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A CRITICAL RACE THEORY CRITIQUE OF THE RIGHT TO A JURY TRIAL UNDER TITLE VII

*Roy L. Brooks**

I

Critical Race Theory (hereinafter referred to as "CRT") is a relatively recent form of legal scholarship.[1] During its young history, CRT has been applied almost exclusively in the context of civil rights law. Some scholars, however, are now exploring other areas of application.[2]

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1. Writings on critical race theory include: DERRICK A. BELL, FACES AT THE BOTTOM WELL: DIVINING THE PERMANENCE OF RACISM (1992) [hereinafter FACES AT THE BOTTOM WELL]; DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW (3d. ed. 1992) [hereinafter RACE, RACISM AND AMERICAN LAW]; DERRICK A. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter AND WE ARE NOT SAVED]; PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Robin Barnes, *Colloquy: Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Scott Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990); Anthony Cook, *Beyond Critical Legal Studies: Reconstructive Theology of Dr. Martin Luther King. Jr.*, 103 HARV L. REV. 985 (1990); Kimberlé Crenshaw, *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988), Kimberlé Crenshaw, *Demarginilizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Jerome Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Jerome Culp, *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992); Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991) [hereinafter *Brewer's Plea*]; Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547 (1991); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing. Ten Years Later.* 140 U. PA. L. REV. 1349 (1992); Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990); Richard Delgado, *Review Essay: Recasting the American Race Problem.* 79 CALIF. L. REV. 1389 (1991) (reviewing ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM) [hereinafter *Recasting*]; Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) [hereinafter *When a Story Is Just a Story*]; Linda Greene, *Breaking Form* (book

At its most basic level, CRT is an attempt to approach legal problems and questions from the perspective of people of color. That is, CRT endeavors to deconstruct what normally passes among legal scholars as objective and neutral rules of law, legal doctrines, and legal relationships. The purpose of this intellectual excursion is to uncover racial subordination that might otherwise go unnoticed.[3]

Professor Richard Delgado, one of the most gifted, influential, and prolific critical race theorists, lists the following characteristics of CRT in addition to a sensitivity to racial implications in law:

> (1) an insistence on "naming our own reality"; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contexualized treatment of doctrine; (7) criticism of liberal legalism; and (8) an interest in structural determinism — the ways in which legal tools and thought-structures can impede law reform.[4]

My ambition in this article is to use CRT as a basis for analyzing a new and important amendment to Title VII of the 1964 Civil Rights

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review), 44 STAN. L. REV. 909 (1992); Alex Johnson, *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN L. REV. 137 (1990); Alex Johnson, *The New Voices of Color*, 100 YALE L.J. 2007 (1991); Randall Kennedy, *Racial Critiques of the Legal Academia*, 102 HARV. L. REV. 1745 (1989), Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, (1988); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Repartations*, 22 HARV. C.R. - C.L. L. REV. 323 (1987); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. (1991); Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 S.D. L. REV. 1043 (1988); Jon Weiner, *Law Profs Fight the Power*, THE NATION. 4/11, 1989, at 246; Patricia Williams, *Alchemical Notes: Reconstructuring Ideals from Deconstructed Rights*, 22 HARV. C.R. - C.L. L. REV. 401 (1987). Not all the above scholars consider themselves to be race crits.

2. Some legal scholars are beginning to explore the use of CRT outside the field of civil rights law. For example, Professor Beverly Moran of the University of Wisconsin Law School is studying tax law from a CRT perspective. Some believe that CRT can be applied to every course in the law school curriculum, and that this will in fact happen by the end of the decade.

3. *See, e.g.*, RACE, RACISM AND AMERICAN LAW, *supra* note 1, at 2; AND WE ARE NOT SAVED, *supra* note 1, at 3, 248-258; *Brewer's Plea*, *supra* note 1, at 12.

4. *When a Story is Just a Story*, *supra* note 1, at 95 n.1.

Act[5] — namely the right to a jury trial in employment discrimination cases involving compensatory or punitive damages.[6] After elaborating on the right to a trial by jury, including the jury-trial amendment to Title VII, I shall address the following question: Is the right to a trial by jury in Title VII cases a positive development from a CRT perspective? I conclude that critical race theorists would probably answer this question in the negative.

II

The Seventh Amendment to the Constitution states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[7] Based on the language that, "In Suits at common law . . . the right of trial by jury shall be preserved . . . " according to the rules of the common law," the courts have ruled that either the plaintiff or the defendant is entitled to a jury trial in all actions at law ("Suits at common law"), but not in actions in equity. The right to a trial by jury which may be exercised by either party, is "preserved" only for those types of claims that could have been brought in a court of law at common law.[8]

Although the distinction between law and equity jurisdiction was never absolute (e.g., the "clean up" doctrine permitted an equity court to decide issues that ordinarily would have been decided by a jury in an action at law[9]), the distinction has become less clear in modern

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5. Civil Rights Act of 1964, 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h through 6.

6. Civil Rights Act of 1991, § 102(c), codified as 42 U.S.C. § 12112(c) (1992). The right to a trial by jury was also extended to claims involving compensatory or punitive damage filed under the Americans With Disabilities Act of 1990 (commonly called the "ADA"), Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 29 U.S.C., 42 U.S.C. and 47 U.S.C.), and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1982). The ADA prohibits discrimination on the basis of disability in a broad range of areas of American life — such as employment, public facilities, transportation, and telecommunications. In contrast, the Rehabilitation Act only prohibits discrimination by federal contractors and sub-contractors and by schools and other recipients of federal financial assistance. The need for the ADA is clear.

7. U.S. CONST. amend. VII. The right to a jury trial is a fundamental guarantee of the rights and liberties of the American people. *See* Hodges v. Easton, 106 U.S. 408 (1882).

8. *See generally* Fleming James, *Right to Jury Trial in Civil Actions*, 72 YALE L.J. 655 (1963); Austin W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669 (1918).

9. *See* Harold Chesin & Geoffrey Hazard, *Chancery Procedure and the Seventh Amendment:*

times with the merger of law and equity and with the creation of new causes of action in response to a social and political order that is vastly more complex than and different from the social and political order of 1791.[10] In addition, the wisdom of allowing the exercise of the right to a trial by jury in complex cases has been called into question.[11]

Despite these problems, the Supreme Court has in principle remained faithful to an historical approach when determining whether the right to a jury trial can be asserted in a given case.[12] But since the merger of law and equity, many remedies once available only in a court of equity have now become "legal." Consequently, the scope of equity as an historical reference point has been narrowed, and this historical change, in turn, has resulted in the expansion of the right to a jury trial since the merger of law and equity.[13]

In the case of a new claim created by statute — one that has no common-law antecedent — Congress can grant the right to a jury trial.[14] When Congress established the right to be free of employment

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Jury Trial of Issues in Equity Cases Before 1791, 83 YALE L. J. 999 (1974); *see also* Ziebarth v. Kalenze, 238 N.W.2d 261 (N.D. 1976).

10. *See, e.g.*, Tull v. United States, 481 U.S. 412, 427 (1987) (even though the statutory action is similar to a common law action at law, the entire statutory action cannot be tried to a jury); People v. Superior Court, 507 P.2d 1400 (1973) (when statute creating a new cause of action does not explicitly restrict a court's general equity powers, a court in equity may exercise the full range of those powers, and issue does not need to be presented to a jury).

11. Arguments have been made in a number of courts that complex cases are beyond the competence of the jury. *See e.g.*, *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (although there is no "complexity" exception to the Seventh Amendment, there may be some instances in which a case is so complex that a jury trial would violate the Fifth Amendment right to due process). *Cf.* United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom* Gant v. Union Bank, 446 U.S. 929 (1980) (there is no complexity exception to the Seventh Amendment).

12. *See, e.g.*, Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990); Tull v. United States, 481 U.S. 412 (1987); Curtis v. Loether, 415 U.S. 189 (1974); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

13. *See generally* 5 J. WM. MOORE, ET AL., FEDERAL PRACTICE ¶ 8.16(2) (2d ed. 1988); 9 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2301, at 12 (1971).

14. When Congress creates a new statutory right, it can expressly grant a right to trial by jury. Less clear are the circumstances under which Congress can establish a new statutory right in such a way that denies the parties' right to a jury trial. In Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (involving an employer's challenge to OSHA's work place safety regulations before an administrative law judge), the Supreme Court held that when "Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible" without violating the constitutional right to a jury trial. *Id.* at 455. In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the Supreme Court stressed that its "prior cases support adminis-

discrimination in Title VII, however, it denied the right to a jury trial by expressly giving courts authority to grant only "equitable relief."[15] Such relief includes back pay for a limited period of time, reinstatement, hiring, or promotion.[16] Compensatory and punitive damages were not allowed.

The Civil Rights Act of 1991[17] amends Title VII to authorize a trial court to award compensatory and punitive damages to the complaining party in cases alleging intentional discrimination[18] and to provide for the right to a jury trial where such damages are sought.[19] Thus, once the complaining party requests compensatory or punitive damages, either party may invoke the right to a jury trial.[20] While critical race theorists would undoubtedly find the damages amendment to Title VII beneficial to people of color, I doubt that they would reach the same conclusion with respect to the jury-trial amendment.

III

The central tenet of CRT is that racism is an ingrained and permanent feature of American society. American culture is naturally racist; ergo Americans and their institutions, which feed off American culture,

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trative factfinding in only those situations involving 'public rights,' e.g., where the Government is . . . creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated." *Id.* at 51. The statutory rights in *Nordberg* — a bankruptcy trustee's right to recover a fraudulent conveyance against one who is not a creditor of the bankrupt debtor — was deemed to be "private" rather than "public," and, hence, entitled to a jury trial. Fraudulent conveyance actions by bankruptcy trustees "are quintessential suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to agument the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right. . . ." *Id.* at 56. The Supreme Court's reasoning in this area begs the question. Further, does Congress' power to limit the right to a jury trial turn on the distinction between "public" and "private" rights or on a determination that the jury is incompatible in one type of proceedings (e.g., in administrative proceedings, as the Court notes in *Atlas Roofing*) but not in another type of proceeding (e.g., in bankruptcy proceedings, as the Court states in *Nordberg*)?

15. 42 U.S.C. 2000e-5g (1992). Congress wanted trial courts to have the flexibility and discretionary powers of a court of equity so that they could "fashion the most complete relief possible." 118 Cong. Rec. 7168 (1972). *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

16. 42 U.S.C. 2000e-5g (1992).

17. 2 U.S.C. §§ 601, 1201 through 1224; 16 U.S.C. § 1a-5 note; 29 U.S.C. § 626; 42 U.S.C. §§ 1981 through 1981a, 1988, 2000e through 2000e-2, 2000e-4 through 2000e-5, 2000e-16, 12111, 12112, 12209 (1992).

18. Section 102, 42 U.S.C. § 12112 (1992). Section 102(b)(3) caps these damages at various amounts depending on the size of the employer's work force.

19. Section 102(c), 42 U.S.C. § 12112(c) (1992).

20. *Id.*

are naturally racist. Thus, rather than an extreme, grotesque or abnormal phenomenon, racism is the norm in American society. It is part of the natural order of things in our society.[21]

Professor Richard Delgado elaborates on this important assertion in CRT. He states that most white Americans, including judges and legislators

> treat racism as an anomaly, an illness, a sort of cancer on an otherwise healthy body. [Racist acts are deemed to be] . . . deviations from a status quo or baseline assumed to represent equality. If we spot such a deviation, we punish it. But most racism is not a deviation. As a number of Critical writers have been pointing out, racial subordination is an ordinary, "normal" feature of our social landscape. It is "normal science" — the ordinary state of affairs. Because racism is an ingrained feature of our cultural landscape, it looks ordinary and natural to everyone in that culture. It is "the way things are." Formal equal opportunity is thus calculated to remedy at most the more extreme and shocking forms of racial treatment; it can do little about the business-as-usual types of racism that people of color confront every day and that account for much of our subordination, poverty, and despair.[22]

It is clear that the concept of racism is crucial to an understanding of CRT. The race crits' concept of racism is taken from a famous statement presented to the United States Civil Rights Commission a generation ago by Anthony Downs. There, Downs explained racism as follows:

> Racism is one of those words that many people use, and feel strongly about, but cannot define very clearly. Those who suffer from racism usually interpret the word one way while others interpret it quite differently. This ambiguity is possible in part because the word refers to ideas that are very complicated and hard to pin down. Yet, before we can fully understand how racism works or how to combat its harmful effects, we must first try to define it clearly even though such an attempt may be regarded as wrong by many.
>
> Perhaps the best definition of racism is an operational one. This means that it must be based upon the way people

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21. *See generally* FACES AT THE BOTTOM WELL, *supra* note 1; RACE, RACISM AND AMERICAN LAW, *supra* note 1.

22. *Recasting*, *supra* note 1, at 1393-1394 (footnotes omitted).

> actually behave, rather than upon logical consistency or purely scientific ideas. Therefore, racism may be viewed as any attitude, action, or institutional structure which subordinates a person or group because of his or their color. Even though "race" and "color" refer to two different kinds of human characteristics, in America it is the visibility of skin color — and of other physical traits associated with particular color or groups — that marks individuals as "targets" for subordination by members of the white majority. This is true of Negroes, Puerto Ricans, Mexican Americans, Japanese Americans, Chinese Americans, and American Indians. Specifically, white racism subordinates members of all these other groups primarily because they are not white in color, even though some are technically considered to be members of the "white race" and even view themselves as "whites." . . .[23]

Thus, the race crits define racism in both "substantive"; and "procedural"; terms.[24] It is not simply prejudicial attitudes, or traditional racism (the belief in white superiority, black inferiority),[25] that draws the race crits' attention. They are equally, if not more, concerned with individual or institutional behavior that has the effect of placing persons of color in positions subordinate to whites.

Based on this concept of racism, critical race theorists would probably argue that Title VII's jury-trial amendment is "racist." The amendment subordinates people of color because it places issues of liability, as well as damages, in the hands of a quintessential American institution — the jury — that is *a fortiori* racist. The Rodney King verdict is the most visible but not the only instance of racism in the jury box.[26] Studies involving interviews of white jurors and statistical analyses of jury performance in racial cases (including cases in which African Americans were convicted of particular crimes and given the death sentence disproportionately more often than whites) clearly demonstrate that there is racism in the jury box.[27] One should not be

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23. Anthony Downs, *Racism in American and How to Combat It*, UNITED STATES COMMISSION ON CIVIL RIGHTS 5-6 (1970).

24. *Does Voice Really Matter*, *supra* note 1, at 104-106 (citations omitted).

25. *See* WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 704 (1966).

26. *See generally* RACE, RACISM AND AMERICAN LAW, *supra* note 1, § 5.14 (sources cited therein).

27. *Id.* § 5.14, at 351 (sources cited therein).

surprised if the demand for a jury trial in Title VII cases is made more often by the defendant than the plaintiff.

Curtis v. Loether[28] illustrates the concerns critical race theorists might have with the jury-trial amendment. Curtis (plaintiff), an African American woman, brought an action under section 812 of the Civil Rights Act of 1968,[29] claiming that Loether and others (defendants), who were white, had refused to rent an apartment to her because of her race.[30] Plaintiff's complaint sought only injunctive relief and punitive damages; a claim for compensatory relief was added later.[31] Defendants (not the plaintiff) made a timely demand for a jury trial in their answer.[32] The district court denied the request for a jury trial, stating that a jury trial was not authorized by the statute nor required by the Seventh Amendment. After trial on the merits, the district judge found that defendants had discriminated against plaintiff. The judge found no actual damages but did award $250 punitive damages. The court of appeals reversed on the jury-trial issue,[33] and the Supreme Court affirmed.[34]

Why did the plaintiff, an African American woman, try to avoid a jury trial? She did not want a jury because she feared that the jury might be racist and that this racism might affect the outcome of her case.[35] Writing for the Court, Justice Marshall, himself an African American, felt impelled to respond to the fear that jury prejudice might adversely affect victims of discrimination. Justice Marshall did not deny the existence of jury racism, even though he might define the term "racism" more narrowly than critical race theorists. But he believed that procedural safeguards were in place to protect persons of color from jury racism. The judgment n.o.v. and motion for a new trial provided adequate protection against jury racism affecting the

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28. 415 U.S. 189 (1974).

29. 42 U.S.C. §§ 3604(a), 3612 (1992). This statute is commonly known as the Fair Housing Act.

30. *Curtis*, 415 U.S. at 190. Section 812 authorizes private plaintiffs to bring civil actions to redress violations of the fair housing provisions of the Act. *Id.* at 189. Under this section, the court may grant injunctions, temporary restraining orders, and award actual and punitive damages. *Id.* at 189-90. The Act was amended in 1988.

31. *Id.* at 190. A preliminary injunction was issued which eventually dissolved because the plaintiff had obtained other housing. The case went to trial only on the issues of actual and punitive damages. *Id.*

32. *Id.*

33. *Id.* at 191. *See* Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972).

34. *Curtis*, 415 U.S. at 191.

35. Id. at 190.

outcome of a case, Justice Marshall said.[36] Thus, Justice Marshall concluded that the plaintiff's concern was "insufficient to overcome the clear command of the Seventh Amendment."[37]

The problem with Justice Marshall's calculation, critical race theorists would contend, is that it is abstract and noncontextual.[38] That is, it does not factor in the socioeconomic conditions of the persons who are most likely to bring civil rights claims. These persons — racial minorities and women — usually do not have the time, money, or flexibility in their lives to file post-trial motions, whether it be to challenge jury racism or for some other purpose. Title VII litigation is protracted and expensive litigation.[39] Simply filing a complaint in Title VII litigation is difficult enough for many persons of color, especially for people unemployed as a result of the alleged discrimination. Thus, post-trial motion practice may offer only hypothetical protection against jury bias. Such procedure may be effectively unavailable to people of color. And when it is available, it will delay final resolution of Title VII cases.

Furthermore, demonstrating a causal relationship between biased jury deliberations and the verdict in a single case is difficult at best. How would one do this? By interviewing the jurors? Who would talk? Who would tell the truth? And can the plaintiff afford to interview those who are willing to speak truthfully?

Racist decisionmaking is also a possibility, race crits would have to acknowledge, in nonjury trials under Title VII and other civil rights statutes. Given their definition of racism,[40] the race crits would have to concede that at least some judges are "naturally" racist. But perhaps critical race theorists are willing to take their chances with a single decisionmaker who just may be more enlightened than other judges and who, in any event, has to commit his or her reasoning to writing.[41] In such a situation, one must accept the lesser of two evils.

IV

I do not consider myself to be a critical race theorist. For one thing, the CRT concept of racism sweeps too broadly for my tastes.

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36. *Id.* at 198. The judgment n.o.v. is now called the renewal of motion for judgment as a matter of law. *See* FED. R. CIV. PROC.

37. *Curtis*, 415 U.S. at 195.

38. *See supra* text accompanying note 4.

39. *See* ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 70 (1990).

40. *See supra* text accompanying notes 22-26.

41. *See* Fed. R. Civ. P. 52 ("In all actions tried upon the facts without a jury . . ., the court shall find the facts specially and state separately its conclusions of law thereon. . . .").

But one does not have to be a race crit to appreciate its contributions to legal scholarship and analysis. CRT adds depth and understanding to the law, especially civil rights law. By deconstructing "neutral" or even seemingly pro-minority rules of law in their own special way, critical race theorists help us all see farther and clearer than we otherwise might see.

Analyzing Title VII's jury-trial amendment from a CRT perspective illustrates this point well. Along with the amendment authorizing compensatory and punitive damages, the jury-trial amendment seems beneficial to Title VII plaintiffs. Indeed, both amendments were part of a civil rights bill designed to strengthen Title VII.[42] But the jury-trial amendment may well have the opposite effect. It may weaken Title VII — make it more difficult for minority plaintiffs to win disparate treatment cases[43] — by giving racial prejudice greater opportunity than it previously had to influence the outcome of Title VII cases.

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42. For a discussion of the Civil Rights Act of 1991, see Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304 (1992).

43. Disparate treatment (intentional discrimination) cases may constitute the greatest number of cases filed under Title VII. A recent study concludes that disparate impact (discrimination characterized by disproportionate effects) cases accounted for less than 2% of all discrimination cases filed under Title VII between January 1, 1985 and March 31, 1987. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 998, n.57 (1991).