics/academic-programs/feminism-legal-theory.html> (last visited Mar. 31, 2011).

¹⁵⁵ The second CRT Workshop was held on June 13, 1990 in Buffalo, New York followed by the Wisconsin Conference on Race and Critical Theory, November 1990 organized by Linda Greene. *See, e.g.*, Phillips, *supra* note 2, at 1250 n.5.

¹⁵⁶ The Workshop served as a vehicle to carry the intellectual project forward, but CRT continued as an intellectual field beyond the confines of the Workshop. As Stephanie Phillips noted, some people who write in the field never attended the Workshops and some who attended do not necessarily consider themselves to be writing in the field. Moreover, by the mid-1990s, some of the earlier participants separated from the Workshop for a variety of reasons while new generations of Race Critics came online. *See id.* at 1246–47.

chapters to be told about the CRT workshops, including the emergence of internal debates concerning the intersections of race with other systems of oppression; struggles over substance or identity in defining the parameters of participation; debates about the role of whites in the project; tensions about the politics and scope of the “white over black paradigm;” and questions about whether subsequent formations such as LatCrit or QueerCrit are turns, spinoffs, or splinterings of CRT. While a fuller exploration of these developments is outside the scope of this Article it is important to note that these are ongoing debates with new chapters still to be written. The principle inquiry in this Article is to join the generative movements of CRT to the contemporary challenge of post-racialism. To preface the contemporary significance of this history, I highlight here what appear to be key conditions of possibility in the unfolding of CRT—namely its institutional, temporal, and epistemological dimensions.

A. *Institutional Infrastructure*

As noted before, many of the critiques of racial power that were amplified and integrated within CRT had been generated by leading race scholars for nearly a century.¹⁵⁷ Yet this history of critical race critiques outside of law actually heightens the question of why the CRT Movement emerged in law. First, as noted above, although the tradition of critical thinking about race was alive for decades, numerous factors clearly suppressed the viability of a collective project organized around counter-disciplinary practices within the established disciplines. The small number of racial minorities in the academy also militated against any organized contestation at any level, but more tellingly, the consequences of foregrounding conceptions of race that were at odds with prevailing thinking were tragically debilitating for academics of color.¹⁵⁸ Even

¹⁵⁷ See James Turner & C. Steven McGannand, *Black Studies as an Integral Tradition in African-American Intellectual History*, in “FREE YOUR MIND”: JAMES TURNER AND THE STRUGGLE FOR AFRICANA STUDIES (Scot Brown & Kimberlé Crenshaw eds., forthcoming) (tracing the roots of Black studies throughout the 20th century, highlighting the groundbreaking studies of Du Bois, the institutionalization of Black history by Carter Woodson, and the multiple ways that scholars in this tradition consistently challenged prevailing paradigms that served to justify, manage and modestly reform racial dominance); see also James E. Turner, *Africana Studies and Epistemology: A Discourse in the Sociology of Knowledge*, in THE NEXT DECADE: THEORETICAL AND RESEARCH ISSUES IN AFRICANA STUDIES (James E. Turner ed., 1984) (“The field has a rich intellectual legacy extending from at least the early nineteenth century, based on the worlds of such people as Edward Wilmont Blyden, Martin Delaney, Francis Harper, Benjamin Brawley, and Casely Hayford, and from the beginning of this century, with W.E.B. Du Bois, Carter G. Woodson, Leo Hansbury, Arthur Schomburg, Charles S. Johnson, J.A. Rogers, and Ida B. Wells, to name a few.”).

¹⁵⁸ Among the path-breaking intellectuals who might be considered the forerunners of CRT are W.E.B. Du Bois and Oliver Cox. Both of their academic careers—already circumscribed by race—were further stunted due to their repudiation of racial orthodoxy. See Sean Hier, *Structures of Orthodoxy and the Sociological Exclusion of Oliver C. Cox*, 11 RESEARCH IN RACE AND ETHNIC RELATIONS 304 (2000) (explaining that Cox’s work “came into conflict with the ahistorical, functionalist-oriented orthodoxy of ‘race relations’ and American stratification studies, as well as a

intellectual giants like Du Bois were stymied by rank racial gatekeeping within an academic power structure that tightly regulated the boundaries of disciplinary inquiry.¹⁵⁹ When Black and Ethnic Studies Programs finally did become a force, it was through transcending traditional disciplinary boundaries rather than setting up house within the confines of any of them.¹⁶⁰ Given the transdisciplinary nature of Ethnic Studies—certainly a condition of its possibility—the emergence CRT in one of the more conservative disciplines is all the more interesting.

Unlikely as it initially seems, it is the particularly conservative character of the legal discipline that spawned a series of counter-disciplinary projects that created a possibility for CRT.¹⁶¹ The possibilities

considerable proportion of the epistemological orthodoxy of the sociological elite, centered at the University of Chicago”). Cox’s proposition that racism is “rooted in the social system, and it can be corrected only by changing the system itself” was at odds with the leading sociological school headed by Robert Parks. With a constant focus on political economy rather than on prejudicial belief structures, Cox anticipated by decades the contemporary critique of “discrimination” models grounded in notions of individual bias. Ironically, perhaps, some of the characters that inflicted the most damage on the potential trajectory of critical race through the twentieth century were liberal scholars who were otherwise celebrated for their support of Black studies. Melville Herskovits, sometime regarded as the father of Black Studies, occupies such a mixed position. Jerry Gershenhorn writes:

Although Herskovits often supported the work of black scholars like Ralph Bunche and Johnnetta B. Cole, he criticized certain activist black scholars—notably Carter G. Woodson and W.E.B. Du Bois—who he considered propagandists rather than scientists because of their social-reform orientations. By consistently promoting the benefits of detached scholarship without regard to social reform goals, Herskovits denied the political nature of scholarly inquiry. Indeed, he failed to admit that his own egalitarian values and assumptions influenced his work. Thus his institutional impact on the development of black studies was mixed. While he generally acted to include black studies, black scholars and black students in the mainstream of academia, at times he hindered progress toward that goal.

JERRY GERSHENHORN, MELVILLE J. HERSKOVITS AND THE RACIAL POLITICS OF KNOWLEDGE (2004).

¹⁵⁹ See, e.g., DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963, at 444–47 (2000) (detailing how Melville J. Herskovits, the “father of African studies” consistently undermined Du Bois’s efforts to produce the “Encyclopedia of the Negro Project”).

¹⁶⁰ James Turner, architect of the Africana school of Black Studies explains that the mid-century emergence of Black studies, rooted in the social movement of the 1960s, was grounded in a conception of knowledge that “would supersede the traditional disciplines by pursuing a holistic structural interpretation in its research and teaching methodology of the black experience. Essentially this means a commitment to an interdisciplinary approach in the construction of both social theories and research paradigms of the various dimensions (i.e., social, cultural, political-economic) of African-American societies.” This perspective was shared by many of the leading voices in Black studies who argued against the traditional disciplinary boundaries and their epistemological assumptions. To this point Turner argues: “Black Studies represents a disillusionment and critique of ‘certified knowledge,’ and the historical currents of disillusionment with the mainstream are also a current of progressive contribution towards a more adequate social analysis and public policy. Therefore, Black Studies is a ‘reconstruction discipline,’ . . . a synthesis of what its criticisms imply, convergence with theories reviewed, and the philosophic methods of its pedagogical emphasis.” Turner, *Africana Studies and Epistemology*, *supra* note 157.

¹⁶¹ In this sense, one might draw a parallel to rigid systems of racial classification and segregation U.S. and South Africa as one of the conditions upon which a mass, cross-class movement was made possible. By contrast, it has been argued that more fluid racial regimes are also more resistant to mass mobilizations. See, e.g., MICHAEL GEORGE HANCHARD, ORPHEUS AND POWER (1998).

that a radical race project would emerge within a conservative discipline such as law were bolstered by the fact that the discipline had already been challenged by a series of critiques over its foundational claims. Well-respected scholars from elite institutions had famously set about the project of deconstructing core legitimizing principles, setting in motion a genealogy of critical engagement that included Legal Realism, the Law and Society Movement and eventually, Critical Legal Studies. It is not exactly a straight line, ideologically speaking, and the underdeveloped engagement with race in each of these projects hints at their limitations; but the presence of organized, dissenting voices not only created cracks in the façade of law, but also established institutional beachheads upon which subsequent mobilizations could be launched.

Casting the genealogy in this direction does not suggest that there was a critical race sensibility hidden in the DNA of these projects that naturally evolved into CRT. Yet what this history of disciplinary contestation did provide was discursive spaces—both organizational and institutional—in which these sensibilities would be articulated and further refined in the context of law. Race discourse was a “moving target” in the 1980s. The courts, the public arena, our law schools, and colleagues in CLS provided a constant flow of texts against which our developing critiques were pitched. We were both inside and outside of the communities we were struggling alongside and against, trying to theorize what we were living with and embattled within. These engagements highlighted the ways in which shared frames helped define and normalize various dimensions of CRT while various misalignments helped fine-tune its contours.¹⁶²

The dynamic of misalignment within a broader frame of a coalition was not discovered on the pages of law reviews and books. These debates were situated and made visible within specific institutional settings that were themselves products of critical intervention and resistance to traditional thinking about law. It was in this space that common ground and oppositionalist engagement set the stage for a plethora of the early CRT articles.¹⁶³ Indeed, many of the early publications began as performances that had taken place at certain conferences.¹⁶⁴ As discussed above, the Critique of Rights¹⁶⁵ was a particular debate that became a

¹⁶² Morris, *supra* note 16, at 534–35.

¹⁶³ See Matsuda, *Looking to the Bottom*, *supra* note 137, at 330–32 (exploring the critiques of CLS and the responses to them).

¹⁶⁴ Introduction to RICHARD DELGADO & JEAN STEFANIC, *CRITICAL RACE THEORY: THE CUTTING EDGE*, at xviii (2d ed. 1999); Mark V. Tushnet, *Critical Legal Studies*, *supra* note 111, at 1515. For an account of the development of the earliest of these conferences, see generally John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). For a list of the first eight CLS Conferences, see *id.* at 398 n.25.

¹⁶⁵ For further background, see Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178, 183–84 (Wendy Brown & Janet Halley eds., 2002).

contentious issue in summer camps and conferences, and finally emerged as a series of articles in pages of law reviews.¹⁶⁶

Indeed, the institutional space that was CLS was a particularly important arena as the momentum for racial reform reversed. It bears noting that in this entire discursive struggle, early CRT scholars were writing with and to specific audiences. We were able to write anticipating the likely counter-arguments because we were in active dialogue with colleagues with whom we both agreed and disagreed. Writing into such a context was far more enabling than writing into the ether. At the same time, while the engagement within CLS's discursive space helped refine the particular dimension of CRT, it is important to recognize that scholars of color came into that space with ideas, paradigms, historical references and orientations that were already shaped. Their substantive ideas were influenced by their lives as people of color and the paradigms of thought developed by generations of thinkers who made this subjectivity the center of their scholarly production. This in no way minimizes the particular flavor CLS brought into CRT, but it highlights the greater institutional role that the organization and the individuals within it played in shaping CRT's possibilities.

Importantly, it is not simply or even primarily that Crits shared a set of "ideas" that marked this relationship as constitutive but more specifically that the relationship with CLS facilitated access to networks and spaces that were artifacts of accumulated racial power within the academy.¹⁶⁷ Access to the professional networks necessary for hiring, publishing, and promotion were, to a significant degree, matters of borrowing what was in some ways accumulated racial capital. That CLS was a left space did not fundamentally alter the fact that its own condition of possibility was its whiteness. The likelihood that an entirely independent association of left-leaning scholars of color could sustain such a formation was virtually nil.

What grounded the racial interventionist dimension of CLS was that important CLS allies were aware that whiteness was an important condition of CLS's being. Thus, while some within CLS may have heard the call to interrogate whiteness through the liberal lens of individual bias and guilt, others understood the engagement as a call to intervene against the systemic dimensions of racialized knowledge production and hierarchy. As such, the alliance-building project around race as understood by a significant cohort of white Crits was not framed in liberal integrationist

¹⁶⁶ See *supra* notes 138–48.

¹⁶⁷ Thus, it is unquestionably true that CRT's emergence was facilitated by the fact that CLS existed, and that some critical mass of thinkers within that formation engaged and supported the project. But, even this recognition cannot be located outside the economy of race in which we all were embedded. It is important to note that the academy, like virtually any other professionalized industry in the U.S., was racialized space.

terms but in explicitly redistributive terms.¹⁶⁸ This conception generated a different orientation both to racial discourse in general (as in considerably less alarm that racialized subjects might actually want to talk about racializing dynamics) and greater recognition of the role of group formation in laying claim to discursive real estate within the movement.

B. *Temporal Opportunity*

An equally important factor in the emergence of CRT was the gravitational force of the centrist projects of liberal legalism that were unfolding in the 1980s. As I have set forth above, when CRT came into existence, the spirit of insurgency still hung in the air. Sociologists might call this a period of continuously rising expectations. Affirmative action was still permissible. Racism remained speakable. Few people had ever heard of Clarence Thomas. Yet the consequences of the civil rights retreat and the limited scope of racial reform were becoming increasingly apparent.

The ideological terms upon which this slowed course of legalized reform would be rationalized was being hashed out at the same time that the unrest that rocked the university system in the late 1960s and 70s was shaping the experiences and expectations of a new generation of students in American colleges and universities. This new cohort included activist students of color emerging from academic programs and community organizing campaigns with intellectual and political sensibilities that were at odds with the status quo-oriented logics of mainstream institutions.¹⁶⁹

¹⁶⁸ For example, Duncan Kennedy, whose argument for affirmative action was grounded in a political power argument that was broadly redistributive has stated: “The political argument includes the idea that minority communities can’t compete effectively for wealth and power without intelligentsias that produce the kinds of knowledge, especially political or ideological knowledge, that will help them get what they want. To do this, they need or at least could use some number of legal academic jobs.” See Kennedy, *Cultural Pluralist*, *supra* note 49, at 713–14. Kennedy’s argument echoes James Turner, who frames Africana studies as

Education is not just the development and teaching of factual information, but is also the primary means for imbuing a people with social values, certain political beliefs, and a specific cultural character. Furthermore, in any social system, teaching is done within definite ideological parameters that engender a common frame of reference and orientation among the people. The assumptions a person conceives will in large measure, influence the definitions that person will accept, which in turn establishes conclusion held to be truths, thus forming one’s perception of reality. Analysis of social process flows from this process.

See Turner, *Black Studies and a Black Philosophy of Education*, in BROWN & CRENSHAW, “FREE YOUR MIND,” *supra* note 157. Both Turner and Kennedy thus regard academic resources in terms of their political function. “Basic to the teleology of Africana Studies is the application of knowledge to promote social change. This primary tenet has been the focus of some controversy.” See James E. Turner, *Africana Studies and Epistemology: A Discourse in the Sociology of Knowledge*, in THE NEXT DECADE (James E. Turner ed., 1980).

¹⁶⁹ Typical of this cohort were many of the leaders of the TWC. Mari Mayeda, for example, notes that her parents, Californians both interned during World War II, were friends with another Japanese American family whose father was a lawyer. She remembers: “I heard from them all about the anti-

Many of the students and young faculty entering legal education in the late 1970s and early 1980s shared not only a common background in student and community activism, but also an orientation toward racial power and inequality shaped by ethnic studies programs that the generation before them struggled to establish.¹⁷⁰ Beyond the earlier battles over mere entry

war protests from the parents and older siblings who attended. I knew about the Third World Strike at SF State. . . . I can't even count the number of times I have seen the movie 'On Strike.'" Mayeda recalls volunteering with United Farmworkers Union in high school, and even then having a keen interest in insurgent knowledge: "I did a lot of reading on my own—being in Oakland, this included things like *Soledad Brother*, *Soul on Ice* (which our library had in the reserved section—you needed permission to check it out), the autobiography of Malcolm X and a paperback history of Asian Americans, African Americans, Native Americans and Latinos." Mayeda sought ethnic studies courses at Davis but was unable to minor in Asian American studies since the concentration was not offered. By the time she reached Harvard and heard about the Third World Coalition, "the concept was so familiar, that no explanation was needed." See Correspondence between Mari Mayeda and Kimberlé Williams Crenshaw (on file with author). Similarly, Cecelie Counts recalls entering Stanford as a seasoned organizer, looking to study the relationship between poverty & race. Concluding that Stanford was not the best place to search for those answers, she transferred to Howard and majored in African American Studies and Economics. Counts entered HLS with the goal of helping newly "independent" countries gain power over the multi-national firm and returned to political organizing/ "lobbying" upon graduation. Other Coalition members such as George Bisharat, Cecil McNab, Mari Matsuda, and Ibrahim Gassama share similar accounts of early activism and intellectual exposure to critical thinking about social power. See *supra* note 102.

¹⁷⁰ In the late 1960s, following the Civil Rights and anti-war movements, American college students began to actively call for changes in higher education. Students of color and white allies challenged their institutions' predominantly white administrations and faculties and demanded better access to higher education, changes in the curriculum to carve a space for multiculturalism, recruitment of more professors of color, and the creation of ethnic studies programs. Beginning at San Francisco State University, and at the University of California at Berkeley and Santa Barbara, ethnic studies programs spread throughout the country. See Evelyn Hu-DeHart, *The History, Development, and Future of Ethnic Studies*, 75 PHI DELTA KAPPAN 50, 50–51 (1993) (reviewing the history and development of Ethnic Studies departments). Student activism continues to shape and perpetuate the development of new Ethnic Studies departments, albeit in an institutional and political environment much changed from that of the 1960s. Mitchell Chang, *Expansion and its Discontents: The Formation of Asian American Studies Programs in the 1990s*, J. ASIAN AM. STUD. 181 (1999) (chronicling the development of Asian American Studies and students activists' role in demanding new programs, arguing that the academic climate of the 1990s and today allow Asian American Studies greater "institutional acceptability" today). See generally SUCHENG CHAN, IN DEFENSE OF ASIAN AMERICAN STUDIES: THE POLITICS OF TEACHING AND PROGRAM BUILDING (2005) (reflecting the controversies surrounding the development of Asian American and ethnic studies and arguing for its pedagogical epistemological and political sign); STEVE LOUIE & RUSSELL LEONG, THE MOVEMENT AND THE MOMENT (2002) (chronicling the development of Asian American Studies); Ramon A. Gutierrez, *Ethnic Studies: Its Evolution in American Colleges and Universities*, in MULTICULTURALISM: A CRITICAL READER 157–67 (David Theo Goldberg ed., 1994) (discussing how ethnic studies became institutionalized differently for different groups); George Lipsitz, *Blood Lines and Blood Shed: Intersectionality and Differential Consciousness in Ethnic Studies and American Studies*, in A CONCISE COMPANION TO AMERICAN STUDIES 151–71 (John Carlos Rowe ed., 2010) (arguing that ethnic studies offers comparative and relational approaches in response to age of repudiation and co-optation of civil rights movement victories); Angie Chabram-Demersesisan, *The Chicana/o Cultural Studies Forum* (a collection reflecting the importance of interdisciplinary ethnic and cultural studies in scholarly research); Jason Ferreira, *All Power to the People: A Comparative History of Third World Radicalism in San Francisco, 1968–1974* (2003) (unpublished Ph.D dissertation, UC Berkeley) (providing a

into white institutions, struggles over the terms of knowledge production had become a new frontier in the academic debates over racial justice.

Legal education attracted many of these students who had come of age in the waning years of the post-Civil Rights Movement. Law students in this cohort entered academia with the notion that sit-ins and other modes of protest were appropriate avenues of action to challenge the foot dragging of recalcitrant institutions.¹⁷¹ Those who cut their activist and intellectual teeth in the universities of the 1970s and early 1980s emerged from these experiences with histories of contesting the institutional terms of higher education through direct action as well as through intellectual critique.

Given the unraveling of the reformist movement that would soon be in full swing as the Reagan courts came online, entry into law schools at this point was somewhat akin to being in the officer's club in a war zone. As the process of retrenchment gathered speed in the courts, the rationalizing dimension of legal discourse became especially visible in law schools. Battles were raging just over the wall, it seemed, but the business at hand was to achieve technocratic competence in manipulating legal rules. This in turn required shuttering the mind to pretty much everything that the activist cohort had learned.¹⁷² Exposure to these routinized dimensions of legal training not only pointed to the self-referential and in some ways, bankrupt notions of merit, they also revealed how the discipline of law underwrote a highly contestable status quo.

C. *The Politics of Law*

What remains to be added to this temporal explanation is what precisely it was about law that proved to be an exceptionally fertile medium for this kind of project to take root. Of course, law is not the only discipline that shores up racial hierarchy. Other disciplines certainly contribute epistemic authority to the naturalized structures of thought and action that constitute racial hierarchy. However, at least during the 1980s, law seemed to be on the frontlines of retrenchment, in part because the relationship between losing a legal battle and suffering a particular material loss was readily visible. While other disciplines do enable racial power, the connections between the disciplines such as sociology, political science, philosophy, and the social practices they authorize appear to be far

comprehensive study of San Francisco State Strike and generative power of the idea of the Third World as a point of unity for racialized groups in the U.S.).

¹⁷¹ For a related discussion, see TONY VELLELA, *NEW VOICES: STUDENT POLITICAL ACTIVISM IN THE 1980S AND 1990S*, at 8–12, 86–91 (1988) (addressing the transmission and generational longevity of protest orientations and tactics grounded in the civil rights era).

¹⁷² See Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 4 (1988) (describing classroom situations where analytical competence of minority students required them to "objectify" themselves in discussions about racially-charged topics).

more mediated. No sophisticated theory is needed to see law operating to constitute and insulate racial hierarchies in American society.

Students and faculty of color entering this arena were thus drawn to challenging the institutional practices of legal education that in their view generated the narrow conceptions of discrimination and equality that underwrote the retrenchment. While it was certainly true that by this time the frontlines of the conservative pushback were in the courts, the White House, and in Congress, the terms under which the rollback of civil rights were legally rationalized implicated legal education's own limitations. While law was far from the only discipline contributing to the narrowed possibility of reforms, it was the place where many who oversaw the collapse of race reform called home.

These factors come together to suggest a partial answer to the question "why law?" The qualified "yes" to the question of whether there was something special about law can now be linked to the institutional, temporal, and disciplinary narrative that I have set forth. The prevailing understanding of race and law that came to a head in the 1980s had premised racial liberation on the enlightened terms of rationality. As such, racial power was understood as discriminatory racial attitudes and behavior, that is to say, a deviation from reason that was remediable through the operation of legal principles. Rationality would prevail over the bias of racial thinking through the application of neutral principles. And although civil rights lawyers and liberal allies may have differed to varying degrees about the need for targeted interventions to achieve a state in which the universalist repudiation of racial distinction might prevail, confidence that law, properly deployed, could deliver on such promises was widely shared.¹⁷³ Yet by the 1980s and 1990s, this liberal equation of the rule of law and racial liberation was ripe for reconsideration. At the same time that hopes for continuous racial reform were unraveling, certain modes of thinking that were far more skeptical of the Rule of Law began to take root.¹⁷⁴ The critique of the ways that legal discourse rationalized

¹⁷³ See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (arguing that the application of an "antidiscrimination" principle, a principle "disfavor[ing] race-dependent decisions and conduct," can successfully guard against "certain defects in the process by which race-dependent decisions are made and also against certain harmful results of race-dependent decisions").

¹⁷⁴ Early indicators that the faith in law-based deliverance was waning were evident in the split between the traditional Civil Rights Movement and the emerging younger black power wing of SNCC. See HERBERT H. HAINES, *BLACK RADICALS AND THE CIVIL RIGHTS MAINSTREAM, 1954-1970*, at 15-76 (1995); see also PENIEL E. JOSEPH, *THE BLACK POWER MOVEMENT: RETHINKING THE CIVIL RIGHTS-BLACK POWER ERA* (2006). This was, however, simply the more public face of a long-standing skepticism about the capacity of law to generate fully realizable reconstruction of white dominance. See, e.g., Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES MAG., Oct. 13, 1968, at SM56, available at <http://select.nytimes.com/gst/abstract.html?res=F10917F7345B14728FDDAA0994D8415B888AF1D3> (critiquing the Warren Court for its record on civil rights); *Civil Rights: Does the Supreme Court Think White?*, TIME, Oct. 25,

dismal limits to race reform provided a window into seeing something more than a failure of legal reform. Indeed, one was able to see how the claim to rationality itself—"the rule of law" rather than to the "politics of the mob,"—helped to rationalize existing racial power.¹⁷⁵

The problem was not simply the takeover of the judiciary by right-wing judges, but also the limits of "reason" itself. Of course this particular critique of the dominant sensibilities in law was analogous to critiques made by a generation of scholars in other disciplines who unmasked how notions of "objectivity" and "science" shored up rather than disrupted the racial order.¹⁷⁶ Yet the critique in law was perhaps more explosive because of law's putatively apolitical status and the corresponding claims that reason more generally could distinguish truth from ideology. Thus, the critique of the apolitical character of law merged with a concrete critique of the epistemological claims of the Enlightenment tradition more generally.¹⁷⁷ In other words, the epistemological critique was not simply a "philosophical" one, but was also a practical component to claims that no neutral concept of merit justified the lack of minority law professors at elite law schools, or that no neutral process of principled, legal reasoning could justify the racialized distribution of power, prestige, and wealth in America.

My sense here is that breaking down the concept of "knowledge" that seemed necessary to contest the claims of the law's neutrality in the late 1980s and 1990s is what migrated well across disciplines. In one way or another, every discipline faced a core problem that its very constitution as a "discipline" might be related to legitimating scholarly assumptions that

1968, available at <http://www.time.com/time/magazine/article/0,9171,900407,00.html>. By the 1980s, these doubts were more widely expressed, causing rifts and tensions within the traditional civil rights coalition. See Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518 (1979) (expressing skepticism toward the emancipatory power of law reform alone, highlighting the fact that despite the fact that *Brown* established Blacks as "citizens demanding equal treatment under the law as their constitutionally recognized right . . . most black children attend public schools that are both racially isolated and inferior"); Derrick Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 515 (1976) ("The tactics that worked for civil rights lawyers in the first decade of school desegregation—the careful selection and filing of class action suits seeking standardized relief in accordance with set, uncompromising national goals—are no longer unflinchingly effective.").

¹⁷⁵ See Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 TIKKUN 28, 92 (1987) ("The very ability of the intellect to 'quell' [the mob] suggests that in some way the intellectuals are like the mob, possessing coercive power.").

¹⁷⁶ See STEPHEN STEINBERG, *RACE RELATIONS: A CRITIQUE* 68–77 (2007) (recounting how Du Bois, Oliver Cox, and Carter J. Woodson, among others, wrote against the prevailing sensibilities in sociology and history and were discredited in some quarters as advocates rather than scholars).

¹⁷⁷ See ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 3, 29–36 (1976) (arguing that liberal principles, including the distinctions between law and politics, and knowledge and power, are not only mutually dependent—"tied together" and mirroring, supporting, and undergirding each other—but also flawed due to the fact that they are based on a mechanistic 17th century metaphysics); see also Crenshaw, *Race-Conscious Pedagogy*, *supra* note 172, at 2 (detailing how ideologies of objectivity presumed by the rule of law created a stance of "perspectivelessness" that presented students of color with particular burdens in the classroom).

have their roots in political, cultural, and racial domination.¹⁷⁸ The claims to non-racial disciplinary neutrality were contested to varying degrees in all disciplines,¹⁷⁹ but law's apparent intimacy with the prevailing racial order presented a unique site for an intellectual sit-in. This window into the constructed nature of the racial order presented an acutely legible nexus between knowledge and power. Its legibility was facilitated as well by the temporal dimension of the post-civil rights reform in which the crack in the external façade of the status quo provided a fuller vision of a social order "caught in the act" of reforming. CRT was thus built on a platform made up of the intellectual and activist traditions that had come before. This plateau facilitated glaring scrutiny of racial order at a time when certain questions were up for grabs in a way they were not before, and probably have not been since.

IV. CRITICAL RACE THEORY IN A "POST-RACIAL" STATE

That these conditions made CRT possible was by no means a guarantee of its survival.¹⁸⁰ By the early 1990s, CRT was in the crosshairs of a powerful conservative backlash. CRT was the "lunatic core" of the legal profession, said Richard A. Posner in the *New Republic*.¹⁸¹ Our work occupied the same conceptual plane as Louis Farrakhan.¹⁸² Going further, CRT critiques of disparate impact suggested that we were outright anti-

¹⁷⁸ See George Lipsitz, *Notes and Thoughts on I. Wallerstein et al, Open the Social Sciences*, presented at Colorblind Disciplining of Race Conscious Research: Critical Intervention Across the Academy Conference at CASBS, June 1–5, 2009.

¹⁷⁹ See generally AFRICAN AMERICAN PERSPECTIVES, *supra* note 6 (political science); MILLS, BLACKNESS VISIBLE, *supra* note 7 (philosophy); GUTHRIE, *supra* note 11 (psychology); MORRISON, *supra* note 13 (literature); STOCKING, *supra* note 14 (anthropology); "RACIAL" ECONOMY OF SCIENCE, *supra* note 14 (science); Darity, *supra* note 14 (economics); Zuberi and Bonilla-Silva, WHITE LOGIC, WHITE METHODS, *supra* note 12 (social sciences); Pulido, *supra* note 14 (geography).

¹⁸⁰ At least one reading suggests that earlier iterations of this narrative present a view that "so long as critical race theorists write and speak compellingly, legal academe will welcome them to the table." Cho & Westley, *supra* note 2, at 1380. This inference is somewhat surprising given the institutional struggles cited within some of those texts as well as the widely acknowledged "tax" on pursuing any work on race, much less radical work. To whatever extent however that my own iterations of CRT origins reinforce either in intent or effect the belief that critical race work need only make it to the marketplace of ideas to find its value, I hope to lay that issue to rest. Other questions about whether the focus on particular institutional moments, actors, or contexts fail to tell the "complete story" are inherent in any history remain debatable.

¹⁸¹ Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (labeling critical race theorists and postmodernists as the "lunatic core" of "radical legal egalitarianism").

¹⁸² Louis Farrakhan is the National Representative of the Nation of Islam, acting as the catalyst for the growth and development of Islam in America. See *Bio Sketch of the Honorable Minister Louis Farrakhan*, NATION OF ISLAM, http://www.noi.org/about_the_honorable_louis_farrakhan.shtml (last visited Mar. 6, 2011); see also MATTIAS GARDELL, IN THE NAME OF ELIJAH MUHAMMAD, LOUIS FARRAKHAN (1996) (describing Farrakhan as a charismatic Black leader with the ability to appeal to the Black masses and also as a controversial figure who has been called an anti-semitic, a demagogue, and an Islamic fundamentalist).

Semites.¹⁸³ Critical race theorists were now the radicals in the Ivory Tower, the intellectual gangbangers in the 1990s, as suggested by Jeffrey Rosen's cleverly titled article, *The Bloods and the Crits*.¹⁸⁴ And if that alone were not enough to send the tenure-denying mobs after the fledgling movement, the framing of CRT as having provided the ideological apparatus for O.J. Simpson's acquittal surely undermined our prospects for intellectual survival.¹⁸⁵ These were bad times for CRT, tough enough to make many of us wonder about our survival as individual academics, much less our ability to sustain an effectively networked intellectual movement. A wholesale routing had happened before and it was not unimaginable that it might happen again.¹⁸⁶

Fast forwarding to the 20th Anniversary of the CRT Workshop, it is in some ways hard to believe that we are in the same universe.¹⁸⁷ Had anyone projected in the early 1990s the utterly unpredictable political campaign that led to the Obama victory, it would have appeared to us to come straight out of one of Derrick Bell's fantastical chronicles.¹⁸⁸ For those of us with vivid memories of the downshift of the late 1980s and the counter-attacks waged openly against CRT in the 1990s, 2009 seemed like a mirage. As if awakening from a bad dream, we opened our eyes to find an African American family living in the White House. The conservative Crit-baiting isn't quite the preoccupation it used to be, as it turns out, because their ammunition is being reserved for far bigger game than CRT. Apoplectic hand-wringing about the role of the entire Critical project in bringing down Western civilization seems even more absurd than ever before. With nothing else to disturb this view, this might well be the

¹⁸³ DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 4–5 (1997) (expressing concern about “radical multiculturalism” and its threat to real justice); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809, 824, 828 (1993) (criticizing narrative scholarship and arguing that legal scholarship contains reason and analysis that goes beyond emotive appeal).

¹⁸⁴ Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27.

¹⁸⁵ *Id.*

¹⁸⁶ With respect to left-liberal and race-conscious academic production, the concept of academic freedom has a checkered history at best. Thus, it was not unimaginable that CRT would follow the trajectories of those trailblazers of the past who struggled, often unsuccessfully, to find a secure place in the academy. The suppression of radical thinking during the McCarthy era and its extension into the 1960s and 1970s is relatively well known in comparison to the earlier silencing of Black intellectuals. See ELLEN W. SCHECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1988). As the arguments against CRT unfolded, it became clear that the threat against CRT was on all fours with the suppression of critical thinkers in the past: “Indeed, the structure of the assault is virtually identical: The baiters identify some threat to our cherished institutions or way of life, tie it to some ‘pointy-headed intellectuals,’ and then claim that ruthless suppression is the only way to be sure the threat has been contained.” See Crenshaw, *Critical Reflections*, *supra* note 1, at 1368.

¹⁸⁷ An anniversary conference was held at the University of Iowa in 2009. See generally CRT 20: *Honoring Our Past, Charting Our Future*, 94 IOWA L. REV. (2009).

¹⁸⁸ See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter BELL, NOT SAVED] (writing from the viewpoint of Geneva Crenshaw, a fictitious character who challenges the accepted beliefs about civil rights laws and policies).

closing scene on CRT, a delightful conclusion that fades to black over rolling credits. Like the happy ending in the disaster flick *The Poseidon Adventure*,¹⁸⁹ survivors rejoice in the realization that there is indeed a morning after. But to quote Derrick Bell, “[w]e are not saved.”¹⁹⁰

Despite this breathtaking turn of events with its picture-perfect ending, the outtakes reveal how today’s racial context presents challenges not at all unlike those of the early 1980s. Barack Obama’s shattering of the political glass ceiling can be analogized to the “White Only” signs that came down in the 1960s and 1970s. With the collapse of segregation came the confidence in some quarters that formal equality alone constituted the ultimate realization of racial justice. Yet, this faith in formal equality’s triumph over white supremacy was unwarranted; formal equality did little to disrupt ongoing patterns of institutional power and the reproduction of differential privileges and burdens across race. Post-reform struggles such as the battle over integration at Harvard involved efforts to impose an institutional settlement in the name of formal equality that left many dimensions of power and exclusion firmly entrenched.

In the same way that the collapse of formal segregation did not dismantle racial power in the mid-20th century, President Obama’s victory did not signal its defeat in 2008. Although the celebration prompted by Obama’s victory was indeed monumental, his breakthrough did not open up a raceless space beyond the glass ceiling so much as it created a new space for race in uncharted terrain.¹⁹¹ The Critical challenge now, as it was in the 1980s, is to resist the conflation of this undeniable accomplishment with the achievement of racial justice itself. A key dimension of this resistance is to counter efforts to deploy the symbolic significance of Obama’s widely applauded breakthrough into an

¹⁸⁹ *The Poseidon Adventure* was a movie in the 1970s that featured a fairly typical disaster-driven plotline featuring a harrowing and counterintuitive journey to the hull of the ship where the few survivors were rescued just as the ship was sinking. Dave Kehr, *Critic’s Choice*, N.Y. TIMES, May 9, 2006, at E3. A box office mega-hit, it is probably more memorable now for Maureen McGovern’s saccharin-tinged theme song, “The Morning After.” *Id.* The movie was remade in 2006, but was a box office disaster.

¹⁹⁰ BELL, NOT SAVED, *supra* note 188, at 3.

¹⁹¹ Obama’s crashing the glass ceiling did not signal his entry into race-free space, but simply opened up another arena in which the meaning of his Blackness would help shape perceptions of the President of the United States. Numerous controversies suggest that race shapes the language and imagery through which the President is critiqued, as well as how he himself occupies the role. *See, e.g.,* Dora Apel, *Just Joking? Chimps, Obama and Racial Stereotypes*, 8 J. VISUAL CULTURE 134 (Aug. 2009) (arguing that Obama’s victory prompted a parallel racial backlash in the form of purportedly satirical visual imagery recovered from the archives of the American print culture of the late 19th and early 20th centuries). Some of the most racialized images included cartoons of Obama holding a knife to Uncle Sam’s throat, as well as the the standard fare involving chimpanzees, watermelons, and nooses. With regard to how Obama occupies the role, the hasty firing of Shirley Sherrod after an intentionally misleading video was released depicting her as a discriminatory public official suggested that the White House had developed a hair-trigger reaction to allegations of “reverse racism.” The revelation that the pressure was generated by the conservative media and that the truth was easily verifiable illustrates how sensitive the President is to certain perceptions of racial bias.

ideological weapon to discipline and ultimately undermine ongoing contestation over racial hierarchy in American society.¹⁹² This threat is represented by the emergence of post-racialism, a compelling ideological frame that is poised to exile racial justice discourse to the hinterlands of contemporary political thought.

Post-racialism is the contemporary frame that establishes both a new arena of contestation as well as new possibilities for the emergence of a more broadly configured CRT. In some ways, the new frame presents parallel challenges to a colorblind formalism that was in the process of settling in as the reigning theory of equality in the 1980s. The contestations that arose out of that bid generated complex patterns of alignment and conflict in much the same way that Obama's election and the post-racial wave that has followed it has done in the contemporary period. At the same time, there are subtle differences between colorblind formalism and post-racialism that broaden the latter's appeal and complicate efforts to imagine a sustainable alternative. As post-racialism becomes a common point of reference in all racial matters, it likewise becomes increasingly important to capture the variety of arguments it authorizes and the new alignments it enables. In the same way that CRT has been articulated through its institutional and discursive embodiment, post-racialism might be articulated through the ways in which it becomes attached to events and conditions. Thus, what meaning "post-racialism" takes on is partly determined by how it is used and performed.¹⁹³

In interrogating the many possible ways that "post" can be thought to be doing a certain kind of ideological work, it is apparent that "post-racial" need not take on the meanings to which I attribute the term herein. For example, the "post" in post-colonial or post-apartheid signals that the past does not simply precede the present but partly constitutes it. In this sense, the significance of "post" is not in the signaling of a before and an after, but in signaling a range of factors—potentially undefined—that make the contemporary social order a variation of the prototype, not its opposite. By contrast, the function of the "post" that garners considerable traction in

¹⁹² The tension between symbolic and material transformation is also merely an extension from the earlier period in which segregation formally fell. As argued in *Race, Reform and Retrenchment*, racial oppression is constituted by symbolic and well as material dimensions, however symbolic change is often taken as indicative of substantive transformation. It was argued there that the next generation of civil rights struggle was going to be centered on the degree to which symbolic change would legitimize and thus reinforce ongoing material subordination. See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1336, 1378.

¹⁹³ Of particular concern here is uncovering what work the "post" in "post-racial" is doing. Sumi Cho takes on this question, emphasizing the way in which the concept of post-racialism is deployed politically in her recent article, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (challenging the common understanding of post-racialism as "political trend or social fact," arguing that post-racialism "in its current iteration is a twenty-first century ideology" that "reflects a belief that due to racial progress the state need not engage in race-based decision-making or adopt race-based remedies" and that civil society should "eschew race as a central organizing principle of social action").

post-racial discourse today operates not only to de-historicize race in American society, but also to reframe the contours of this contemporary moment as constituting the opposite of what preceded it. By these lights, a post-racial America is a racially egalitarian America, no longer measured by sober assessments of how far we have come, but by congratulatory declarations that we have arrived.¹⁹⁴

Of course in some sense, there is nothing conceptually new in any of this. An entire industry of lawyers, politicians, pundits and foundations has worked over the past twenty years to convince judges, policy makers, and voters that the project of racial reform was completed long ago.¹⁹⁵ Under this view, what remains of race are the baseless efforts of identity politicians to perpetuate the toxic discourse of racial grievance. What is new is the opportunity to re-align this conservative discourse to more progressive visions of the future by its attachment to an extraordinary contemporary event. This attachment is not exactly a free rider but a passage made possible by what I will call “post-racial pragmatism.” This pragmatism jettisons the liberal ambivalence about race consciousness to embrace a colorblind stance even as it foregrounds and celebrates the achievement of particular racial outcomes. In the new post-racial moment, the pragmatist may be agnostic about the conservative erasure of race as a contemporary phenomenon but may still march under the same premise that significant progress can be made without race consciousness. This realignment brings liberals and some civil rights advocates on board so that a variety of individuals and groups who may have been staunch opponents of colorblindness can be loosely allied in post-racialism. How this marriage of the old and new has come to be and what its implications are for CRT will take up the remainder of this Article.

For CRT to grapple with post-racialism and its consequences, it must address the Obama phenomenon. Obama as a post-racial figuration is key to the remaking of old debates into a new common sense, one that draws the masses as well as elites, whites as well as racial Others into a familiar and comfortable script about the benign nature of race and opportunity in American society. Indeed, if white supremacy in the past can be described

¹⁹⁴ See discussion *infra* notes 196–98, 200–06.

¹⁹⁵ See, e.g., THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 138 (1984) (writing that “the battle for civil rights was fought and won—at great cost—many years ago”). For a critique of the concerted effort to install colorblindness as the constitutional and political successor of the Civil Rights Movement, see Kimberlé Williams Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 109, 127–28 (2007), <http://www.michiganlawreview.org/assets/first/105/crenshaw.pdf> [hereinafter Crenshaw, *Framing*] (arguing that the conservative claim to the Civil Rights tradition relies on “a mythical past wherein equal treatment and nondiscrimination ruled the day”); see also BUYING A MOVEMENT: RIGHT WING FOUNDATIONS AND AMERICAN POLITICS, PEOPLE FOR THE AMERICAN WAY 3, 27–30 (1996), available at <https://www.pfaw.org/sites/default/files/buyingamovement.pdf> (describing the way in which generous and unparalleled funding for conservative advocacy groups, think tanks, college programs and scholars has fostered a “a climate of hostility to affirmative action, and even to racial minorities”).

in terms of the equilibrium it achieved through generating the ideological consent of those who dominate and the legitimate coercion of those who are dominated, today's equilibrium is calibrated further along the lines of mass consent. Some critics of post-racialism may agree that Obama's victory is a key moment in this move, yet frame his role as accidental. However, Obama is more than a political Sphinx to which post-racialism has become attached. Obama as a candidate and subsequently as the first African American president has come to signify post-racialism by virtue of what he affirms and what he omits, and what he draws attention to and what he directs elsewhere.

A. *Colorblindness's Billion Dollar Make-Over: Old Ideas in New Skins*

Post-racialism rode to the center of American political discourse on Barack Obama's coattails,¹⁹⁶ carrying along with it a longstanding conservative project of associating colorblindness with racial enlightenment and racial justice advocacy with grievance politics.¹⁹⁷ Obama's widely heralded avoidance of so-called "racial grievance" has not only opened the door to "a new era of American politics,"¹⁹⁸ it has also

¹⁹⁶ See Phillip Morris, *America Begins its Journey into a Post-Racial Era*, CLEV. PLAIN DEALER, Nov. 6, 2008, at A1 ("America has done its part. Without a blink of an eye, we have just boldly ushered in a new, post-racial era. Once again, we have proven ourselves a nation of leaders: a representative democracy in its truest sense."); Juan Williams, *Obama's Color Line*, N.Y. TIMES, Nov. 30, 2007, at A23 ("Mr. Obama is in the vanguard of a new brand of multi-racial politics. He is asking voters to move with him beyond race and beyond the civil rights movement to a politics of shared values."). This "moving beyond" marked the long-awaited hopes by some that the country would one day be "liberated" from certain civil rights leaders. One commentator argued that, "[r]acial progress has reduced the need of African-Americans for racial-grievance leaders like Jackson and Sharpton, but America has not progressed enough to put these types of leaders out of business." Clarence Page, *Al Sharpton Weighs His Next Big Loss*, CHI. TRIB., Aug. 22, 2001, at N23. Eventually, this hope became attached to Obama. "[Obama] can be called a great unifier because he presents a fresh black face free of the baggage of historical bigotry—systemic and enduring racism that has left black Americans scarred and white Americans blushing." Amos N. Jones, *Black Like Obama: What the Junior Illinois Senator's Appearance on the National Scene Reveals About Race in America, and Where We Should Go from Here*, 31 T. MARSHALL L. REV. 79, 92 (2005). It was a hope that even those opposed to Obama latched onto. As conservative commentator George Will said early in the campaign, "On the matter of race, which I think is the least important aspect of him, his election, that's the end of Al Sharpton. It's the end of Jesse Jackson. Great getting-up day in this country." *Nightline* (ABC television broadcast Nov. 25, 2007).

¹⁹⁷ See Shelby Steele, Editorial, *Obama's Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008 (arguing that Obama's post-racial idealism represents to whites what they most want to hear—that racism is no longer an issue); *The Situation Room*, CNN.COM (Jan. 11, 2008), <http://archives.cnn.com/TRANSCRIPTS/0801/11/sitroom.02.html> (Costello: "Let's face it, Obama has been genius at transcending not race but racial issues. He's very careful to deliver a message that's not exclusionary. In other words, he's a member of the black community, but he doesn't vocalize racial grievances. So far, so good."); Editorial, *President-Elect Obama*, WALL ST. J., Nov. 5, 2008, at A22 ("While Mr. Obama lost among white voters, as most modern Democrats do, his success is due in part to the fact that he also muted any politics of racial grievance.").

¹⁹⁸ This sentiment—that Obama has ushered in a new, post-racial era in American politics—has been widely echoed among the national press. See, e.g., Matt Bai, *Post-Race*, N.Y. TIMES, Aug. 10, 2008, at MM34 (claiming that "for a lot of younger African-Americans, the resistance of the civil rights generation to Obama's candidacy signified the failure of their parents to come to terms, at the dusk of

opened up liberal and progressive civil rights constituencies to rhetorical frames that were forged in retrenchment politics.¹⁹⁹

The post-reform trajectory of civil rights discourse has long revealed that modest victories are inevitably appropriated as ammunition by those seeking to limit the scope of racial reform.²⁰⁰ Often with such

their lives, with the success of their own struggles—to embrace the idea that black politics might now be disappearing into American politics”); Robert S. Boynton, *Demographics and Destiny*, NYTIMES.COM (Jan. 16, 2009), <http://www.nytimes.com/2009/01/18/books/review/Boynton-t.html> (“It is possible that [Obama and other contemporary Black politicians] may become the defining force in a new era of American politics.”). Despite the post-racial celebration underwriting this coverage, the majority of white Americans did not vote for Obama. See Timothy Noah, *What We Didn’t Overcome: Obama Won a Majority of Votes, He Didn’t Win a Majority of White Votes*, SLATE.COM (Nov. 10, 2008), <http://www.slate.com/id/2204251/> (“While it’s certainly true that enough white people voted for Obama to put him in the Oval Office, the blunt fact remains that a majority of white people did not. . . . Obama got 53 percent of the broad electorate to vote for him but only 43 percent of the white electorate.”).

¹⁹⁹ The denigration and outright persecution of critics of the racial status quo has a long history that has often involved the exercise of state power. During the early nineteenth century, abolitionists were cast as dissidents with a “wicked plan of exciting the Negroes to . . . massacre.” Letter from Postmaster General Kendall to Pres. Andrew Jackson (Aug. 7, 1835), in 5 THE CORRESPONDENCE OF ANDREW JACKSON 361 (John S. Bassett ed., 1931); see also Patricia Roberts-Miller, *FANATICAL SCHEMES: PROSLAVERY RHETORIC AND THE TRAGEDY OF CONSENSUS* (2010). This sentiment was reflected in laws passed by a number of southern states that banned the mailing of abolitionist materials and imposed criminal penalties on subscribers to abolitionist newsletters. See, e.g., ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA, 1835–36 (Richmond, 1836), ch. 66, sec. 3 (printing a 1836 Virginia law that required the destruction of any abolitionist materials mailed into the state and the arrest of the addressee “if the latter subscribed for the said book or pamphlet with intent to aid the purposes of the abolitionists or antislavery societies”); H.M. HENRY, *THE POLICE CONTROL OF THE STATE IN SOUTH CAROLINA* 162 (1914) (describing a similar law passed by South Carolina in 1859). See generally W. Sherman Savage, *Abolitionist Literature in the Mails 1835–1836*, 13 J. NEGRO HISTORY 150 (1928).

During the twentieth century, SNCC organizers and Freedom Riders were called “outside agitators” and incarcerated in state penitentiaries primarily for their advocacy against the racial order. See RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL JUSTICE* 214–46 (2007) (describing the experiences of Freedom Riders during their incarceration in Mississippi’s Parchman Prison); Bruce D’Arcus, *Dissent, Public Space and the Politics of Citizenship: Riots and the “Outside Agitator,”* 8 SPACE & POLITY 355, 365 (2004) (showing how government officials and others “constituted” and deployed the figure of the “outside agitator” in the 1960s as the “cause of illegitimate dissent” and as the target of state intervention”). Even Martin Luther King, Jr. was characterized by the FBI as a Public Enemy Number One. See FEDERAL BUREAU OF INVESTIGATION, *MARTIN LUTHER KING, JR.: THE FBI FILES* 113–39 (2007) (describing the FBI surveillance and harassment of Dr. King and the ongoing dispute between King and Hoover); Ben A. Franklin, *Hoover Assails Findings of Warren Commission and Calls Dr. King a “Liar,”* N.Y. TIMES, Nov. 19, 1964, at 1; see also DAVID J. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.: FROM “SOLO” TO MEMPHIS* (1983). By these standards, allegations of race mongering and its politer version of “playing the race card” might be considered relatively benign. However, when considered in the context of a legal apparatus that is now grounded in skepticism towards claims of race discrimination, combined with the subtle way in which this skepticism has traveled into popular and political discourses, the wide circulation of such tropes can be seen as a coercive rhetoric that generates mass consent to the existing system of racial inequality and silences opposition. Particularly perverse is the way those who have fought for racial change have been bludgeoned by the symbolic victories that their vision and activism helped make possible. See generally Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1335 (discussing the dialectics of transformation and legitimation in civil rights discourses, particularly in anti-discrimination law).

²⁰⁰ *Id.* Typical of those who took the opportunity to advance their-preexisting agendas was Ward Connerly who latched onto Obama’s victory to argue that “liberation from the debilitating paradigm” associated with affirmative action was “now possible.” Of course, had Obama lost, it is unlikely that

advancements comes rhetoric that celebrates the inherent egalitarianism of American society while repudiating the very advocacy work and the long-term struggle that made the breakthrough possible. Indeed, when viewed through this vantage point, such victories point not to the efficacy of race consciousness advocacy but instead to the notion that it is not only unnecessary but is actually counterproductive. This phenomenon was readily apparent the night of the election as pundits tallying up the night's loser included Jesse Jackson, Al Sharpton, and by extension, other racial justice advocates who had presumably just become unemployed.²⁰¹ The "Mission Accomplished" theme was echoed by those who proclaimed that the great attraction of President Barack Obama was that he eschewed civil rights baggage.²⁰² This reduction of the human tragedies and acts of sheer

Connerly would have asserted the opposite, namely, that the failure of the first viable Black candidate suggested that now was not the time to eliminate affirmative action. See Ward Connerly, *A Triumph of Principle over Color*, SACRAMENTO BEE, Nov. 16, 2008.

²⁰¹ Throughout the campaign and in its immediate aftermath, the dominant narrative about the likely impact of an Obama victory was that the civil rights leadership would be put out of business. George Will repeated his "biggest loser" theme throughout the campaign. After Obama's Iowa caucus victory, "[t]he big losers, two big losers [were] probably Jesse Jackson and Al Sharpton, representative of those who have a sort of investment in the traditional and, I believe, utterly exhausted narrative about race relations in the United States." *Nightline* (ABC television broadcast Jan. 2, 2008). This line re-emerged as a caption to explain Reverend Jackson's tears on election night. See Kevin Leininger, *Obama Win Takes Race Off the Table*, NEWS-SENTINEL (Fort Wayne, TX) (Nov. 6, 2008), <http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/20081106/NEWS/811060344> (speculating that Reverend Jesse Jackson's tears on election night were "simply the realization that Barack Obama's victory signaled the long-overdue demise of the type of divisive racial politics Jackson, Al Sharpton and others have perfected over the past several decades—the kind built on the premise that America is a hopelessly racist country that refuses to give minorities a chance to succeed"). This and other comments implicitly dismissed the likelihood that Rev. Jackson was emotionally moved by the historic significance of the moment, as were millions of other Americans. That even opponents of Obama could profess pride without being subject to critique while Jackson was ridiculed suggests that underlying the critique was a firm belief that much if not all of racial justice advocacy was mere opportunism. While some in the racial justice community share such views of Jackson and Sharpton, the critiques launched by Will and others seem to apply to the entire body of racial justice advocacy.

Perhaps the most unexpected development in the haste to put Al Sharpton into permanent retirement is his re-emergence as one of few African Americans to have President Obama's ear. Interestingly, Sharpton appears to have secured this status as his advocacy has acquired post-racial tones. President Obama kicked off his re-election campaign with a visit to Sharpton's National Action Network, a particularly interesting development considering the distance that Obama maintained during the first campaign. "Obama stayed so far away from Sharpton during the 2008 campaign that Sharpton, with Obama's blessing, never even endorsed him. Yet not only did Obama just become the first president ever to appear at the annual conference of Sharpton's National Action Network, ten top Obama aides, including six cabinet members, Valerie Jarrett and David Axelrod, spoke at various sessions of the four-day event. It was a "Yes Al Can" celebration." See Wayne Barrett, *Al Sharpton: Obama's Go-To Black Leader*, THE DAILY BEAST (Apr. 12, 2011, 6:37 PM), <http://www.thedailybeast.com/articles/2011/04/12/al-sharpton-obamas-go-to-black-leader.html>.

²⁰² The theme of eschewing "civil rights baggage" and the figures associated with it was more subtly suggested in the reading offered by *Newsweek's* Mark Whitaker who argued that "Jesse Jackson, who was part of the Moses generation, who had been there with King, was feeling certainly his age, feeling that he was being overcome by Obama." Obama himself invoked the metaphor of a Joshua who, unlike Moses, was able to lead his people into the Promised Land in a Selma speech referring to his relationship to the civil rights leadership that preceded him. See David Remnick, *The Joshua Generation: Race and the Campaign of Barack Obama*, NEW YORKER, Nov. 17, 2008, available at

courage that were the hallmarks of the civil rights struggle to “baggage” was particularly striking given the fact that these sacrifices were invoked by many to underscore the significance of the moment. That the very struggles that made the moment both possible and meaningful could be so effortlessly reduced to historical dead weight²⁰³ indicates the frustrating paradox of racial reform. This monumental victory was taken to affirm the claim that race doesn’t matter, but the reason Obama’s election mattered so much was because of his race. Indeed, contrary to the thrust of colorblind proscriptions against noticing race, Obama’s Blackness was harnessed to prove that the remaining markers of racial subordination (including the now Black-free zone of the Senate) are no longer indicators of exclusion but merely opportunities yet to be realized by individuals disinclined to take advantage of them. The dialectic of transformation and legitimation that took years to play out in the context of formal equality became instantly apparent in the aftermath of Obama’s victory. Broad segments of the population seemed to believe that with Barack Obama now in the White House, that the chapter on race could at last be closed.²⁰⁴

http://www.newyorker.com/reporting/2008/11/17/081117fa_fact_remnick. Obama’s use of the Biblical metaphor gave considerable credit to courageous men and women on whose shoulders he stood, yet through the same gesture, he dramatically minimized how much further down the road the Promised Land lay. Of the Selma speech, Eduardo Bonilla-Silva noted:

Obama . . . stated that the Moses generation (the Civil Rights generation) took us “90% of the way there” and that the job for his Joshua generation (in truth, he seems to suggest he is Joshua-like) is to finish closing the 10% gap to reach racial parity. Is Obama kidding us or what? Who, except for the truly confused and ignorant of the facts, believes we are 90% on the road to equality? The data shows the racial gap in income, education, and wealth between whites and nonwhites is huge and that old- and new-style discrimination is alive and well.

Eduardo Bonilla-Silva, *We Are Still the (Dis)United States of America*, BLACK AND PROGRESSIVE SOCIOLOGISTS FOR OBAMA (Feb. 15, 2008), <http://sociologistsforobama.blogspot.com/2008/02/from-eduardo-bonilla-silva-we-are-still.html>.

²⁰³ See, e.g., Connerly, *supra* note 200 (“We should liberate ourselves from the past and all of the racial baggage that had been heaped on our shoulders.”). Part of this “baggage” is the urge to retire civil rights leadership. See *American Morning*, CNN.COM (Nov. 4, 2008), <http://transcripts.cnn.com/TRANSCRIPTS/0811/04/ltn.02.html> (“ROBERTS: “One question a lot of people have is Barack—if Barack Obama wins the presidency, what happens to the people who went before him, people like Jesse Jackson, people like Al Sharpton? You know, there are a lot of African-Americans who currently are saying, hey, those people don’t represent me. What happens to the old guard? Does Barack Obama become the new leader for everybody?”). However this sentiment runs counter to later comments about the Obama presidency, namely, responses to the critique that the President is unresponsive to the civil rights agenda. Defenders argue that Obama is the president for all the people and cannot have a race specific agenda. Of course this is true, but the obvious difference between being a civil rights leader and the President of the United States seemed to be entirely lost in the widespread belief that the election of latter obviated the need for the former.

²⁰⁴ While pundits and commentators throughout Obama’s 2008 campaign had tentatively explored this theme, a wide range of media figures confidently embraced it after Obama’s election. See, e.g., John O’Sullivan, *The Conservative Interest*, NAT’L REV. ONLINE (Feb. 21, 2008), <http://www.nationalreview.com/articles/223701/conservative-interest/john-osullivan?page=3> (“It seems possible and even likely that a victory by Barack Obama would be the climax of this long policy of fully integrating black and minority America into the nation and putting the querulous politics of race behind us.”); *Personal Reflections on a Historic Moment*, USA TODAY (Jan. 21, 2009, 1:48 PM), <http://www.usatoday.com/news/opinion/personal-reflections.htm> (including the following statements from public figures:

This over-investment in the symbolic significance of the Obama victory obscures the ongoing operation of racial power in much the same way that formal equality sanitized patterns of institutional exclusion in the formative years of CRT. In the same way that elite law schools congratulated themselves for being institutions in which merit flourished, many commentators upheld President Barack Obama as evidence that the competition over political power is indeed colorblind.²⁰⁵ In both instances, the assertions rested on efforts to associate a certain construction of race neutrality to the absence of racial power. Yet, in the same way that the mere assertion of colorblind merit did not exhaust the operation of race in American law schools, Obama's victory proves little about the triumph of colorblindness either as a tactic for gaining power or as a frame for how it is exercised. In fact, upon closer inspection, the election of the first African American to the White House supports the opposite inference.

Despite the common refrain that President Barack Obama is the brightest example of the limitless potential of post-racial politics, the Obama campaign reflects the continuing significance of race-consciousness among the electorate, the pundits, and the candidates. Obama's measured performance of racial avoidance along with his selective staging of racially salient messaging reveals that the candidate was uniquely adept in maneuvering the complex terrain of race. However remarkable this particular accomplishment has been, it serves as meager evidence that the socio-political terrain is itself colorblind. Barack Obama's unique victory stands neither as a pathway that can be readily replicated across American society nor as a shining example of what colorblind social practice can deliver. Indeed, the public image of Obama's "race neutrality" masked an intensely race-conscious campaign to counter his racial deficit where necessary and to bolster his racial capital where advantageous. This was anything but an avoidance of race; it was instead, a direct encounter with it.

While race might have been downplayed in the candidate's public posture, strategists were well aware that ignoring the racial reservations of white voters would have been politically disastrous. Race was a factor to

"America has graduated from its past" (will.i.am); "[W]hen Barack Obama won, it validated a piece of me that I wasn't allowed to say out loud—that America is not a racist nation. I love that all of our excuses have been removed." (Will Smith). Critics of affirmative action wasted little time in attaching their colorblind agenda to Obama's electoral victory. See, e.g., Ken Blackwell, *Post-Racial Preference America*, NAT'L REV. ONLINE (Nov. 10, 2008, 12:00 AM), <http://www.nationalreview.com/articles/226288/post-ndash-racial-i-preference-i-america/ken-blackwell> (arguing that President Obama should oppose affirmative action because "[t]he fact that an African-American has been elected commander-in-chief of this country and will be the leader of the free world shows that race is not an insurmountable obstacle to success in today's America").

²⁰⁵ Clarence Page, *Jackson's Eloquent Tears*, CHI. TRIB., Nov. 9, 2008, at C40 ("America is a better country . . . not because so many of us voted for Obama but because many more of us have made a place where Obama's victory is possible.").

be managed, not only in Obama's public appearances, but also in the all-out ground campaign for votes in the key battleground states.²⁰⁶ This imperative to engage the racial reservations among white voters required Obama's white supporters to take up intra-racial conversation among other whites that was barely reported in the mainstream press. This direct engagement side-stepped, if not wholly reversed, the prevailing expert-based communications strategies that lean in the direction of racial avoidance. Indeed, in key swing states such as Pennsylvania and Ohio, whites were mobilized to talk with other whites in a ground campaign to neutralize Obama's racial disadvantage.²⁰⁷ This is a far cry from the myth that Obama won by running a non-racial campaign. Race was definitively and repeatedly engaged. Post-racial defined in terms of the Obama campaign cannot be taken to mean "beyond race" or even colorblind, but instead, to symbolize a particular kind of approach toward dominant racial sensibilities.

Even the celebration of Obama's public performance as "race-neutral" was not a concession to the colorblind values of the electorate but rather an accommodation to the opposite—the color-conscious prisms through which Obama's embodiment would be interpreted. Obama's racial performance was being read by voters of all races in a complex effort to assess what *kind* of Black president Obama was likely to be.²⁰⁸ This was anything but colorblindness, neither on the part of the candidate nor on the part of the electorate. As Carbado and Gulati might put it, Obama "worked" his identity in ways that would communicate his desired

²⁰⁶ Howard Winant describes his experience as a soldier in this ground campaign in *Just Do It: Notes on Politics and Race at the Dawn of the Obama Presidency*, 6 DU BOIS REV. 49 (2009).

²⁰⁷ Don Gonyea, *Union Leader Confronts Race Issue in Campaign*, NAT'L PUB. RADIO, Oct. 10, 2008 (describing union leader Richard Trumka's efforts to convince union workers who say they won't vote for a black man to realize that Obama is the candidate who most supports their interests); see also *Act Three: Union Halls*, PUB. RADIO INT'L (Oct. 24, 2008) <http://www.thisamericanlife.org/radio-archives/episode/367/ground-game> (discussing Richard Trumka's pleas to union members to not abstain from casting a vote for Obama because of his race); Avi Zenilman & Ben Smith, *Labor Confronts Race Issue*, POLITICO.COM (Nov. 2, 2008, 7:15 AM) <http://www.politico.com/news/stories/1108/15176.html> (describing Trumka's speeches to Rust-belt union workers to encourage their voting without a racial bias). It was in the context of the Ohio campaign where Clinton remarked that she was the candidate of the "hard-working Americans, white Americans." Kathy Kiely & Jill Lawrence, *Clinton Makes Case for Wide Appeal*, USATODAY.COM (June 8, 2008), http://www.usatoday.com/news/politics/election2008/2008-05-07-clintoninterview_N.htm.

²⁰⁸ This was captured in the repeated (and often disdainful) references to the intra-racial conversations among African Americans that were labeled as debates about "whether Obama was Black enough." An equally pointed conversation was taking place in public among whites about the quantum of Obama's Blackness that would be acceptable to white voters, but this was less frequently identified as intra-racial discourse about whiteness and more often packaged as fact-based coverage of Obama's inroads or deficits among white voters. See Debra J. Dickerson, *Colorblind*, SALON.COM (Jan. 22, 2007, 7:35 AM), <http://www.salon.com/news/opinion/feature/2007/01/22/obama> (arguing that "Barack Obama would be the great black hope in the next presidential race—if he were actually black"); see also Stanley Crouch, *What Obama Isn't: Black Like Me*, DAILY NEWS, Nov. 2, 2006, available at http://articles.nydailynews.com/2006-11-02/news/18339455_1_black-world-alan-keyes-people-of-african-descent.

message to audiences looking for different racial codes.²⁰⁹

Many commentators, pundits, voters and observers now converge in labeling this particular racial maneuvering as post-racial, but what has crystallized is a flavor of Blackness made palatable to “the mainstream” by its disassociation with racial complaint.²¹⁰ While packaged as racial transcendence, it is legible against a backdrop saturated with racial meaning, portrayed through a growing repertoire of dissociative gestures, and always, it seems, subject to disciplinary revocation.²¹¹

The race-conscious “reading” of Obama was not the sole province of wary whites and suspicious African Americans. Many thinkers who might be styled as critical race commentators read Obama’s performance against the tightrope that they believed he was forced to walk.²¹² Familiar with the demands of racial performance in a variety of high stakes social contexts, many erstwhile critics of dominant racial discourse gave Obama a pass even when his widely applauded speech on race²¹³ seemed to veer into ideological terrain from which colorblind offensives have been launched. Obama’s stately Philadelphia speech, “A More Perfect Union,”

²⁰⁹ In their article, *Working Identity*, Carbado and Gulati argue that because women and minorities often “perceive themselves as subject to negative stereotypes” in social and professional settings, they often feel the need to over-express the required traits—to “signal” and “work” their identities in such a way as to overcome these stereotypes. Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (1999). This dynamic, combined with the workplace ideal of colorblindness, also serves to discourage minority individuals from associating with or supporting one another as this behavior could create an impression of “racial cliquishness.” *Id.* at 1286.

²¹⁰ In one sense, there is nothing particularly new about the aggregate preferences of white Americans for racial performances that are regarded as “race neutral” or “colorblind.” Part of the shock and spectacle generated around O.J. Simpson was that the inference of “safety” that seemed to go along with Simpson’s muted Blackness was violently disrupted when he was indicted for murder. Simpson’s re-racialized image on the cover of *Newsweek* was a flashpoint in this drama. What is potentially new in this moment is the migration of this well-rehearsed presentation from popular culture to politics and along with it, its repackaging as a blanket prescription about how to be successful while Black. “Black” is specifically marked here because the messages of safety and palatability are currently tied to threatening and vengeful characterizations of Black grievance. Parallel demands on other non-whites are likely to find expression in contexts where their “otherness” is specifically marked and rationalized as a justification for differential treatment. The specific contours of post-racial performance are thus likely to differ depending on the context and relevant stereotypes that are salient for each non-white group.

²¹¹ One study reportedly describes Obama as “the type of black political leader who has been historically most popular among whites—one who was not part of the civil rights movement, who accommodates rather than confronts, and who maintains close personal and political ties to whites.” See Paul Bedard, *Obama Is Changing America’s View of Blacks*, WASH. WHISPERS BLOG (Mar. 28, 2011) http://www.usnews.com/news/blogs/washington-whispers/2011/03/28/obama-is-changing-americas-view-of-blacks_print.html (discussing a study by the Annals of the American Academy of Political and Social Science). That this acceptance is conditional is suggested by the very limited leeway the candidate and then President has to hint at much less directly express critiques of racism.

²¹² See, e.g., Manning Marable, *Racializing Obama: The Enigma of Post-Black Politics and Leadership*, 11 SOULS: CRITICAL J. BLACK POL., CULTURE, AND SOC’Y 1 (2009); Winant, *supra* note 206, at 56 (characterizing Obama’s speech as “an advanced message on race and democracy”).

²¹³ Senator Barack Obama, *A More Perfect Union*, Remarks at the Constitution Center, Philadelphia, Penn. (Mar. 18, 2008), available at http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html.

demonstrated the candidate's abilities to galvanize constituencies from across the racial terrain. But the speech provided more sobering glimpses of racial frames that had been actively deployed by the Supreme Court and by other legal institutions to limit the remedial scope of antidiscrimination law. That it was barely noticed suggests how a post-racial spin could effectively repackage a colorblind sensibility into a performance that left spectators from across the spectrum in awe.

In stepping through the racial mine field created by the surfacing of Jeremiah Wright's damning critiques of American society, Obama courageously confronted the contemporary legacy of racism.²¹⁴ Seeking to contextualize Wright's volatile rhetoric in his generation's debilitating encounter with the country's racial past, Obama insisted that "the anger is real; it is powerful, and to simply wish it away, to condemn it without understanding its roots only serves to widen the chasm of misunderstanding that exists between the races."²¹⁵ Yet the upshot of this "misunderstanding" was an appeal that seemed to be taken directly from the classic "race relations" approach.²¹⁶ Key moments in the candidate's address framed racial conflict as a misunderstanding between social equals rather than matters of exclusion and power. In perhaps the most memorable passage of the speech, Obama drew out a parallel between his white grandmother and his Black pastor, and by extension, between whites and African Americans that effectively framed both sides as warring factions whose pain was both legitimate and misunderstood by the other.²¹⁷

²¹⁴ "But we do need to remind ourselves that so many of the disparities that exist between the African-American community and the larger American community today can be traced directly to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow. Segregated schools were, and are, inferior schools. We still haven't fixed them, fifty years after *Brown v. Board of Education*. And the inferior education they provided, then and now, helps explain the pervasive achievement gap between today's black and white students." *Id.*

²¹⁵ *Id.*

²¹⁶ For a critical history of the race relations school of sociology, see STEINBERG, *supra* note 176, at 50 (arguing that the race relations school represented by the Chicago School of Sociology suppressed structural accounts of racial power to create a relatively benign portrait of race relations).

²¹⁷ Obama, *A More Perfect Union*, *supra* note 213 (stating that he could "no more disown [Reverend Jeremiah Wright than . . . [his] white grandmother," drawing a parallel between Wright's ambivalent status and his grandmother by describing his grandmother as being both "a woman who loves me as much as she loves anything in this world" and "a woman who once confessed her fear of black men who passed by her on the street, and who on more than one occasion has uttered racial or ethnic stereotypes that made me cringe").

Interestingly, for a campaign that was framed and received as a transcendence of racial divides, the speech largely engaged only the animus and tension between African Americans and whites. This in part reflected the terms upon which the was controversy framed—the question seemed to be whether the obvious anger that his pastor expressed would be read as Obama's, thus compromising his provisional acceptance among whites as a non-angry Black man. This remains a racially specific obstacle for almost any Black candidate and the tape of Wright's sermon couldn't have been a more salient marker of this burden. At the same time, another racial mine field that was repeatedly presented by the media was the question of how other non-whites would "line up" in this epic moment. Thus, the speech aimed to bring what was widely framed as two warring sides to the table, and to avoid the vexed question of which "side" other non-whites were poised to take. Despite Obama's efforts to sidestep

Obama's efforts to frame the grievances that reflect centuries of discrimination as on par with white anger over affirmative action convincingly mixed material inequalities with anxieties, continuing injuries with under-realized remedies, and minority rights with majority power.²¹⁸ While balance and symmetry were the admirable and in some sense beguiling features of Obama's oratory, underneath this statesmanlike intervention was an asymmetrical analysis that distributed responsibilities and obligations differently. To bridge the divides that proved so divisive for African Americans, Obama's prescriptions included a full complement of actions that were both public (admonishing African Americans to "bind your grievances to . . . the larger aspirations of all Americans") and private (urging African Americans to "read to your children" and to be good fathers). For their part, white Americans were asked to understand that the anger was real even if its roots were buried in the past, and that the consequences of the past continued into the current milieu. Beyond that, however, whites were prescribed no parallel responsibility in the home (one could imagine, for example, encouraging white Americans to "read to your children about this history I have just set forth," or "watch 'Roots'"). Neither was there encouragement in the discursive arena to rethink their underinvestment in the civil rights vision that had at least formally built on the idea of "We the People." Universal messages of equality and dignity were the hallmarks of civil rights visionaries such as Martin Luther King, Jr., yet in admonishing Black Americans to bind their grievances to the plight of their fellows, Obama subtly reinforced a damaging distortion of

this question, however, the news media covered this question of what "sides" other minority groups were to take extensively. Jeff Chang, *Why Latinos and Asian Americans Went for Hilary*, Editorial, HUFFINGTONPOST.COM, (Feb. 6, 2008), http://www.huffingtonpost.com/jeff-chang/why-latinos-and-asian-ame_b_85359.html (suggesting Asian and Latino voters represent emergent voting blocs that identify with community leaders like Clinton, as opposed to issue-based insurgent voting blocs that favor the call-for-change angle of Obama); Angie Chuang, *Racial Rifts: Obama's Candidacy a Rorschach Test for Nation's Minorities*, Editorial, SEATTLE TIMES, July 16, 2008, http://seattletimes.nwsource.com/html/opinion/2008053408_raceriffop16.html (discussing the tensions between minority groups embracing Obama after Clinton exited the race); Lisa Takeuchi Cullen, *Does Obama Have an Asian Problem?*, TIME, Feb. 18, 2008, <http://www.time.com/time/politics/article/0,8599,1714292,00.html> (discussing variables of age, gender and community outreach, among others, that may explain the skew of votes to Clinton over Obama); Adam Nagourney & Jennifer Steinhauer, *In Obama's Pursuit of Latinos, Race Plays Role*, N.Y. TIMES, Jan. 15, 2008, at 1, <http://www.nytimes.com/2008/01/15/us/politics/15hispanic.html?pagewanted=1> (discussing the process of courting Latino voters in light of the tensions between African American and Latino voting blocs).

²¹⁸ Obama's "symmetry" might well be seen as conceding too much to "racial grievance" in light of the sensibility among some whites that empathetic intervention to equalize inequalities constitutes a loss for whites. A recent contribution to this literature includes: Michael I. Norton & Samuel R. Summers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCH. SCI. 215, 215-18 (May 2011) (describing an emerging belief amongst whites that racism is a zero sum game wherein reduced racism against Blacks over the past six decades is associated with perceived increase in bias against whites). Moreover, the study suggests that whites have now come to view anti-white bias as a more significant social problem than anti-Black bias.

the Civil Rights Movement as simply a special interest formation. Completely missing was the recognition that the movement activists not only bound their aspirations to a more inclusive vision of community from the beginning, but that the interventions they sparked set the terms upon which advances for women, other people of color, workers and other disenfranchised groups could gain traction. Considering this history, a truly balanced prescription might have included an invitation to reckon with the habits of thought and privilege that may have undermined many whites' ability to accept the invitation to equal belonging that was repeatedly offered throughout civil rights history. Yet in Obama's framing, the failure to see racial justice as tied to white interests is the failing of civil rights leadership.

This framing was subtle and largely overlooked in the masterful way that Obama spoke into the moment. In its deft circumvention of the contours of white dominance, it was a tour de force that has, at the same time, come to define a certain sensibility that is at odds with key elements of CRT.²¹⁹ Indeed, the speech in general—its acknowledgment of racial injury along with the admonishment that we rise above it to address “universal” interests—may come to define the post-racialist gloss on colorblindness. Packed into the speech were embodiments of the very ideologies of racial symmetry and the moral equivalence between segregation and affirmative action that have grounded the rollback of civil rights remediation. Obama's framing recalls the overarching frame of race

²¹⁹ CRT's emphasis on the asymmetries of racial power rather than on the reductionist discourses of racial difference places it in some tension with the (false) symmetry of Obama's speech. Of course, political speeches offered in the throws of a hotly contested Presidential campaign must be read through the political imperatives of that moment. On the other hand, the framework Obama advanced is not at all unique to political campaigning but constitutes the architecture of the dominant school of “race relations.” The CRT emphasis on racial power as opposed to racial difference tracks what Steinberg frames as the tensions in sociology between a racial dominance frame and a racial relations frame. As Steinberg writes, “Consider the difference between the two terms. “Race relations” obscures the nature of the relationship between the constituent groups in a cloud of ambiguity. In contrast, “racial oppression” conveys a clear sense of the nature, magnitude, and sources of the problem. Whereas the race relations model assumes that racial prejudice arises out of a natural antipathy between groups on the basis of difference, “racial oppression” locates the source of the problem within the structure of society. Whereas “race relations” elides the issue of power, reducing racism down to the level of attitudes, “racial oppression” makes clear from the outset that we are dealing here with a system of domination, one that implicates major political and economic institutions, including the state itself. Whereas “race relations” implies mutuality, “racial oppression” clearly distinguishes between the oppressor and the oppressed. Whereas “race relations” rivets attention on superficial aspects of the racial dyad, “racial oppression” explores the underlying factors that engender racial division and discord. Whereas the sociologist of “race relations” is reduced to the social equivalent of a marriage counselor, exploring ways to repair these fractured relationships, the sociologist of “racial oppression” is potentially an agent of social transformation, forging a praxis for remedying racial inequities. Yet we have a profession that rejects “racial oppression” as tendentious, and pretends that “race relations” is innocent of ideology, merely because it is allied with the racial status quo.” STEINBERG, *supra* note 176, at 17.

as symmetrical,²²⁰ and also the idea that there is a moral equivalence between the indignation over segregation in the past and the resentments of many whites today.²²¹ Obama's focus on past discrimination, like the Supreme Court's, locates the source of contemporary disparities in the past. The contemporary consequences may be real, but like the Court's nod to societal discrimination, the responsibility for eliminating this embedded discrimination rests on behavioral uplift, universal policies, and presumably, the passage of time.²²² Obama's urging to Civil Rights leaders to bind their grievances to universal interests replicates both the Court's under-reading of affirmative action programs as broadly inclusive and at the same time, over-reads those efforts as "special interests."²²³ Locating the future of race equity in universal rather than targeted programs replicates the Court's repudiation of institutional or structural justifications for remedial action.²²⁴ Obama's spectacular gloss on these concepts provides a soothing voice-over to a set of ideas that has fueled a rightward drift in civil rights for decades.

Ironically, for an ideology premised on the irrelevance of race, the election of President Barack Obama is probably the best thing that could have happened for proponents of colorblindness. Colorblindness had fueled a host of right-wing projects throughout the 1990s and the early twenty-first century, including Ward Connerly's assault on both affirmative action and the collection of racial data, and efforts by others to attack the Voting Rights Act and Title VII.²²⁵ Given its deployment as a

²²⁰ This reduces race to a symmetrical plain of skin color, which presumably everyone has, such that equality is simply achieved by colorblindness, rather than acknowledging the asymmetries of race and the inequalities produced by treating all races as though they were the same.

²²¹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part) (arguing that there is a moral equivalence between segregation and affirmative action in contrast with Justice Stevens arguing that there was a difference between a welcome mat and a no trespass sign).

²²² See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (arguing, in a decision by Justice O'Connor, that the failure to identify specific acts of past discrimination upon which to predicate affirmative action leaves only societal discrimination for which there is no constitutional remedy).

²²³ See, e.g., *id.* at 480–82, 486 (criticizing the Richmond program for including racial groups that had no particular history of discrimination in Richmond versus the subsequent framing of the program as potential payback against whites).

²²⁴ See, e.g., *id.* at 486 (assailing the 30% set aside as arbitrary given the City Council's failure to establish how many qualified MBEs there actually were in Richmond in contrast to Justice Marshall's argument that the program was a legitimate effort to address the structural exclusions that had diminished the number of qualified MBEs).

²²⁵ Ward Connerly, *It Is Time To End Race-Based "Affirmative Action,"* 1 U. ST. THOMAS J.L. & PUB. POL'Y 56, 62 (2007) (arguing that "affirmative action" is no longer necessary and that it represents a "betrayal of one of our nation's basic civic values, namely a nation in which all of its citizens are of equal value in the eyes of the government"). For examples of attacks on the Voting Rights Act, see Abigail Thernstrom, *Reviewing (and Reconsidering) the Voting Rights Act*, ENGAGE, Winter 2006, available at http://www.manhattan-institute.org/html/_engage-reviewing_the_voting_rights.htm; and Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now a Murky Mess*, 5 GEO. J. L. & PUB. POL'Y 41 (2007). For examples of attacks on Title VII, see RICHARD EPSTEIN,

justification for civil rights rollbacks, colorblindness has never been fully embraced by moderates and liberals and has failed to achieve the broad-scale endorsement by civil rights organizations and even the mainstream media. One might characterize colorblindness as a reasonably popular act that played well to specialized audiences, but one that never enjoyed the bandwidth of a truly crossover phenomenon. Today's post-racialism brings rock star marketability to colorblindness's legitimizing project, rebranding it with an internationally recognized symbol attached to its conservative rhetorical content. While the celebratory dimension of the "Obama phenomenon" pulls countless people into its orbit, the colorblind rhetoric of racial denial strips ongoing efforts to name and contest racial power of both legitimacy and audience.

The still emerging elements of post-racial rhetoric appear to be both grounded in and extensions of colorblindness. Both articulations can be utilized to advance the notion that the intergenerational residue of white supremacy in the United States is fairly superficial, time-bound and ultimately transparent. This view of racial power as after-effects of the past has been undergirded by the formalist conception of equality embraced by the post-civil rights judiciary.²²⁶ Colorblindness as doctrine not only undermines litigation strategies that rely on race-conscious remediation, but it also soothes social anxiety about whether deeper levels of social criticism, remediation, and reconstruction might be warranted.²²⁷ While colorblindness declared racism as a closed chapter in our history, post-racialism now provides reassurance to those who weren't fully convinced that this history had ceased to cast its long shadow over contemporary affairs. Post-racialism offers a gentler escape, an appeal to the possibility that racial power can be side-stepped, finessed and

FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 205–41, 505 (1995) (calling for a repeal of Title VII, critiquing disparate impact doctrine and arguing that modern civil rights law are a "new form of imperialism that threatens the political liberty and intellectual freedom of us all"). Elsewhere, Epstein has tied his call for the repeal of Title VII to the ideal of colorblindness, stating that "antidiscrimination laws as they apply to the employment relationship" should be "forthwith repealed" and that all individuals would be "far better off under a color-blind state" enforcing a regime that "gives legal protection to voluntary contractual relations in competitive markets." Richard Epstein & Erwin Chemerinsky, *Forum: Should Title VII of the Civil Rights Act of 1964 Be Repealed*, 2 S. CAL. INTERDISC. L.J. 349, 356 (1993).

²²⁶ I have discussed aspects of this process and its import for race-conscious advocacy previously. See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1346.

²²⁷ This anxiety is also soothed by a foregrounding of the President's multiracial identity as evidence *ipso facto* of racial transcendence. In lieu of a searching critique of structural racism, this biologically and sexually inflected formulation of racial progress emphasizes the power and importance of individual attitudes vis-à-vis race. See, e.g., Marie Arana, *He's Not Black*, WASH. POST, Nov. 30, 2008, at B01 (arguing that "intermarriage . . . represents a body blow to American racism"). In an interview with a French journalist, Jim Hoagland was asked why Americans insist on labeling Obama "Black" when, under a French understanding of race, he is clearly both Black and white. Hoagland suggests that this ability to be both Black and white is the true meaning of "post-racial"—a meaning that Americans are slowly starting to accept as a common reality. Jim Hoagland, *The Post-Racial Election*, WASH. POST, Nov. 2, 2008, at B07.

ultimately overcome by regarding dominance as merely circumstance that need not get in the way of social progress.²²⁸

As post-racialism becomes the vehicle for a colorblind agenda, the material consequences of racial exploitation and social violence—including the persistence of educational inequity,²²⁹ the disproportionate racial patterns of criminalization and incarceration,²³⁰ and the deepening patterns of economic stratification²³¹—slide further into obscurity. Under the thrall of post-racialism, these stubborn conditions pose little challenge to interpreting the historical election of one politician as the end of racism.²³²

B. *Post-Racial Sanction*

There is no inherent reason why post-racialism would have to signal the end of racial history; it could be understood as a temporal marker in a progression of racial orderings as with, for example, post-colonialism. Yet post-racialism has become tied to a rhetoric that stigmatizes race-conscious advocacy, social policy and institutional critique. From civil rights advocacy that foregrounds racial disparities to legal doctrines that seek to dismantle structural disadvantage, post-racialism potentially sanctions all discourse pertaining to racism as racial grievance.²³³ In the most ambitious

²²⁸ As Ron Walters noted, “As the Obama campaign took shape in late 2006–early 2007, the basic strategic line about “race,” therefore, was to deny its enduring presence or relevance to contemporary politics. Volunteers often chanted, in Hari Krishna-fashion, “Race Doesn’t Matter! Race Doesn’t Matter!” as if to ward off the evil spirits of America’s troubled past.” Manning Marable, *Racializing Obama: The Enigma of Post-Black Politics and Leadership*, SOULS: A CRITICAL J. OF BLACK POL., CULTURE, & SOC’Y, 2009, at 1, 1–15.

²²⁹ EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 1–4 (2003) (arguing that the refusal to acknowledge race perpetuates racial disparities regarding the quality of education that Blacks and Whites receive); Derrick Darby, *Educational Inequality and the Science of Diversity in Grutter: A Lesson for the Reparations Debate in the Age of Obama*, 57 U. KAN. L. REV. 755, 768 (2009) (arguing that in a post-racial era, there has been a shift from overt bigotry to negative stereotyping, which blames “black behavioral characteristic and personal choices” for existing educational inequalities).

²³⁰ Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1047 (2010) (arguing that the lack of racial discourse helped to persuade voters to replace civil rights and social welfare with crime control).

²³¹ Darity, *supra* note 14, at 796 (disputing the post-racialists’ perspective that the enslavement of black people does not explain present racial disparities in wealth and income); Peter Halewood, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 ALB. L. REV. 1047, 1050 (2009) (arguing that colorblindness and post-racialism contributed to this decade’s rapid and pronounced expansion of economic inequality).

²³² Under this rubric, President Obama’s election is read as confirmation that racism is no longer serious enough to justify racial grievances which themselves harmfully insist on racialism to identify and redress social problems. See, e.g., Joan Vennochi, *Closing the Door on Victimhood*, BOS. GLOBE, Nov. 6, 2008, at A23 (“Some black leaders say Obama’s political success means it’s time to shift away from the dialogue of victimhood.”).

²³³ See Blackwell, *supra* note 204 (“The fact that an African-American has been elected commander-in-chief of this country and will be the leader of the free world shows that race is not an insurmountable obstacle to success in today’s America.”).

articulation of this sensibility, to be post-racial is to cease any engagement with or acknowledgment of racial injustice.

The lasting damage has been sustained by the racial injustice narrative itself, a broad discursive framework that held together an array of actors and demands through a common rubric of a collective harm for which society as a whole is accountable. The injustice frame was perhaps best symbolized by Dr. King's opening image in his March on Washington speech linking the unrealized promises of the Fourteenth Amendment to a bounced check, a metaphor that framed racial inequality as social debt rather than natural social stratification.²³⁴ At its peak, the injustice narrative won the assent of President Johnson who stunned the Nation by ending his special address to Congress with the movement's theme "We Shall Overcome."²³⁵ At its nadir, the injustice frame has become the symbol of an era gone by: a frame narrowed and ultimately rejected by the Supreme Court, repackaged as unwarranted grievance in popular discourse, and largely abandoned by the logics of post-racial pragmatism.²³⁶

This premature celebration of racism's demise carries a certain race-baiting critique long deployed against critical race projects into the center of mainstream discourse. The concept of racial grievance entered the contemporary political arena through conservative anti-affirmative action critics such as Shelby Steele²³⁷ and others prior to Barack Obama's entry

²³⁴ King opened his now famous March on Washington speech with the metaphor of the promissory note:

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

It is obvious today that America has defaulted on this promissory note insofar as her citizens of color are concerned. Instead of honoring this sacred obligation, America has given the Negro people a bad check, which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. We refuse to believe that there are insufficient funds in the great vaults of opportunity of this nation.

Martin Luther King, Jr., *I Have a Dream Speech*, Wash., D.C., Aug. 28, 1963, available at http://avalon.law.yale.edu/20th_century/mlk01.asp.

²³⁵ See Tom Wicker, *Johnson Urges Congress at Joint Session to Pass Law Insuring Negro Vote*, N.Y. TIMES, Mar. 15, 1965, at 1 (reporting that "President Johnson took the rallying cry of American Negroes into Congress and millions of American Homes tonight by pledging that 'we shall overcome' what he called 'a crippling legacy of bigotry and injustice'").

²³⁶ The discursive repudiation of Dr. King's metaphor is summed up by Justice Scalia's statement in *Adarand* that "there can be no such thing as either a creditor or a debtor race. . . . In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

²³⁷ Steele describes his concept of the identity grievance as a baseless assertion of victimization made by an unharmed individual invoking the history of his aggrieved minority group to induce white guilt.

Today the angry rap singer and Jesse Jackson and the black-studies professor are all joined by an unexamined devotion to white guilt. To be black in my father's

onto the national political stage. It had been a stock trope used in the *National Review*²³⁸ and by columnists writing in the *New York Post*, among others.²³⁹ It traveled further into the mainstream when Obama's post-racial image was associated with eschewing racial complaint. The sentiment that "we like Obama because he doesn't complain about race"²⁴⁰ has subsequently merged with the polarizing critique that "people who do are grievance-mongers,²⁴¹ who seek personal dividends by keeping alive recrimination and guilt from the past."²⁴² Thus, post-racialism's

generation, when racism was rampant, was to be a man who was very often victimized by racism. To be black in the age of white guilt is to be a victim who is very rarely victimized by racism. Today in black life there is what might be called "identity grievance"—a certainty of racial grievance that is entirely disconnected from actual grievance.

Shelby Steele, *The Age of White Guilt and the Disappearance of the Black Individual*, HARPER'S MAG., Nov. 30, 1999, at 33, 40. The anti-grievance crowd often cites Booker T. Washington's critique of racial justice advocates in 1910: "There is another class of colored people who make a business of keeping the troubles, the wrongs, and the hardships of the Negro race before the public. . . . Some of these people do not want the Negro to lose his grievances, because they do not want to lose their jobs. . . . There is a certain class of race-problem solvers who don't want the patient to get well." Given the desperate state of affairs in 1910, in particular, the wide embrace of rigid white supremacist practices and the abject oppression that they produced, any effort to cite criticisms of racial justice advocates in that period as authoritative should be discredited out right. See also Charles Blow, *Let's Rescue the Race Debate*, N.Y. TIMES, Nov. 19, 2010 ("My present worry is that denial may be the new normal and that the hot language of the past summer [that discrimination against whites is on par with discrimination against racial minorities] has cooled and hardened into a permanently warped perception of the very meaning of discrimination and racism.").

²³⁸ John J. Miller, *Kerry's Race Baiting*, NAT'L REV. (Sept. 22, 2004), available at <http://www.nationalreview.com/corner/85778/kerrys-race-baiting/john-j-miller> (describing John Kerry's reference to uncounted African-American votes and voter suppression in the 2000 election as "race-baiting"); David Frum, *Whose Party? We'll Take Our Stand*, NATIONALREVIEW.COM, Dec. 19, 2002, <http://frum.nationalreview.com/post/?q=MDk1ZGU4ZThkOTkyOTg2N2I4ZjA1ODIiNzAxODc0NmI> (drawing an analogy between Segregationist Strom Thurmond's 1948 presidential campaign and Al Sharpton's 2004 campaign, describing Sharpton as "the only race-baiter on the ballot in 2004").

²³⁹ The *New York Post* frequently used this critique against Black leaders, especially the Rev. Al Sharpton. See, e.g., Steve Dunleavy, *Has Rev. Al Set the Stage for a Social Earthquake?*, NEWYORKPOST.COM, Feb. 14, 2000, http://www.nypost.com/p/news/has_rev_al_set_the_stage_for_social (describing Sharpton's long-time advocacy for racial justice as "mindless race-baiting"); Rod Dreher, *Rudy's Grit's Got Southern Appeal*, NEWYORKPOST.COM, July 29, 1999, http://www.nypost.com/p/entertainment/rudy_grit_got_southern_appeal_G1lfkFS4sWdMlIdj7VBDNM (describing Al Sharpton as a "buffoonish, race-baiting apologist for criminals").

²⁴⁰ Shelby Steele, *Sotomayor and the Politics of Race*, WALL ST. J., June 8, 2009, at A17 [hereinafter Steele, *Politics of Race*] ("Mr. Obama has been loved precisely because he was an anti-Jackson, a bargainer who grants them innocence before asking for their support.").

²⁴¹ Editorial, *Obama's Racial Candor*, N.Y. POST, Mar. 19 2008, at 28, available at http://www.nypost.com/p/news/opinion/editorials/item_svefByt788ttiG3tOv3lGL (asserting that then-candidate Obama's belief that "America can change"—presumably interpreted by the author as meaning that America can change without being pushed by complaints—is "of particular relevance to racial grievance-mongers like Jesse Jackson and Al Sharpton").

²⁴² Clarence Page explicitly credits President Obama's dissociation from American slavery for his electoral success:

Obama had an advantage in his quest, I suspect, in his lack of a family ancestry in American slavery, a defining characteristic of most African-Americans. Being raised by his white mother and grandparents in multiracial Hawaii and Indonesia, he was spared the post-slavery traumatic syndrome that for many of us African-Americans has been a culturalcrippler. Many of us older folks were conditioned at

celebration of complaint-free Others is increasingly cast as a prophylactic against discourse about racism writ large. This silencing of racial justice advocacy is obviously not new, however with post-racialism, the constraints have tightened further. Civil rights advocates, social justice organizers, and critical intellectuals are perhaps accustomed to being defamed as a group of self-centered identity politicians and their enablers who sew social discord for nefarious purposes. This much the colorblind campaign has steeled them to over the years. But with post-racialism's pop-star popularity, the more damning diss is that they're yesterday's news—irrelevant, delusional and unsophisticated.

C. *From Colorblind Meritocracy to Post-Racial Pragmatism: The New Cool Pose*

As discussed above the links between the visions of colorblindness in the 1980s and more recent embrace of post-racialism are robust. Yet while both cast a foreboding shadow over racial injustice frames, there are nuanced differences between them with respect to their stances toward racial power. These differences are best captured by lining up their descriptive and performative analogues—colorblind merit and post-racial pragmatism. The differences between them can be traced in part to their contextual origins. The former arose in the context of elite institutions where a certain degree of bureaucratic rationalism lay at the center of the contestations around “colorblind merit.” Post-racialism by contrast is most readily identified with an electoral event, an exercise of political power where the outcomes are dictated by mass preferences. These differences help explain the new conditions that any broadened notion of CRT will confront.

In the context of institutional struggles in higher education and other elite spaces, the notion of colorblind merit came to define the baseline for measuring whether the relative absence of racial minorities is the product of discrimination or the unhappy reality of the uneven distribution of “qualifications.” At least with respect to merit, the assertion—although contested—was that merit stood apart from racial power. Merit was value set apart from the economy of racial power, qualities that may well be maldistributed but not racially inscribed.

Importantly, it was not necessary to believe that merit constituted a here-and-now justification for who got what in American institutions in order for adherents to embrace the idea of colorblind merit. Indeed, defenders of meritocracy might be called idealists in that their belief in

an early era about our “place” in a white-dominated society in ways that culturally cripple many of our offspring, if the young’uns bother to listen to us at all.

colorblind meritocracy did not necessarily turn on its current reality but instead on a normative defense of a metric of just deserts that was utterly disconnected from the subjective preferences of the evaluator or the evaluated. One could believe that contemporary practices were stacked or even that a different set of institutional rules might be in place had the relevant history been different, yet hold nonetheless that these realities did not justify the abandonment of the colorblind ideal.²⁴³ The normative commitment to a certain vision of race neutrality in turn foregrounded prescriptive commands that located the seeds of transformation in the willingness of the Other to acquire the skills, attitudes, and hard work needed to succeed in these institutions.²⁴⁴ Race consciousness of any sort would be a departure from colorblind merit. Such departures might be justified temporarily for a variety of institutional purposes, but race itself was ideally irrelevant in assessing a candidate's intellectual performance and deservingness. Ideally, both the candidate as well as the institution should be colorblind.

Post-racial pragmatism as it is unfolding is less beholden to the ideal of colorblind merit and more grounded in reckoning with white preferences and values to develop the tactical means of engaging them. In contrast to the debates in the 1980s where the racial contours of institutional standards were obscured in an idealist discourse of merit, in electoral politics one is hard pressed to say that racial power is effectively hidden within American "democracy." In contrast to the idealism of colorblind merit where the promise of hard work and the right values elevates the possibility of success, post-racialism's North Star is majority preferences. Freedom and progress turn on the recognition that race need not stand as a barrier to those who satisfy majority sensibilities. Pragmatism locates deservingness not as an objective quality intrinsic to the candidate but in the resourceful adaptation to the projected preferences of those who have power to determine what matters. This is not the idealism of meritocracy but the realism of racial power, now tamed to the limited extent that whiteness can

²⁴³ Indeed, the ideological investment in colorblind meritocracy generated a full-throated defense of race neutral standards even in the face of numerous "ameritocratic" practices that characterizes standard operating procedures in elite institutions. Randall Kennedy defended the ideal of colorblind merit notwithstanding critiques that many institutional practices cannot be described as meritocratic: "I don't want to normalize race in academic evaluation. . . . I do not want race-conscious decisionmaking to be assimilated into our conception of meritocracy." Randall Kennedy, *supra* note 148, at 1807. *But see generally* Duncan Kennedy, *supra* note 49, at 711 (labeling this position "colorblind meritocratic fundamentalism" and proposing an argument against a sharp boundary between meritocratic decision and race-based decision).

²⁴⁴ The line of difference and debate between liberals and conservatives was about how long and to what ends this notion of merit might be suspended in order to ensure modest levels of integration; the line of contestation between liberals and race critics was that merit should not be suspended but rethought. Importantly, colorblind merit was not seen as race neutral at all, but a product and practice forged in the image and preferences of those who were dominant within it and the functions it traditionally served.

be erased as a prerequisite for accepting a lifeline from someone with a funny name and brown skin.

Politically and institutionally, what post-racial pragmatism suggests is that maneuvering around racial power is not only possible and productive, but in virtually all cases normative. Taken up and popularized in public discourse, post-racial pragmatism sets a standard not only for campaigns and for governance, but for racial justice constituencies, advocates and stakeholders as well. This form of pragmatism is an adjustment to and negotiation with existing power while ensuring that such power remains unmarked. It is a position that urges scaling racial obstacles while declining to name them, walking on water without calling attention to this fact. The ability of some to perform such feats soon becomes the responsibility of all. The rose that grows through the cracks confirms that concrete is fertile after all; the slave who manages to escape proves that those who remain in captivity do so out of choice. It is not the instinct to find a way forward that is problematic here, but it is the inattention to the asymmetrical conditions out of which this post-racial performance is launched. Post-racialism thus raises the baseline to another higher level. While formal equality grounds the legitimacy of the racial status quo in race neutrality, the calling card for post-racial pragmatism is maneuverability.

Of course, the terms of the maneuver are neither available nor acceptable to all. What might be standard practice in politics, especially in mass elections, may not be transferable to ordinary social life. What may be possible for particular individuals might not guarantee trickle down opportunity for others confronting racial obstacles, preferences, and outright exclusions. History makes the fairly obvious point that while some exceptional performers were able to break through racial barriers, this implied little about the lifting of barriers for others. Jackie Robinson still played in front of segregated audiences. White audiences' taste for Black performers at the Cotton Club did not whet the desire to share the dress circle or even the same row with other African Americans, much less neighborhoods, schools, and any other social space. Yet the magnitude and very public nature of Obama's political win has created a narrative of transcendence that operates as though all lesser obstacles disintegrate when the greater one gives way. It is as if the moment Jackie Robinson signed with the Dodgers, all other manifestations of segregation fell apart right then and there.

The difference post-racialism makes—if there is one—is that it facilitates a re-alignment between critics of the racial injustice narrative and those who push back against its repudiation. Post-racialism's cool pose with respect to the thicket of racial obstacles that continue to shape the social terrain permits a deeper alignment with forces that deny that significant racial barriers remain. In the face of the conservative

celebration of arrival, the bargain that post-racial pragmatists strike is silence about the racial barriers that continue to shape the life chances of many people of color. This failure to engage racial power jeopardizes racial justice agendas by giving license to those who seek to stigmatize all discourse pertaining to ongoing inequalities. The difference between the post-racial stance and its colorblind predecessor—and this may be slight indeed—is that with respect to colorblind merit, there is at least an opening to argue about its racially-inflected construction. Race Critics came to be through early attempts to critique colorblind merit while liberals disagreed even as they sometimes “suspended” their commitment to it, but at least there was space for a debate. The relevant frames overlapped just enough to provide some possibility that the liberal investment in rooting out “bias” could open up a conversation about rethinking meritocratic standards more broadly. Post-racial pragmatism allows for relatively few interventions of this sort because the issue at base is not whether the standards are fair and race neutral. The question instead is that given what they are, whether they constitute a total bar to all racial Others or whether, as is likely to be the case, some, few, or even One, can make it through. If it is indeed possible, perhaps miraculously so, that one racial Other can overcome, the assumption becomes that any other inequality or barrier is simply an excuse, a failing to make good on opportunity that is now provably there.

While critiques of *racism* are losing ground, not all discourse about race has been swept under post-racial sanction.²⁴⁵ Race remains available both to mark non-white delinquency and to deploy disciplinary power to contain it.²⁴⁶ The differential sanction between talk about racism versus talk about race is apparent in the contrasting reactions to Obama’s entreaties to voters not to let his non-traditional image stand in the way of his becoming president (condemned as playing the race card)²⁴⁷ versus the warm reaction to his Father’s Day speech lecturing Black fathers on paternal responsibility (portrayed as courageous truth-telling).²⁴⁸ One

²⁴⁵ Equally troubling, there is research that suggests that white Americans who voted for Obama now find it easier to express their racial grievance without the sanction of race. Daniel A. Effron et al., *Endorsing Obama Licenses Favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 590, 592 (2009) (concluding from three studies that expressing support for Obama grants people moral credential, thus reducing their concern with appearing to be racially biased).

²⁴⁶ See, e.g., Wornie L. Reed & Bertin M. Louis, “No More Excuses”: *Problematic Responses to Barack Obama’s Election*, 13 J. AFRICAN AM. STUD. 97 (2009) (evaluating some of the more “disturbing” aftereffects of Obama’s election, specifically addressing the sentiment that “now Blacks have no more excuses” as evidence of a resurgence of conservative theories that “eschew[] racism as a factor in African American life and blame[] victims of this racism for their resulting situations”); see also Patricia Cohen, “Culture of Poverty” *Makes a Comeback*, N.Y. TIMES, Oct. 18, 2010, at A1.

²⁴⁷ Michael Cooper & Michael Powell, *McCain Camp Says Obama Is Playing “Race Card,”* N.Y. TIMES, Aug. 1, 2008, at A1 (reporting that the McCain Campaign criticized Obama’s mention of his race as “divisive, negative, shameful and wrong”).

²⁴⁸ Ben Feller, *Obama Father’s Day Message: Dads Need to Step Up*, HUFFINGTON POST (June 19, 2009, 9:44 PM), http://www.huffingtonpost.com/2009/06/18/obama-fathers-day-message_n_

might infer a similar disciplinary impulse in the widespread criticism Obama received for commenting on the controversial arrest of notable Harvard scholar Henry Louis Gates in his Cambridge home. Although the President declined to definitively denounce the arrest in the common parlance of racial profiling, his comment that the police acted stupidly in arresting a man in his own home was widely denounced as out of line.²⁴⁹ In the controversy that followed, it was apparently beyond the pale to so much as intimate that Henry Louis Gates might have been the victim of racism yet it was almost axiomatic to many commentators that the insult to Sergeant James Crowley was racially-tinged.²⁵⁰

217561.html (applauding Obama's message that Black fathers need to be involved in the lives of their children).

²⁴⁹ For the full text of President Obama's remarks, see President Barack Obama, News Conference, (July 22, 2009), available at <http://www.whitehouse.gov/the-press-office/news-conference-president-july-22-2009> ("I don't know, not having been there and not seeing all the facts, what role race played in that, but I think it's fair to say . . . that the Cambridge Police acted stupidly in arresting somebody when there was already proof that they were in their own home."). For criticism of Obama's remarks, see Russell Goldman, *Did Obama Go Too Far With Race Remark?*, ABCNEWS.COM (July 23, 2009), <http://abcnews.go.com/Politics/story?id=8156606&page=1> (quoting George Stephanopoulos, ABC News' senior Washington correspondent, as saying Obama "crossed the line when he said the police acted stupidly"); Marcus Baram, *Cambridge Police Union President Stephen Killion "Disgraced" that Obama "Is Our Commander-In-Chief,"* HUFFINGTONPOST.COM (July 23, 2009), http://www.huffingtonpost.com/2009/07/23/cambridge-police-union-pr_n_244048.html (quoting Stephen Killion, president of the Cambridge Police Patrol Officer's Association, as saying that Obama's comments were "wrong," "disgraceful," and "totally inappropriate" and that Killion was "disgraced that he is our commander-in-chief [because] he smeared the good reputation of the hard-working men and women of the Cambridge Police Department"); Huma Khan & Michele McPhee, *Obama Defends Criticism of Cambridge Police in Arrest of Gates*, ABCNEWS.COM (July 23, 2009), <http://abcnews.go.com/Politics/story?id=8153681&page=1> (quoting Alan McDonald, the lawyer for the Cambridge Police Superior Officers Association, as saying that Obama "was dead wrong to malign this police officer specifically and the department in general"). Many commentators specifically criticized Obama's comments as undermining his "post-racial" politics. Rich Lowry, *Who was 'Stupid' in the Gates Arrest? (Even in Obama's 'Post-Racial' America, Lectures Never End)*, NAT'L REV. (July 24, 2009), available at <http://www.nationalreview.com/articles/227943/who-was-stupid-gates-arrest/rich-lowry> (writing that "Obama's ignorance didn't keep him from commenting on a matter of local policing," offering this as proof that "even in Barack Obama's 'post-racial' America, the lectures never end"); see also Amy Goodman, *Cornel West and Carl Dix on Race and Politics in the Age of Obama*, DEMOCRACY NOW (July 22, 2009), http://www.democracynow.org/2009/7/22/cornel_west_and_carl_dix_on (casting the Gates arrest as having "reignited debates about racism in the so-called 'post-racial' era of Barack Obama's presidency").

²⁵⁰ This shifting signification of whiteness from marker of racial privilege to racial victimization has been discernible in the long struggle over remedying illegitimate racial power, but it has arguably become more prevalent in the last several years. Whites' claims that integration violated their civil rights were ultimately trumped by the consensus that segregation constituted a clear constitutional wrong, but more recently, the Supreme Court's equation of disparate treatment with efforts to remedy disparate impact suggests an abiding sympathy for the notion that the "diminished overrepresentation" of whites throughout American institutions marks their current vulnerability to racial discrimination. See Luke Charles Harris, *Affirmative Action and the White Backlash: Notes from a Child of Apartheid*, in PICTURING US: AFRICAN AMERICAN IDENTITY IN PHOTOGRAPHY (Deborah Wills, ed., 1994) (arguing that in the context of the dramatic overrepresentation of whites throughout American institutions, racial anxiety about discrimination against whites should be read functionally as a complaint about the marginal decline in their overrepresentation); see also Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 83 (2010) (arguing that *Ricci v. DeStefano* "marks an important step in 'whitening' the Title

In crossing a line that was until that moment undefined, the President also revealed the strings attached to his dizzying post-racial triumph. Indeed, while it was Professor Gates who was visibly carted away in handcuffs, the more lasting image was the discursive constraints that tied the tongue of the President of the United States. The beer summit that tidied up the controversy reproduced President Obama's Philadelphia script in positioning the conflict in the symmetrical terms of a misunderstanding between racial equals. Of course even the Philadelphia script contained a subtext of asymmetrical responsibilities for African Americans that was implicitly written into this one as well. Obama's earlier line-crossing comments had given some credence to an asymmetrical perspective—veering off script in both the sense that it suggested that the scene might have been racially inflected and that something more might be going on than Black sensitivity to past racism. The great upshot of this “teachable moment” was the famous beer summit where the President, the Professor, and the Officer—joined by the completely uninvolved Vice-President—presented a photo-op that recalibrated the President's more candid response to fit the Philadelphia frame. At no moment was the Professor's indignation about being arrested for what many saw as talking back to power in his own home framed as a legitimate or even understandable reaction to his perception of having been racially profiled.²⁵¹

Conveyed in the casual image of four dudes kicking back a cold one in the Rose garden was the message that racial conflict could be managed, even finessed, largely on terms carefully chosen to extinguish the lingering sting of racial accusation. Racial protest was thus doubly arrested in the episode,²⁵² and President Obama has not been seen in these parts since.

VII disparate treatment standard by making it easier for whites than nonwhites to succeed on claims that they are the victims of intentional race discrimination”).

²⁵¹ There was a robust debate within the Black community about Professor Gates's actions, but much of it revolved around the Professor's indignation about what was framed as the predictable consequence of mouthing off to the police. Some critics fully conceded that the scene was racially loaded, but even those critics argued that the preferred response was accommodation rather than resistance. This sentiment is a microcosmic dimension of the larger project that a pragmatic sensibility represents. Avoidance may be advisable (though not always accessible) but the failure to affirm the right to be angry or to call out the action as itself unwarranted shows how seamlessly protest of racial power has been supplanted by the tactic of maneuvering around it. See, e.g., Helen Kennedy, *Colin Powell on Arrest of Professor Henry Louis Gates: “You Don't Argue with Cops,”* N.Y. DAILY NEWS, July, 2009 (noting that Powell like an array of African Americans acknowledged that there might well have been something problematic in what the police officer did, but he nonetheless maintained that “when you are faced with a police officer trying to do his job and get to the bottom of something, this is not the time to get in an argument with him”).

²⁵² To its credit, the Cambridge Police Department convened a 12-person committee to review the event and to issue recommendations. While in many ways insightful, the report replicated a symmetrical frame that leveled responsibility on both Crowley and Gates for missing opportunities to de-escalate the situation. The report indicated that both men feared the other without acknowledging the racial contours of that fear, nor including any racial content in its ten recommendations. Beneath the symmetry was a sensitive discussion of the risks of policing, but no engagement whatsoever of the

Admittedly speculative, it is hard to fathom that the President's utterance in that unguarded moment was an aberrant thought unrelated to a broader view that race still matters in ways that are contemporary and real rather than post-traumatic projections from an ugly but distant past. Yet the President is constrained by the terms upon which his acceptance by and future ability to win white voters is predicated. That the most powerful man on earth may be silenced and surveilled is a particularly sensitive barometer of the wages of post-racialism. These constraints—this post-racial entrapment—is particularly acute for the President and others who skirt the margins of the majority's racial comfort zone in a way that suppresses any hint of racial complaint. The strategy carries consequences not only for a politician seeking votes, but for any person or group seeking to operate under a less accommodationist sensibility. To borrow a page from post-racialism's "greater accomplishments includes all lesser ones" one might ask, "If the President can't speak Truth to Power, is it possible that lesser mortals can?"

D. The New Misalignments: Racial Justice Advocacy and Post-Racial Entrapment

Post-racial pragmatism entraps not only the President, but racial justice advocates and constituencies as well. The bargain comes with strings attached—or perhaps more accurately, discursive handcuffs. The measured agnosticism toward racial power that is characteristic of the post-racialist stance makes it that much harder to affirm, on occasion, that racial injuries actually exist. Like a reverse Chicken Little, repeated assurances that racial harmony can be purchased without breaking the embargo on racial grievance becomes a trap. Where racial complaint is a predicate for understanding and moving against racial harms, the messenger who has promised no racial drama compromises his credibility if he hints that he not only understands the complaint but might share it. The post-racial pragmatist must be guarded so as to preclude a replay of the unsightly vision of the President being carted away to the virtual slammer.

Although the triumph of a competent Black man in the White House offered reason to hope for an Administration uniquely responsive to racial inequality, fidelity to the terms of post-racial pragmatism virtually guaranteed continuing silence about the crisis in communities of color.

risks of being policed while Black. As an analogue to "rising tide lifts all boats" ideology, the report proceeds as though a colorblind response is sufficient to address the racial dimensions of such conflicts. At the end of the day, the equation of Gates's racial protest with disorderly conduct was neither challenged nor were the reasons he may have read Crowley's actions as racially-contingent acknowledged. See MISSED OPPORTUNITIES, SHARED RESPONSIBILITIES: FINAL REPORT OF THE CAMBRIDGE REVIEW COMMITTEE, June 15, 2010, http://www.cambridgema.gov/CityOfCambridge_Content/documents/Cambridge%20Review_FINAL.pdf

Like the colorblind gloss on formal equality, post-racialism's stance toward the remainder of racial power leaves little room for critique and contestation. For racial justice constituencies, the election brought with it an old lesson: winning and losing can be part of the same deal.

This entrapment born of the post-racial bargain is perhaps the ultimate example of contemporary frame misalignment. While broad constituencies found pleasure and hope in what was widely regarded as a shared breakthrough, the terms of success buttressed a deadly silence about the disproportionate and growing losses suffered by wide swaths of people of color. The challenge faced by civil rights constituents and other stakeholders is to find new ways to talk about the reproduction of racial inequality in a political era in which race is left off the table by the very representatives they have supported.

Patterns and practices such as standardized tests²⁵³ and universalistic naturalized conceptions of meritocracy,²⁵⁴ complex systems that produce

²⁵³ Of course there are those who will be quick to point out that not all disparities support an inference of racial marginalization per se, but instead, suggest the influence of class, culture or individual initiative. Underlying many counterclaims such as these is the suggestion that absent acceptable proof of causation, racial disparities demand no racially attentive societal response. The opposite (and I would contend more defensible) presumption that disparities might be the product of social history unless proven otherwise has quietly been put to rest. Post-racialists may side step this question of presumptive causation but it matters little given the "rising tide" ideology that refuses race-attentive solutions in the name of the "rising tide" universalism. See Darlene Superville, *Obama Defends Himself Against Black Critics*, HUFFINGTONPOST.COM, http://www.huffingtonpost.com/2009/12/21/obama-defends-himself-aga_n_399819.html (Dec. 21, 2009, 5:44 PM) ("I'm the president of the entire United States," Obama said, giving his standard answer to questions about the economic and other disparities facing blacks. "What I can do is make sure that I am passing laws that help all people, particularly those who are most vulnerable and most in need," he said. "That in turn is going to help lift up the African-American community."). Of course, whether addressing, for example, the especially debilitating effects of the economic downturn on black and Latino communities is in fact "special treatment," or whether the failure to do is special exclusion, is precisely the kind of question that had long been debated under the rubric of civil rights.

²⁵⁴ There is an extensive literature on the racial biases and racially disparate impacts of standardized testing. See, e.g., *Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools*, 9 MICH. J. RACE & L. 5, 12 (2003) (arguing that "the racial bias in standardized tests is not accidental; test makers are aware of the bias and actively structure this bias into the very constitution of the tests"); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 22 (1994) (criticizing the "uncritical use of test scores" in college admissions both because such use "has an adverse impact on Black applicants" and because standardized tests are "inaccurate indicators even with respect to their limited stated objective of predicting students' first-year grades in college and professional school"). Beyond questions of racial bias in test construction, there is psychological evidence that internalized racialized stereotypes act to suppress the standardized test performance of students' of color. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 808-10 (1995) (examining the effects of stereotype threat—"the threat of confirming or being judged by a negative societal stereotype"—in standardized testing, finding that stereotype threat "impairs performance" on standardized testing by splitting Black students' attention between the question at hand and self-censoring their answers to avoid such stereotypes).

This meritocratic universalism is particularly pernicious when it is naturalized scientifically and deployed in arguments meant to explain gaps between different racial groups on biological grounds.

the school-to-prison pipeline²⁵⁵ and the disproportionate impact of the mortgage-foreclosure crisis,²⁵⁶ material disparities that limit both the

While these arguments have been soundly refuted by the scientific community, *see* STEPHEN GOULD, *MISMEASURE OF MAN* 20 (1981) (critiquing the naturalization of a universalist concept of merit through the biologically determinist idea that “the social and economic differences between human groups—primarily races, classes and sexes—arise from inherited, inborn distinctions and that society, in this sense, is an accurate reflection of biology”), such naturalist meritocratic arguments have never really gone away. *See* Nicholas Wade, *Scientists Measure the Accuracy of a Racism Claim*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/science/14skull.html> (suggesting that Gould’s criticism of brain measurement was in fact, wrong). Of course, this raises the question of why the fascination with brain size and the associated emphasis on intellectual deficits, particularly of African Americans, remains such a fixture in both scientific inquiry and public policy.

A particularly vexed argument treading on such themes can be found in the controversy surrounding the claims of Richard Sander that affirmative action in law school admissions “produces more harms than benefits for its putative beneficiaries” because such a preference places minority students in situations where their academic credentials are “significantly weaker” than their classmates and thus does minority students a disservice because “students simply learn less when they are academically mismatched with their peers.” *See* Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371, 450 (2004). Sander’s data and analysis has been sharply criticized as analytically unsound. *See* David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1857 (2005) (arguing that Sander’s conclusions “rest on a series of statistical errors, oversights and implausible assumptions”). His arguments have received front-page coverage in the *New York Times*. *See* Adam Liptak, *Lawyers Debate Why Blacks Lag at Major Firms*, N.Y. TIMES, Nov. 29, 2006, at A1, available at <http://www.nytimes.com/2006/11/29/us/29diverse.html>. At the time of this writing, Sanders is involved in a lawsuit against the California Bar to gain access to “detailed data on the academic records, bar exam results and ethnicities of candidates for admission to practice.” Karen Sloan, *Professor Hopes Bar Passage Data Will Produce “Crisper Debate” over Affirmative Action*, NAT’L L.J. (June 15, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202497503009>. The Bar contends that the release of such data compromises the confidentiality of the test takers and violates the terms that the it had established regarding the limited uses for which the data could be used. *Id.* Although the California Superior Court ruled against Sander’s request for access to the Bar’s data, the California Court of Appeals has reversed the lower court’s ruling and remanded the case for further argument. *See* *Sanders v. State Bar of California*, no. A128647, 2011 WL 2279029 (Cal. Ct. App. June 10, 2011).

²⁵⁵ *See* AM. CIVIL LIBERTIES UNION, *LOCATING THE SCHOOL-TO-PRISON PIPELINE*, http://www.aclu.org/images/asset-uploadfile966_35553.pdf (last visited Mar. 25, 2011); Tona Boyd, *Confronting Racial Disparity: Legislative Responses to the School-to-Prison Pipeline*, 44 HARV. C.R.-C.L. L. REV. 573 (2009); Chauncey D. Smith, Note: *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Cases Through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009 (2009) (arguing that the “focus on punishing adult and youth minorities has blurred the pedagogical distinctions between America’s education and criminal justice systems”). Many argue that underlying this pipeline is an increase in the scope of behaviors punishable by criminal penalties. *See, e.g.*, ROBIN L. DAHLBERG, AM. CIVIL LIBERTIES UNION, *LOCKING UP OUR CHILDREN* (2008), available at http://www.aclu.org/pdfs/racialjustice/locking_up_our-children_web-ma.pdf; DEBORAH FITZGERALD FOWLER, ET AL., TEXAS APPLESEED, *TEXAS’S SCHOOL-TO-PRISON PIPELINE* (2007), available at <http://www.texasappleseed.net/pdf/pipeline%20report.pdf>; ELORA MUKHERJEE, N.Y. CIVIL LIBERTIES UNION, *CRIMINALIZING THE CLASSROOM* (2007), available at <http://www.nyclu.org/files/criminalizing-the-classroom-report.pdf>. Others point to stricter enforcement policies and the implementation of zero-tolerance policies in schools. *See generally* ADVANCEMENT PROJECT & HARVARD UNIV. CIVIL RIGHTS PROJECT, *OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO-TOLERANCE AND SCHOOL DISCIPLINE* (2000), available at <http://www.advancementproject.org/reports/opsusp.pdf>.

²⁵⁶ According to United for a Fair Economy, a Boston non-profit, the sub-prime mortgage collapse led to the “greatest loss of wealth to people of color in modern US history.” AMAAD RIVERA ET AL., *FORECLOSED: STATE OF THE DREAM 2008*, at vi–vii (2008), available at http://www.faireconomy.org/files/pdf/StateOfDream_01_16_08_Web.pdf. The total loss of wealth

quality and length of life such as the wealth gap,²⁵⁷ the health gap,²⁵⁸ and so

for people of color due to foreclosure on loans made between 1998–2006 to be between \$164 billion and \$213 billion, with Black borrowers accounting for \$71–92 billion and Latino borrowers accounting for \$75–98 billion. *Id.* at 16. Although white borrowers have also been devastated by this crisis, the collapse of the housing market has disproportionately affected the Black and Latino communities because of racial disparities in subprime lending patterns. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA* (2000). These racial and ethnic disparities in these estimated foreclosure rates hold even after controlling for differences in income patterns between demographic groups. See FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS, CENTER FOR RESPONSIBLE LENDING (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.html> (finding that Black and Latino homeowners were 76% and 71% more likely to go into foreclosure than whites and that high-income African Americans and Latinos were 81% and 94% more likely to face foreclosure than whites with similar incomes).

Although African Americans comprise only 12% of the adult population of the U.S., they hold 52.4% of the subprime and/or high-cost home loans. See NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), *DISCRIMINATION AND MORTGAGE LENDING IN THE USA: A SUMMARY OF THE DISPARATE IMPACT OF SUBPRIME MORTGAGE LENDING ON AFRICAN AMERICANS 6* (2009), available at http://naacp.3cdn.net/4ca760b774f81317c4_klm616yxx.pdf. According to one 2007 study, people of color in some of the nation's largest metropolitan areas were 3.8 times more likely to have subprime loans (high-cost loans account for 55% of loans to Blacks, but only 17% of loans to whites). See JIM CAMPEN ET AL., *PAYING MORE FOR THE AMERICAN DREAM: A MULTI-STATE ANALYSIS OF HIGHER COST HOME PURCHASE LENDING* (2007), available at <http://www.woodstockinst.org/publications/download/paying-more-for-the-american-dream%3a-a-multi%11state-analysis-of-higher%11cost-home-purchase-lending>; see also NATIONAL COMMUNITY REINVESTMENT COALITION, *THE OPPORTUNITY AGENDA, AND POVERTY & RACE RESEARCH ACTION COUNCIL, HOMEOWNERSHIP AND WEALTH BUILDING IMPEDED: CONTINUING LENDING DISPARITIES FOR MINORITIES AND EMERGING OBSTACLES FOR MIDDLE INCOME AND BORROWERS OF ALL RACES* (2006); ASSOCIATION OF COMMUNITY ORGANIZERS FOR REFORM NOW (ACORN) FAIR HOUSING CORPORATION, *FORECLOSURE EXPOSURE: A STUDY OF RACIAL AND INCOME DISPARITIES IN HOME MORTGAGE LENDING IN 172 AMERICAN CITIES* (2007).

²⁵⁷ The amount of wealth and assets held in reserve rather than merely received as income, available to individuals and families greatly determines their ability to “create the opportunity to secure the ‘good life’ in whatever form is needed, education, business, training, justice, health, comfort, and so on.” MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 2* (2d ed. 2006). There has been evidence of a wealth gap, a disparity in the amount of wealth held, between Black and White households since the early 1980s when the earliest surveys were conducted on the subject. See ERIK HURST ET AL., *WEALTH DYNAMICS OF AMERICAN FAMILIES: 1984–1994*, at 19 (1998) (reporting a gap in median wealth between white and Black families of 16.1 to 1 in 1984). Although the size of the gap has fluctuated over the last thirty years, surveys have shown that the amount of wealth held by white families is consistently an order of magnitude greater than that held by Black families. See TOM SHAPIRO, *THE COST OF BEING BLACK 47* (2005) (noting that “the net worth of typical White families is \$81,000 compared to \$8,000 for Black families” (citing ELENA GOUSKOVA & FRANK STAFFORD, CENTER INSTITUTE FOR SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, *TRENDS IN HOUSEHOLD WEALTH DYNAMICS 1999–2001*, at 6–7 (2002), available at http://psidonline.isr.umich.edu/Publications/Papers/tsp/2002-02_Trends_in_Household_Wealth_Sep_02.pdf)). Compounding this historical trend, recent data suggests that the wealth gap is skyrocketing in the aftermath of the subprime mortgage crisis. See, e.g., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW CHARITABLE TRUSTS (July 26, 2011) available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=85899362293&category=300 (writing that in 2009 “median wealth of white households is 20 times that of black households and 18 times that of Hispanic households); THOMAS M. SHAPIRO ET AL., INSTITUTE ON ASSETS AND SOCIAL POLICY, BRANDEIS UNIVERSITY, *THE RACIAL WEALTH GAP INCREASES FOURFOLD* (2010) (reporting a 20–1 wealth gap between White and Black families in 2007). The extent of this wealth gap is particularly disheartening among women of color. See *Lifting as We Climb: Women of Color, Wealth, and America's Future*, INSIGHT CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT 3 (2010), available at <http://www.mariko-chang.com/LiftingAsWeClimb.pdf> (“While white women in the prime

on are dynamics that are becoming unremarkable features of the post-racial world. As these conditions are being swept under post-racialism's "rising tide" mythology, there is in effect, a critical drama playing out in America

working years of ages 36–49 have a median wealth of \$42,600, the median wealth for women of color is only \$5.”).

²⁵⁸ There continues to be a marked disparity between the overall health and medical outcomes of minority and white individuals in the U.S. See David R. Williams, *Race, Socioeconomic Status, and Health The Added Effects of Racism and Discrimination*, 896 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 173, 176 (1999), available at <http://hdl.handle.net/2027.42/71908> (“At every level of income, for both men and women, African Americans have lower levels of life expectancy than their similarly situated white counterparts.”); see also Anne Marie McCarthy et al., *Racial/Ethnic and Socioeconomic Disparities in Mortality Among Women Diagnosed with Cervical Cancer in New York City, 1995–2006*, 21 CANCER CAUSES & CONTROL 1645, 1648–49 (2010) (examining the incidence and mortality rates of cervical cancer cases in NYC from 1995 to 2006, noting that Black and Hispanic women had higher incidence and mortality rates than white women); The Office of Minority Health, U.S. DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *Infant Mortality and African Americans*, <http://minorityhealth.hhs.gov/templates/content.aspx?ID=3021> (last visited June 20, 2011) (“African Americans have 2.4 times the infant mortality rate as non-Hispanic whites. They are four times as likely to die as infants due to complications related to low birthweight as compared to non-Hispanic white infants.”); Daixin Yin et al., *Does Socioeconomic Disparity in Cancer Incidence Vary Across Racial/Ethnic Groups?*, 21 CANCER CAUSES & CONTROL 1721 (2010) (examining the incidence of invasive cancers in relation to socioeconomic status (SES) and race/ethnicity, finding “significant variations were detected in SES disparities across the racial/ethnic groups for all five major cancer sites”). This disparity is also reflected in studies examining related factors among the U.S. populace. See, e.g., Rebecca Siegel et al., *Cancer Statistics, 2011: The Impact of Eliminating Socioeconomic and Racial Disparities on Premature Cancer Deaths*, 61 CA: A CANCER J. FOR CLINICIANS (2011), available at <http://onlinelibrary.wiley.com/doi/10.3322/caac.20121/abstract> (“The reduction in the overall cancer death rates since 1990 in men and 1991 in women translates to the avoidance of about 898,000 deaths from cancer. However, this progress has not benefited all segments of the population equally; cancer death rates for individuals with the least education are more than twice those of the most educated. The elimination of educational and racial disparities could potentially have avoided about 37% (60,370) of the premature cancer deaths among individuals aged 25 to 64 years in 2007 alone.”). In explaining this disparity, scholars have long considered a number of environmental factors, both emotional and physical. See, e.g., Chiquita A. Collins & David R. Williams, *Segregation and Morality: The Deadly Effects of Racism?*, 14 SOCIOLOGICAL F. 495, 507 (1999) (finding that high levels of residential racial segregation are positively related to the fact that “mortality rates for all causes and for heart disease, cancer, and homicide are higher for black men and women compared to their white counterparts”); Rodney Clark et al., *Racism as a Stressor for African Americans: A Biopsychosocial Model*, 54 AM. PSYCHOLOGIST 805, 805 (1999) (considering the medical impact of the experience of societal racism on African Americans, finding that “intergroup and intragroup racism may play a role in the high rates of morbidity and mortality in this population”); COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, at xiii (1987) (reporting on two studies considering the coincidence of minority-majority demographic patterns and hazardous waste sites, finding that “race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities”); see also Robert D. Bullard, *Urban Infrastructure: Social, Environmental, and Health Risks to African Americans*, in HANDBOOK OF BLACK AMERICAN HEALTH: THE MOSAIC OF CONDITIONS, ISSUES, POLICIES, AND PROSPECTS (Ivor Lensworth Livingston ed., 1994). Compounding these environmental effects are structural inequalities in U.S. healthcare. According to the Institute of Medicine of the National Academies, African Americans and other people of color still tend to receive “a lower quality of healthcare than non-minorities, even when access-related factors, such as patients’ insurance status and income are controlled.” BRIAN D. SMEDLEY ET AL., COMMITTEE ON UNDERSTANDING AND ELIMINATING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, U.S. INSTITUTE OF MEDICINE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 1 (2003).

with no narrative frame under which it might be told. The loss is not simply material and discursive, it is political as well. Without some version of a racial justice frame, the possibilities for collective action are similarly jettisoned. Moreover, this abandoned space does not remain narrative free. As post-racialism takes racial injustice out of the equation, it also widens the bandwidth of other race discourses that naturalize the status quo—recast and rebranded but effectively serving the same purposes as the biological and cultural explanations of the past.

The virtual abandonment of the racial injustice frame is perhaps the most significant misalignment between critical race theorists and the various cohorts with which we have occasionally allied and struggled. Its antecedents pre-exist the rise of post-racialism, and extend well beyond the front-line of presidential politics and media punditry. The disintegration of the injustice frame began the instant the contradictions upon which it was premised yielded to reformist demands. Contradiction-closing reforms such as the repeal of white-only rules and the collapse of formalized white supremacy offered legitimating cover to the ongoing material inequalities that gave rise to the demands in the first place. Transformation and legitimation have been flip sides of the same coin, however ambivalence and tension within the liberal civil rights coalition about colorblindness, meritocracy and the terms of integration continued to erode the powerful vision that inspired millions to move against the status quo. By the time colorblindness became attached to a powerful cultural force that changed the complexion of presidential politics, there was little in the discursive arsenal from which to resist the overnight reframing of racial injustice as racial grievance. Entrapment was the natural if not inevitable outcome.

Some part of the vulnerability to this post-racial malaise points to the limited field of vision that has long characterized the discourses of the liberal/civil rights establishment. The community's contradictory orientation towards affirmative action, as demonstrated in the Harvard debacle, was just one of many episodes that revealed the deep divisions between the mainstream understanding of racial under-representation and more critical frames that foregrounded the notion of meritocracy as one of many repositories of racial power.²⁵⁹ The subsequent embrace of diversity in the context of affirmative action symbolized a broader concession about how to understand racial disparity at a wider societal level.²⁶⁰ In embracing the language of diversity, the civil rights coalition endorsed a shift from a discrimination paradigm, already somewhat limited in its

²⁵⁹ See, e.g., Crenshaw, *Framing*, *supra* note 195, at 127–28.

²⁶⁰ Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment,"* AFRICAN AM. POL'Y F. (Feb. 25, 2007), <http://aapf.org/aarl/equalizingopportunity/#comments> (arguing that diversity as a rationale was a defeat for civil rights constituencies because diversity was a retreat from the understanding that race conscious policies were justified as tools to dismantle the racial contours of mainstream institutions).

capacity to capture the fuller dimensions of racial power, to its distant cousin—diversity. In the same way that diversity erased the particular dimensions of racial subordination in education, especially its institutional and structural synergies, the widespread articulation of diversity as the stand-in for race reform helped to marginalize racial injustice as a contemporary phenomenon.

Today, civil rights pragmatism is reflected in beltway politics that rely on polls and focus groups with an eye toward branding and messaging.²⁶¹ Moving in concert with a professionalized notion of racial justice advocacy, this generation takes cues from communications specialists who provide expert advice on whether and how persuadables—largely white voters—might be convinced to support various social justice objectives. Of course, there may be no way to get to some destinations, given the existing geographies of race and public opinion. Where there is no way to get to Peoria, post-racial pragmatism provides little direction.

The distance between the world of civil rights advocacy now and civil rights advocacy of the 1950s and 1960s is not just the difference in the target, but also a difference in the stance itself. Where King's civil disobedience and Marshall's appeal to equal citizenship both sought to broaden and transform the boundaries of racial equality, today's more pragmatic orientation seems limited to those issues that can be advanced within the limited sensibilities of persuadable (white) voters. Needless to say, had Martin Luther King, Jr. or Thurgood Marshall looked to dominant opinion to sort out a strategy in mid-20th century America, it is doubtful whether and how the March on Washington and the campaign to end school segregation would have unfolded.²⁶² Missing from much of contemporary racial politics is the recognition that short term campaign-based advocacy is not a social movement. Pollsters might be able to fashion a strategy for the former, but the larger goal of broadening and

²⁶¹ See, e.g., Thomas B. Edsall, *Rights Drive Said To Lose Underpinnings; Focus Groups Indicate Middle Class Sees Movement as Too Narrow*, WASH. POST, Mar. 9, 1991, at A6 (citing focus groups and national polls as indicators of public sentiment towards racism and equality); see also Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1, 176 (1993) ("As the Business Roundtable negotiations stalled, realization of Kennedy's stated desire to introduce legislation depended on whether the results from commissioned focus groups and public opinion polling provided a viable strategy to rebuild political support for civil rights legislation."). For more recent discussion of the use of focus group research in developing strategies to defend affirmative action, see Khaled Ali Beydoun, *Without Color of Law: The Losing Race against Colorblindness*, 12 MICH. J. RACE & L. 466 (2006) (detailing the development of messages in the battle to defend affirmative action in Michigan, in particular, the focus on white women as a key persuadable group and the relative neglect of the political base). The initiative passed with 57% of white women voting in favor of the ban. The ban was overturned by the 6th Circuit in *Coalition to Defend Affirmative Action Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 2011 WL 2600665; see also Crenshaw, *Framing Affirmative Action*, *supra* note 195 (discussing the challenges and contradictions of using colorblind messaging to defend race-conscious programs).

²⁶² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

sustaining racial equality discourses cannot be sustained within the limited parameters of current opinion.

The media also helped normalize a particular erasure of racial power in its coverage of racial disparities and conflict. By rarely situating affirmative action or any other race-conscious policies within a frame that pointed to contemporary practices of racial discrimination, the media helped frame racism as a thing of the past. Those who resisted this interment of race were increasingly positioned as outside the mainstream.

As the colorblind offensive continues to move against doctrines and ideas that were partial but hard-won victories, civil rights advocates and constituencies find themselves reigned in and the field of contestation substantially narrowed. In the space that remains, debates about key racial issues have either suppressed the racial dynamics that underscore key social issues or have reversed the frame altogether. As a consequence, those who were formerly recognized as the racially-entitled are turning into racism's new victims and established legal remedies are re-emerging as intolerable civil wrongs.

Consider the way in which post-racial discourses distort understandings of contemporary social problems, often by banishing the racial histories pertaining to these problems to the land of unspeakables. The widely acclaimed *Waiting for "Superman"*²⁶³ is a particularly compelling example. The portrayal of our deteriorating public school system conjures up images of racial isolation, yet the film manages to narrate a story about the tragic abandonment of public education without any reference to the racial history that shaped public education today. Neither the landmark case of *Brown v. Board of Education* and the massive white flight that it eventually prompted, nor the interventions such as tracking and magnet schooling that arose in its aftermath, are told as events pertaining to race. Racial power is neither spoken nor acknowledged, although it is shown in almost every frame. *Waiting for "Superman"* is like a silent film, one in which the viewer can see dynamics that are unfolding, but can hear nothing that vocalizes the actions that are being shown.

Waiting for "Superman" is more than a silent movie about race in America. It is a triumph of the post-racial paradigm. Its ability to engage, move, and inspire millions of Americans, many of whom are destined to live within the racialized contours of opportunity that it fails to name, makes it one of the most significant accomplishments of post-racialism to date. It manages to generate support for interventions that are in many ways the product of resistance to *Brown's* basic commands, even among those who have been left behind by a jurisprudence that has largely

²⁶³ WAITING FOR "SUPERMAN" (Electric Kinney Films, Participant Media, Walden Media 2010).

insulated public education from meaningful reform.

Whereas “*Superman*” repudiates racial injustice frames in its failure to name racial injustice, the case lodged against the then-Supreme Court nominee Sonia Sotomayor in the summer of 2009 represents an even more sobering case of outright reversal.²⁶⁴ The case against Sotomayor was that Obama’s search for “empathy” in his nominees and her outsider origins would manifest as open bias against white men. Sotomayor’s race and her judicial opinions were lined up to indict the nominee within the emerging discourse of post-racialism while her supporters largely declined to defend the vision of racial justice for which she was being excoriated.²⁶⁵ Judge Sotomayor’s participation in *Ricci v. DeStefano*’s appellate decision to uphold prevailing interpretations of Title VII disparate impact law against the claims of white males seemed to only confirm for her opponents the need to oppose Sotomayor in the language of reverse racism.²⁶⁶ This framing, ultimately upheld by the Supreme Court, was itself a reversal of the basic assumptions underlying disparate impact doctrine.²⁶⁷

²⁶⁴ Press Release, The White House, Judge Sonia Sotomayor (May 26, 2009), http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor; see also *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 152 (2009) (presenting questionnaire responses provided by Justice Sotomayor as part of her confirmation process).

²⁶⁵ Shelby Steele, for example, charges that Justice Sotomayor’s speech acknowledging the relevance of situated knowledge to the judicial enterprise and the fact of her nomination to the high court both compromise the promise of post-racialism. He describes Sotomayor as “a hardened, divisive and race-focused veteran of the culture wars [that Obama] claims to transcend.” Nevertheless, her nomination was “perfectly predictable” according to Steele. “Somehow we all simply know—like it or not—that Hispanics are now overdue for the gravitas of high office. And our new post-racialist president is especially attuned to this chance to have a ‘first’ under his belt, not to mention the chance to further secure the Hispanic vote. And yet it was precisely the American longing for post-racialism—relief from this sort of racial calculating—that lifted Mr. Obama into office.” Steele, *Politics of Race*, *supra* note 240. According to Steele’s logic, apparently President Obama could abide by post-racialism only by perpetuating the absence of Latinas on the Supreme Court. *Id.*; see also, e.g., Andy Barr, *Rush Limbaugh: Sotomayor a “Reverse Racist,” “Hack,”* POLITICO.COM (May 26, 2009, 5:15 PM) <http://www.politico.com/news/stories/0509/22983.html> (“Conservative radio host Rush Limbaugh blasted President Barack Obama on Tuesday for picking a ‘reverse racist’ and ‘hack’ in Judge Sonia Sotomayor for the Supreme Court.”).

²⁶⁶ The disciplining of now-Justice Sotomayor for not adequately adhering to post-racial norms is evident not only in her treatment at the hands of the Senate Judiciary committee, but also in the framing of the Supreme Court’s recent decision in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), wherein the Supreme Court overturned her ruling. The case has since been re-cast in public discourse as “*Ricci v. Sotomayor*,” accompanied by analysis affirming the notion that Sotomayor’s sympathy to race-conscious judicial interpretation placed her outside the realm of prospective legitimacy as a Supreme Court nominee. See, e.g., Eric Etheridge, *Ricci v. Sotomayor*, OPINIONATOR: N.Y. TIMES (June 29, 2009, 3:23 PM), <http://opinionator.blogs.nytimes.com/2009/06/29/ricci-v-sotomayor>; see also Cheryl I. Harris & Kimberly West-Faulcon, *Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 76, n.7 (2010) [hereinafter Harris & West-Faulcon, *Whitening Discrimination*] (noting that *Ricci* has been cast and widely accepted as “leveling the playing field,” even by those supporting Sotomayor’s nomination. The defense of her decision has been limited to the assertion that “her decision followed the law as it existed at the time, not that it was substantively correct.”).

²⁶⁷ *Ricci* held that the City of New Haven’s decision not to certify 2003 promotional exam results because the significant statistical disparity in favor of whites gave rise to the possibility of disparate

Accordingly, employers who are attentive to the possibility that their employment practices may unnecessarily exclude minority candidates may also be vulnerable to allegations that this very attentiveness discriminates against whites. The zero-sum frame that is evident in beliefs that more opportunity for racial minorities constitutes less opportunity for whites has been further amplified in *Ricci*. By tightening the reigns on how and when an employer can act to preclude a disparate outcome, the Court added yet another layer of insulation around the status quo. At the same time, the kind of racial discrimination that disparate impact had traditionally been deployed to remedy was itself erased, defined away by the Court's failure to seriously consider the job-relatedness of the criteria. The stigma of discrimination was visited upon City officials who accepted their responsibility to disrupt the unnecessary exclusion of minority firefighters rather than on those who rallied to prevent the reconsideration of practices that had created a racially skewed status quo.

This attack on the principle of disparate impact became a direct attack on Sotomayor herself. Critics seized on Sotomayor's embrace of her own background as a source of a judicial wisdom and married that to her vote in *Ricci* to build an image of the judge as a reverse racist, one who will simply hurt white male interests if permitted to serve on the Supreme Court. Yet consistent with the contradictions of post-racialism, white male justices whose backgrounds were invoked as markers of their ethnic identities remained free of such racial sanction even when their rulings functionally benefit white men.²⁶⁸ The attack on Sotomayor and the

impact liability was itself illegal under Title VII "absent some valid defense." Compliance with disparate impact law would not suffice without strong basis in evidence that "a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." As Harris and West-Faulcon argue, "even before *Ricci*, modern antidiscrimination law's central narrative was that potential changes to the racial status quo in the workplace, in business, and in schools and universities, threatened and compromised the rights and legitimate expectations of whites as a group. Over the long colorblind march of the past two decades, the Court has embraced the view—albeit by a bare five-vote majority—that racially attentive actions or public policy are inherently suspect, no matter the motive. This doctrinal move has effectively constrained the operation of antidiscrimination law and remedies—indeed turning the remedies into racial injuries and further legitimizing a narrative in which whites are (or are at risk of being) repeatedly victimized because of their race." Harris & West-Faulcon, *Whitening Discrimination*, *supra* note 265.

²⁶⁸ In Justice Samuel Alito's 2006 confirmation hearings, Alito's candid references to his Italian Catholic background and the way in which this background influenced his thinking on cases involving immigration, race, and discrimination were met with little press attention. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary, U.S. Senate*, 109th Cong. 475 (2006) (statement of Samuel Alito) ("When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."). In stark contrast to the treatment of Alito's comments, Now-Justice Sonia Sotomayor was widely and vehemently criticized before and during her confirmation hearings for saying "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life." Sonia Sotomayor, *A Latina Judge's Voice*, Judge Mario G. Olmos Memorial Lecture, Univ. of California,

broader mischaracterization of disparate impact law warranted little response from the Administration and a rather tepid response from the civil rights community more broadly. No doubt part of this deflection was grounded in the pragmatic understanding that there was little point in engaging in a fist-fight when the votes for confirmation were already secure. But a longer-term loss was evident in the fact that there was virtually no conversation about the devastating consequences of *Ricci* itself nor a strategy to regain the ground—both conceptually and legally—that was lost by the Court’s gesture toward equating disparate impact doctrine with reverse discrimination. Although the handwriting about the eventual confrontation between Congress and the Supreme Court on the scope of Congressional power to address disparate impact is on the wall, there seem to be no readily discernible plans to defend this vital terrain. Experts will no doubt warn that framing issues around race and discrimination are losing propositions, and thus, defending the scope of Title VII’s protections must be rebranded or jettisoned.

At the end of the day, there are limits to the degree that racial justice can be finessed; while bridges to white opinion can be built through analogies and commonalities, at some point the rubber meets the road and the specific burdens of race must be addressed. Concessions made to occupy only the space that is pragmatically useful limits the ability to explore possibilities not yet discovered, to tell stories and counter-narratives that hold the possibilities of broadening rather than constraining the terrain of social discourse.

V. REVISIONING CRITICAL RACE THEORY OUTSIDE THE BOUNDS OF POST-RACIAL ENTRAPMENT: ASSESSING THE CONDITIONS OF POSSIBILITY

One of the early debates through which CRT came into recognition was around the silencing conventions of legal scholarship.²⁶⁹ This critique

Berkeley, School of Law (Oct. 26 2001), in Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87 (2002); see, e.g., Wendy Norris, *Tancredo Calls SCOTUS Nominee Sotomayor a Racist*, COLORADOINDEPENDENT.COM (May 26, 2009), <http://coloradoindependent.com/29745/tancredo-calls-scotus-nominee-sotomayor-a-racist> (quoting former U.S. Representative Tom Tancredo as saying Sotomayor “appears to be a racist” in reaction to Sotomayor’s 2001 speech); Christina Bellatoni, *Gingrich Condemns Court Pick as Racist*, WASHINGTONTIMES.COM (May 27, 2009), <http://www.washingtontimes.com/news/2009/may/27/gingrich-condemns-court-pick-racist/> (reporting Former Speaker Newt Gingrich’s comments that Sotomayor was a “Latina woman racist” and should withdraw from consideration). For commentary on this contradiction, see Eugene Robinson, *Whose Identity Politics?*, WASH. POST, July 14, 2009, at A17 (“Thus it is irrelevant if Justice Samuel A. Alito Jr. talks about the impact of his background as the son of Italian immigrants on his rulings . . . but unforgivable for Sotomayor to mention that her Puerto Rican family history might be relevant to her work.”). Among the more insightful deconstructions of this contradiction is Stephen Colbert’s “Neutral Man’s Burden,” a satirical commentary highlighting the association of Justice Alito’s white Italian ethnicity as neutral, and Sotomayor’s Puerto Rican ethnicity as racialized and biased, available at <http://www.colbertnation.com/the-colbert-report-videos/238783/july-16-2009/the-word-burden>.

²⁶⁹ See discussion of the Sounds of Silence conference, *supra* Part II.D.

set off a debate about whether these constraints were real or self-imposed, and further, whether the content that was presumably embargoed was meritorious or self-involved drivel. While conventional wisdom holds that the academy is simply a marketplace of ideas in which thinkers should simply speak or write while letting the chips fall where they may, the critique waged by early CRT critics was that there was a broader institutional and ideological infrastructure that worked to cabin, stigmatize and ultimately suppress certain voices and ideas. CRT came into existence as an insurgent expression in the face of these potential consequences, premised on the recognition that beyond the material dimensions of domination, the loss of the ability to name and contest a reality was perhaps the final triumph of racial power.

Today's post-racialism creates pressures that are, if anything, greater than those that confronted the individual scholars who sought critical engagement within law. The post-racial bargain has come with strings attached, strings that tie up the ability of even the victor to address matters as he may see them. While efforts to stigmatize and silence racial grievance are not new,²⁷⁰ post-racialism brings new elements to the equation. It is a trick room whose welcoming spaciousness belies the gradual closing of the four walls, a closing that represents a synthesis between a colorblindness that simply denied the structural reproduction of racial power and a post-racialism that seeks to minimize its effects. Escape seems impossible until an off switch can be found.

The question confronting us now recalls the question that confronted early CRT: are the conditions ripe to facilitate confrontations with the current configuration of racial power, including its ideological dimensions, no matter from whence they come? It was daunting enough to challenge liberal and radical colleagues as well as the civil rights establishment over institutional discrimination. Is it possible to critique the post-racial strategies of the first African American administration, or the entrapment of civil rights discourse more broadly? Is it possible to articulate a substantive and compelling critique of the Obama Administration when it comes to its failures to articulate meaningful leadership on issues such as the devastating effect of the housing crisis and the recession on communities of color, the moribund immigration reform, or the global conversation on racial discrimination? Can we rise to these occasions to suggest that the current terms of discursive respectability demanded such an intra-racial vigilance that the President of the United States and the head of the nation's oldest civil rights organization felt compelled to summarily shove a respected civil rights activist—an African American woman

²⁷⁰ See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1335 (discussing the dialectics of transformation and legitimation in civil rights discourses, particularly anti-discrimination law).

falsely accused of racism—under the post-racial bus?²⁷¹ Are the conceptual tools available to take on the ideological contours of today's racial apologia in the manner that critical race theorists took on liberal constitutionalism in the 1980s?

These answers may turn on revisiting the conditions of possibility that prefigured the emergence of CRT. One of the conditions of possibility currently is that many of these debates build on similar dynamics that were present in the 1980s.²⁷² This is not, therefore, a blank slate but an adaptation of dynamics that have been in progress for some time. At the level of liberal race discourse, post-racial pragmatism has emerged as the equivalent of colorblind merit. It might be argued that this pragmatism is to Obama's victory what colorblind merit was to formal equality: both operate as presumptions that a formal breakthrough or a collapse of explicitly exclusionary norms renders the remaining practices race neutral and normative. In both instances, mainstream discourses seem to generate an impatient critique of those who pointed to the remainder of racial power that lay outside the self-congratulatory terrain. In both instances, alignment around the embrace of the symbolic value of a transformative moment gave way to heady conflict about the details. If CRT's history of frame misalignment with liberal integrationism has any purchase today, it is certainly in marking the fact that in many ways we have been here before.

CRT grew as well out of a convergence with and contestation within CLS. As explored above, CLS contributed the institutional space in which competing conceptions about race, knowledge, and social hierarchy could be vetted, refined and reproduced. Taking a page from the CLS tradition, the task at hand is to interrogate (racial) power where we live, work, socialize and exist. For academics, that world is implicated in the ways that the disciplines were built to normalize and sustain the American racial project. A contemporary critical race theory would thus take up the dual tasks of uncovering the epistemic foundations of white supremacy as well as the habits of disciplinary thought that cabin competing paradigms through colorblind conventions. Unraveling this story while at the same time generating an inventory of critical tools that have been fashioned by generations of Race Critics effectively replicates across disciplines the construction of CRT within one discipline.²⁷³

Building on our own histories of synthesizing thematic frames within the interstices of competing ideological discourses, the potential for

²⁷¹ See, e.g., *Race-Baiting*, *supra* note 23; Condon, *supra* note 23.

²⁷² See Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1356.

²⁷³ Borrowing from James Turner's approach to Africana studies, we need an approach to constructing an approach to knowledge about racial power "that transcends and transforms the boundaries of the traditional disciplines into a new interdiscipline."

recreating the conditions of possibility today lie in identifying counterparts who, like critical race theorists, currently reside at the margins of a variety of different disciplines, who are in some ways lined up within and in other ways critical of the prevailing knowledge-producing conventions about race within their field of practice. What is needed is a crisp exchange of ideas, tools, histories and contemporary understandings from critical thinkers who are fully conversant with and able to deploy the conventions of their disciplines to explain how they contribute to racial hierarchy. In this sense, the gathering place is beyond post-racialism's pragmatic silences. Its operating logic is to pay attention not only to that which is no longer spoken, but to elevate those ideas that have never been widely shared across disciplines and sectors. The observations and critiques mentioned at the beginning of this article that have emerged from psychology, sociology, philosophy and more illustrate the ways that each discipline has placed its stamp upon the status quo.²⁷⁴ This is the raw material that can come together in an institutional understanding of how the knowledge industry generates consent to racial domination.

The critical call is for social constructionists to help contribute to a counter-narrative of how prevailing ideas about race have come to be, and how the post-racial agnosticism about their continuing imprint on social life contributes to rather than detracts from the continuing significance of race. Our attention should neither become trapped in the assertion that attentiveness to race only serves to reify it, nor by the moderate view that the best approach now that these historical missteps are exposed is to embrace a colorblind strategy to ignore it. Race is not natural, yet race is embedded in social relations, many of which are naturalized by the knowledge-making disciplines that we have inherited and participate in reproducing. These are the poles of thinking out of which CRT emerged in law, and that may give way to the emergence of a similar kind of project across the disciplines today.

Key to building a coherent counter-narrative about race in American society is gathering up and integrating energies that are locked behind disciplinary walls and colorblind traditions. There are potentially many efforts of this sort, including one that was launched at the Center for the Advanced Studies on the Behavioral Sciences at Stanford. In the summer of 2008, twenty-five scholars from a variety of disciplines answered a call to "work across [their] disciplinary silos to fashion a more integrated and common sense account of how race shapes social life."²⁷⁵ The seminar grew out of a yearlong gestational process in which academics from a variety of disciplinary traditions focused collective attention on the

²⁷⁴ See *supra* notes 8–15.

²⁷⁵ Letter from Claude M. Steele, Former Director of the Center for Advanced Studies in the Behavioral Sciences, to Kimberlé Crenshaw (May 7, 2009) (on file with author).

problem of colorblindness. As stated there:

[O]ur attention has been drawn to the various ways that colorblindness “disciplines” knowledge production about race. Our dialogues have thus led us to consider how the academy itself reinforces a central dimension of colorblindness—the widespread belief that racial exclusion and marginality are aberrational and largely extinct features of American society. Often these colorblind sensibilities are seamlessly integrated into the work that we do, even work that at least topically takes up questions of race and/discrimination.²⁷⁶

A central premise that undergirded this effort was that highlighting the interconnection between colorblind projects in all disciplines brings to the fore the role of the university in creating a particular consensus around race. The process of excavating the deeper ideological structures that link the academy to the common sense assumptions that underscore colorblindness is more than a knowledge-producing activity. It is instead fashioned in the tradition of Du Boisian praxis, replicated by scholars who delivered historical, sociological, psychological, and economic analysis to service the arguments that underscored *Brown v. Board of Education*.

One of the key conditions of possibility for CRT was the institutionalization of critical legal studies space, a place of collective engagement where the value and shelf life of ideas and debates was not measured solely by its placement in a law review, but by how people engaged and deployed ideas. To more fully embrace this legacy, a revision of the academic orientation toward the social world is foundational to the project. This revision must critically engage the academic embodiment of post-racial sanction and agnosticism. As noted before, insights generated by earlier generations of critical race scholars were marginalized and the brilliant scholars who produced them were stigmatized as too invested in social reform to be considered legitimate academics.²⁷⁷ As Charles Mills wryly noted, “Here again we encounter the breathtaking illogic of the epistemology of ignorance: a call to change the system is condemned as crossing the line from science into politics, but the obverse position-ratification of the status quo is regarded as apolitical, faithful to the precept of ‘objectivity.’”²⁷⁸ This earlier version of racial sanction still has some currency today. While certain disciplines seem to gain their authority through their applications in the real world, race scholarship seems particularly vulnerable to pressures in the opposite direction. There is

²⁷⁶ *Id.*

²⁷⁷ See discussion *supra* Part II.C.–E.

²⁷⁸ See MILLS, *supra* note 7.

likewise an academic analogue to the post-racial agnosticism, captured in a certain impatience with projects that rest on collectively generated insights that posit alternative visions of social life. And paralleling the debates in CRT about trashing, there is similarly a sense among some scholars that revealing the contingencies of social life and language is itself transgressive and thus transformative.

Critical race projects have occupied both deconstructionist and interventionist spaces; there is no necessary inference that allegiance to the former precludes investment in the latter. Critical Race Theory, both in its traditional iterations and in an expanded articulation, can and should disrupt racial settlement and push for conceptual tools that may, for a short time, push things in a different direction. Certainly there are no final answers, no blueprints for transformation, but something more than the post-racial agnosticism seems warranted by today's milieu.

More importantly, it is not necessary for every writer or researcher with an interest in race to think critically about the apparatuses that they use, nor about the possible ways that their work can help illuminate new patterns of thought and action that might spur incremental change. What is necessary is that a critical mass engages these questions collectively with a certain intention. Whether to understand more fully the context of the university as a historical site of racial power, or to harness these resources to facilitate a more effective resistance to the social settlement that post racialism carries, it is decidedly a project that resists post-racialism's agnosticism on race and that replaces it with an engaged, alternative set of possibilities. Whether these alternatives are framed as racial injustice narratives or something else is up for grabs. Something else might come into its place. Indeed, in the same way that post racialism builds on colorblindness but re-popularizes it, a new critical approach might build on the remnants of racial injustice to fashion a new intellectual frame.

Whether these tentative steps toward a broadened critical race project gain traction or become one of several starts that don't pan out will be determined by many factors. The intention and agency of participants are probably not the most significant ones. Possibilities don't always develop even though the conditions may be ripe. But the space for such projects will remain, fueled by the likelihood that there are pockets of scholars, activists, policy makers and lay people who share a sense that among the worse outcomes of post-racialism would be not only the loss of forward momentum, but the loss of the ability to witness, to call forth hopes about different imaginaries that are not embargoed before they can ever be spoken.

Likewise, there are those who recall that monumental shifts in the social imagination were brought forth not by attempting to accommodate prevailing viewpoints, but by attempting to broaden the vision and understanding of what unjust domination looked like and why it was

important to change it. They recall that the brilliance of those who inspired such change was not that they talked only about the positives but were unflinching in their willingness to hold up contradictions, however inconvenient their truths might be. True, Dr. King had a dream but he also contrasted that dream with a harsh reality that he remained steadfast in articulating. We do a disservice to what made his oratory so moving to elevate the dream over the conditions that moved people to take action.²⁷⁹

This is not a call to sidestep academic rigor, nor is it a move to replace social movement-building with academic discourse. It is instead a plea to help rescue both from the conventions that have prevailed in the absence of active efforts to broaden the parameters of both. It is to re-introduce a sense of accountability, not solely to the “persuadable” voter, but to the stakeholders and constituents of racial justice. Such a meaningful modality must be premised on the belief that change is not a paint-by-the-numbers message, but embodies the relentless hard work of mapping racial power and transforming it where possible.

Our challenge is to develop a broader project, one that interrogates the limitations of contemporary race discourse both in terms of its popular embodiment and its epistemic foundations. It is not a project of fitting inside prevailing sensibilities and disciplinary paradigms, but of broadening them. As Martin Luther King, Jr. once said, “[a] genuine leader is not a searcher for consensus but a molder of consensus.”²⁸⁰ If this is indeed the task of a broadened, interdisciplinary CRT—to remap the racial contours of the way that people see the world that we live in—then in so doing we create a new set of possibilities for racial-justice advocates. Of course, any call to re-imagine the world we live in is one that puts participants at odds not only with prevailing institutional practices, but with allies as well. It requires a certain resistance to “friendly fire,” recognizing that some of the most trenchant, invested and rewarded critics may reside closer to home. Yet having such critics, whether near or far, puts us in good stead. It has been reported that Malcolm X once said that if you have no critics, you’ll likely have no success. If indeed having critics is the key to success, then critical race theorists have every reason to be wildly optimistic.

²⁷⁹ In the talking point gloss on how to move a racial justice agenda without engaging in the dreaded discourse of complaint, one of the common refrains is, “Martin Luther King didn’t say he had a complaint; he said he had a dream!” Of course, the dream made little sense without the complaint, which he brilliantly and evocatively set forth in the first three quarters of his riveting speech.

²⁸⁰ Dr. Martin Luther King, Jr., Address at Santa Rita Rehabilitation Center in Santa Rita, California (Pacifica Radio Broadcast Jan. 14, 1968), <http://www.archive.org/details/MartinLutherKingAtSantaRita1968>.

