

# Subject Unrest

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PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION. By Ian Ayres.\*\* Chicago: University of Chicago Press, 2001. 433 pp. + xi.

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## Subject (n)

1. A matter, theme, etc., to be discussed, described, represented, etc.
2. A field of study
- ...
4. Any person owing obedience to another.

## Subject (adj)

1. Owing obedience to a government, colonizing power, force, etc.; in subjection
2. Liable, exposed, or prone to
3. Conditional upon<sup>1</sup>.

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1. OXFORD ILLUSTRATED AMERICAN DICTIONARY 826 (1998).

## I. THE PROBLEM OF THE SUBJECT: AN "OBJECTIVE" PERSPECTIVE

More than a decade ago—as the project of critical race theory was getting underway—Pierre Schlag remarked,

Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.<sup>2</sup>

Considered together, our books and the four reviews of them collected here call attention to four aspects of the notorious problem of the subject—a problem that remains in not-so-quiet dispute in the legal academy. They also attest to the powerful lure of what Schlag calls the story of formalism, and whose analysis we alter to examine a prevalent form of liberalism.

By "subject unrest," we first mean to mark the struggle between accounts of subordination that first brought critical race theory into being. What is the proper subject of analysis—"discrimination" or "subordination?" Professor Ian Ayres, whose book is, despite its depth, intellectual breadth, and clarity, very much in the vein of traditional law and economics, takes "discrimination" as its object; our book concerns the subject of subordination.

Much of economic theory is driven by the conviction that discrimination is impossible in the long run. Ayres, however, is not blinded by the normative imperatives of economic theory; he allows the facts to carry him wherever they will. As a result, his book represents the part of law and economics that is most politically progressive—a progressivity with a hard-edged passion for justice. Indeed, there is much agreement between Ayres and the critical race theory presented in our volume. Both are dissatisfied with traditional models of discrimination, finding them wanting in descriptions of the reality of American life. Yet, Ayres cannot quite join critical race theory in changing the subject from discrimination to subordination. He accepts the structure of the market as a given—outside our control and therefore not part of the analysis. Critical race theory, in contrast, is founded on the proposition that white supremacy pervades society, that it is intertwined with the very institutions of family, market, and state that shape social life. Ayres's "discrimination" is ultimately separable from "the market"; critical race theory's "subordination" is integral to it. As we will suggest later, this difference ultimately separates critical race theory from the liberal antidiscrimination project.

By "subject unrest," we mean to refer, secondly, to the tension between first-person and third-person accounts of the world—between the "objective" and the "subjective." The subject of Ayres's book is the traditional disinterested neutral observer, a scientist outside the vagaries of racial, gender, class, and sexual subordination. The questions presented by scientific

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2. Pierre J. Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1628 (1991).

observation are not dependent on who is doing the observing. For critical race theory, however—as the essays in our volume by Farley, Ortiz and Elrod, Monture-Angus, Ross, and Montoya suggest—questions, perceptions, and priorities change drastically in the realm of subordination as we shift in perspective from observer to observed.<sup>3</sup> These essays and others illustrate the passion, insight, and theoretical moves enabled by taking a subject position that is implicated in, rather than distanced from, the subject of analysis.

To acknowledge one's participation in systems of subordination is to recognize the story of the subject as a story of subjection. The traditional liberal model of discrimination, even the progressive version put forward by Ian Ayres, requires that the people subject to subordination buy into the system's goals and its assumptions. Critical race theory, by recognizing this demand for obedience, simultaneously suggests that it is possible for a subject to reject that demand. Certainly Professor Ayres pauses to ask whether he might learn something from the subjects of discrimination, but he cannot change his (or his coauthor's) role as outside observer. In this sense, though perhaps as a reluctant monarch, Ayres remains sovereign over his analysis.

Our third suggested meaning for "subject unrest" is the problem of identity. What is the being that is subjected, and what would it mean to end its subjection? Race and gender identities are just givens in Ayres's world and in much of traditional legal scholarship. Ayres's book looks at the role of gender and race in constructing some market discrimination, but Ayres does not problematize identity as such. Critical race theory, in contrast, draws from a poststructuralist tradition that takes identity itself as a subject, and from a series of political movements that have sought to create new subjects.

At least two kinds of theoretical objections have been raised to the project of "identity politics." One, usually identified with the political right, is that racial, gendered, and queer identities are inferior to the identity of the universal, unmarked individual.<sup>4</sup> In this view, such subjected identities are an impediment to the universal equality that we all are entitled to and seek.<sup>5</sup> Recently, scholars on the political left have made a different attack on marked identities. Drawing on Nietzsche, they argue that the dangerous lure of "identity politics" is the foreclosure of the subject's own freedom—"its impulse

3. CROSSROADS, pp. 97, 248, 251, 258, 274.

4. See Jean Bethke Elshtain, *Homosexual Politics: The Paradox of Gay Liberation*, 58-59 SALMAGUNDI 252 (1982-83). But see Gary Lehring, *Essentialism and the Political Articulation of Identity*, in PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 173 (Shane Phelan ed., 1997).

5. This is a variation on the theme that the purpose of law is to achieve this universal goal, a view frequently held by those on the left as well as the right. See, e.g., ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 260 (1975) (seeking the "regulative ideal" of a "universal community" in which "the sense of immanent order would be brought into harmony with the capacity of criticism or transcendence" and "the antagonism of the individual with the social aspect of personality" would be dissolved in "each person's recognition of the concrete individuality of his fellows").

to inscribe in the law and in other political registers its historical and present pain rather than conjure an imagined future of power to make itself."<sup>6</sup> In this view, the desire for justice is an illegitimate effort to take "the moralizing revenge of the powerless";<sup>7</sup> this desire and the effort to satiate it with governmental action must therefore be viewed with at least a certain amount of trepidation. From both right and left, then, politicized identities are problematic because they offer impediments to the project of transcendence.

Critical race theory, at its best, attempts to resist the right's and left's demands that the subject transcend the conditions of its making while simultaneously resisting the desire, present within some versions of identity politics, to slip off the yoke of subjection and stand revealed as an authentic and pure self. This is subject unrest at the most basic level: the struggle against what William Connolly calls "the drive to evil installed in the imagination of wholeness," whether that wholeness represents authenticity or transcendence.<sup>8</sup> Critical race theory's understanding of the subject resists the ideal of wholeness; it also refuses to disclaim engagement with the state and other institutional sites of power, problematic though that power may be.

Finally, as Moran, Case, and Freshman note in their reviews, our book and Ayres's raise the questions: How does the subject of subordination understand when discrimination has occurred, and what is to be done about it?<sup>9</sup> For critical race theory, this fourth aspect of the problem of the subject involves us with the micropolitics of subjection, the problem of subjectivity, and the speaking I. This problem is our next subject.

## II. THE PROBLEM OF THE SUBJECT: A "SUBJECTIVE" PERSPECTIVE

"They're trying to kill me," Yossarian told him calmly.

"No one's trying to kill you," Clevinger cried.

"Then why are they shooting at me?" Yossarian asked.

"They're shooting at *everyone*," Clevinger answered. "They're trying to kill everyone."

...

"Who's they?" he wanted to know. "Who, specifically do you think is trying to murder you?"

"Every one of them," Yossarian told him.

"Every one of whom?"

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6. *E.g.*, WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 66 (1995).

7. *Id.*

8. WILLIAM E. CONNOLLY, WHY I AM NOT A SECULARIST 150 (1999).

9. Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN. L. REV. 2273 (2003); Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293 (2003); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365 (2003).

"Every one of whom do you think?"

"I haven't any idea."

"Then how do you know they aren't?"

...

Yossarian had proof, because strangers he didn't know shot at him with cannons every time he flew up into the air to drop bombs on them . . . .<sup>10</sup>

I (Jerome) am a dialysis patient. I am the subject at stake in the medical treatments I face every week. The medical literature describes my condition as End Stage Renal Disease (ESRD). If I had lived in the first half of the last century instead of the first half of this one, I would now be dead.<sup>11</sup> As an ESRD patient, I am a too-frequent consumer of medical services (too frequent both for me and for the insurance companies who would like to have all ESRD patients eliminated). In the first year after being diagnosed as an ESRD patient, for example, I had fourteen operations (primarily outpatient procedures).<sup>12</sup> When a panel was scheduled for the Law and Society Association's annual meeting in Vancouver in late spring 2002 to discuss the reviews of our books, I was not sure I would be there; I had hoped to be off the transplant list and recuperating from a kidney transplant rather than talking about Ian Ayres's examination of prejudice in transplant rules. It was strange to be in the transplantation process as we objectively spoke of prejudice in the process of kidney transplants.

I bore you with the petty details of my medical history for a reason. How do I, the subject of the decisions, decide whether my treatment is fair and unaffected by my race or income? One would hope that the law and legal scholarship of antidiscrimination might by now provide an answer; that it does not is one of the chief failures of the modern legal system. Yet, evidence suggests that racial disparities in health care treatment are rampant. For example, a recent summary of the evidence of discrimination in medical care made the following conclusions:

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10. JOSEPH HELLER, *CATCH-22*, at 25-26 (Scribner Paperback Fiction ed. 1996) (1955).

11. Dialysis is a medical procedure that uses a machine to filter waste products from the bloodstream and restore the blood to its normal constituents. It is a necessary form of treatment for patients with ESRD and, in most circumstances, is administered in a fixed schedule of three times per week. I have been a dialysis patient for more than two years now. Without dialysis I, like almost all of the 53,259 dialysis patients on the kidney transplant list on October 22, 2002, would now be dead. While waiting on transplants, 20,000 dialysis patients died between 1992 and 2001. See United Network for Organ Sharing, Reported Deaths and Annual Death Rates Per 1,000 Patient Years at Risk, 1992 to 2001: Kidney Waiting List, at [http://www.optn.org/data/annualReport.asp?url=/Data/ar2002/ar02\\_table\\_503\\_AGE\\_KI.htm](http://www.optn.org/data/annualReport.asp?url=/Data/ar2002/ar02_table_503_AGE_KI.htm).

12. I don't want to give the impression that I am complaining about my health status. In actuality, I am a functional dialysis patient. I am still able to work and carry a full teaching load. I have yet to experience the full panoply of issues faced by many diabetes ESRD patients (amputations of joints, immobility, inability to work, and inability to care for themselves without assistance). I intend this to be only a brief description of my situation without seeking any pity from this audience or having pity for myself.

Racial and ethnic minorities 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. . . . Evidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services. . . . The majority of studies, however, find that racial and ethnic disparities remain even after adjustment for socioeconomic differences and other health care access-related factors. . . . Racial and ethnic disparities are found in . . . diabetes care . . . , end-stage renal disease and kidney transplantation . . . .<sup>13</sup>

Liberal theorists generally look for racial animus as the touchstone of discrimination. Traditional law and economics scholars do not. Within law and economics, not all forms or acts of discrimination matter, only those that amount to "effective" discrimination, and discrimination can be "effective" in the long run only if there is some market imperfection that does not allow discrimination to be eliminated. Therefore, for the traditional law and economics scholar, it is not enough to know that someone has racial animus; one must be able to show that the market permits that animus to be effective. Accordingly, discrimination for the law and economics scholar is always observed from a safe distance. If I tell a law and economics scholar, even a liberal one, hypothetically that my employer is a founding member of the KKK and a person who views all African Americans as subhuman, he likely would say that this information is only marginally interesting and not dispositive of whether I face real or "effective" discrimination in my employment. Discrimination becomes for the law and economics scholar—and for law as it adopts more and more of economics' tenets—something that is proven only as a remainder after all other issues are eliminated. Discrimination and racism are the exceptions that can only be proven by overwhelming evidence presented by the subjects of that discrimination.

The identity politics of this conventional economic analysis are obvious. It is no accident that this analytical structure makes it mightily difficult to "prove" discrimination, much less systematized subordination. Nor is it coincidence that today's judges have selected this structure for transformation into formal constitutional law.<sup>14</sup> And for the same reasons, it is no surprise that critical race theory attacks this structure.

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13. UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 5 (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2002) (references omitted); see also W. MICHAEL BYRD & LINDA A. CLAYTON, AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEMS OF RACE: BEGINNINGS TO 1900 (2000); W. MICHAEL BYRD & LINDA A. CLAYTON, AN AMERICAN HEALTH DILEMMA: RACE, MEDICINE, AND HEALTH CARE IN THE UNITED STATES 1900-2000 (2002).

14. See, e.g., Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993); Jerome McCristal Culp, Jr., *An Open Letter From One Black Scholar to Ruth Bader Ginsburg or How Not to Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994) (observing that Justice O'Connor has distinguished between race and

gender issues, making it more difficult for plaintiffs to prove race discrimination); Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994) (arguing that Justice Rehnquist, first as an Associate Justice and now as Chief Justice, has made it his program to eviscerate the rights of blacks to achieve justice under the civil rights statutes); CROSSROADS, p. 393, 395-96 (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in Mari Matsuda's essay).

This thought structure is evident in the jurisprudential devolution of recent decades, which has begotten an "intent"-obsessed analysis that refuses to "see" even rampant discrimination absent irrefutable "proof" akin to the proverbial smoking gun. Conceptually, this thought structure discounts the possibility—or probability—of discrimination to explain a given social circumstance unless all other plausible hypotheses can be excluded from consideration as a result of the smoking-gun evidence. In effect, this approach to "discrimination" and "antidiscrimination" leaves the status quo undisturbed unless all other possible causes of subordination can be eliminated from consideration. As a result, this "wrong turn" in equality jurisprudence ignores the culture of subordination established socially and legally through invidious discrimination, which the Fourteenth Amendment formally repudiated but which remains in operation through institutional and other societal means. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

This devolution proximately began with the decision in *Washington v. Davis*, 426 U.S. 229 (1976) under the relatively "liberal" high court of that era, which effectively devalued and sidelined the analytical significance, and necessary salience, of statistical, structural, or circumstantial evidence to show the existence and operation of systemic, institutional, or social subordination. More recently, this devolution has produced *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988), and *Adarand Constructors Inc. v. Peña*, 515 U.S. 200 (1995), which explicitly constricted the availability of antidiscrimination remedies to cases where "specific" rather than "societal" subordination could be proven. And the requisite proof, under the *Washington v. Davis* precedent, must of course be focused on motive and intent rather than on impact, consequence, or effect. The jurisprudential regime constructed via these and similar decrees has brought to life a self-fulfilling prophecy, foreseen and forecast by the very designers of affirmative action in the 1970s. The early architects of "affirmative action" foresaw that, without a proactive approach to implementation, custom and "tradition" would doom the national effort to remedy entrenched "patterns" of prejudice and achieve equality under the antidiscrimination principle: Affirmative intervention was foreseen as necessary to alter in social terms the ingrained "patterns of past discrimination built into institutional systems so they are re-created without the necessity of malice" on the part of any particular individual or entity. James E. Jones, Jr., *Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 395 (1988). See generally Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of The Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Susan Strum & Lani Guinier, *Rethinking the Process of Classification and Evaluation: The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996). Because these historically instilled patterns of thinking and doing are embedded in social life—at both the individual and institutional levels—the practice of discrimination needs no "malice" to continue operating; hence, the juridical demand for smoking-gun evidence of discriminatory "intent" effectively immunizes these patterns of "unconscious" racism from any legal remedy despite the formal repudiation of inequality as public policy.

This devolution, and its foreseeable consequences, of course are part and parcel of the larger sociolegal backlash unleashed in recent decades via the "culture wars" being waged in law, policy, and society. See *infra* notes 39-41 and accompanying text. For a more detailed discussion of cultural warfare, retrenchment politics and backlash lawmaking, see Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kenneth L. Karst,

The legal liberal also faces the discrimination question, but instead of seeking market imperfection, he searches for subjective intent on the part of some responsible individual(s) who, because of such manifest intent, justly may be held individually responsible for specific misconduct. This search for individuated badness mollifies traditional liberal concerns about harm, causation, and individual culpability. The liberal legal tradition substitutes the intent of the individual “bad apple” for the market “imperfection” for which the economist instead searches. In the end, however, like the economic analysis, this analysis makes it quite difficult to prove discrimination and expose the ways and means of subordination that, over time, have been normalized as “tradition” and culture.

Ian Ayres’s powerful book of essays tries to look inside the black box of discrimination, but because of his assumptions Ayres cannot help the individual participant caught in the processes of subordination. Professor Ayres would tell me, both as an economist and a liberal, that he does not know whether I am the subject of discrimination in my treatment for ESRD. As an economist, he would have to go through a careful process of eliminating all of the other possible reasons for differential treatment to answer that question. As a liberal, he would have to inquire into subjective intent. This is the discrimination question, and posed this way it foreseeably will elude a satisfactory answer. Even if Ian Ayres is convinced that there is discrimination in the provision of health care to African American dialysis patients, he cannot tell whether I am personally a victim. Even if he could give me an answer to that question, however, that would not satisfy me. I consider myself a subject of subordination whenever other members of my group suffer or, indeed, anyone suffers inappropriately.

Critical race theory provides other ways of posing the discrimination question and then answering it. In his review, for example, Professor Haynes refers back to a very early but powerfully influential critical race theory story: that of Patricia Williams’s attempt to buy her mother a sweater at Benetton one Christmas.<sup>15</sup> The issue that arises from the Benetton story for an economist and for a liberal is whether there is discrimination in the decision of the clerk not to admit Professor Williams to the store. If there is not, then Professor Williams is being silly, perhaps hysterical, perhaps paranoid, in her subsequent

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*Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991); Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409 (1998). More recently, this devolution has juxtaposed general notions of “federalism” against the antidiscrimination principle of the Fourteenth Amendment to produce the (aptly yet perversely named) “anti-antidiscrimination agenda” of the five-member majority on the Supreme Court that enjoys current control of the federal judicial power. See Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002).

15. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-46 (1991); Kevin Haynes, *Taking Measures*, 55 STAN. L. REV. 2349, 2349 (2003).



efforts to denounce Benetton and its employees. The story ultimately puts Professor Williams's status as a proper subject into question. Is Professor Williams crazy, or is she sane?

Similar themes are evoked in the Case review, and in particular in the story of her reaction to Ayres's market studies when they first were published. As Case recounts, the possibility of discrimination in auto sales markets documented by Ayres stopped her own plans to buy a car in their tracks—precisely because Ayres's market studies made her confront both the pervasiveness of that possibility and the impossibility of confirming or dispelling it while caught in the very market that is the subject of both Ayres's study and her life.<sup>16</sup> The Case account, like the Williams story, captures the human disorientation produced by living constantly subjected to the possibility—even probability—of discrimination in everyday moments. The two narratives capture the problem with both liberalism and law and economics and bring into sharp relief why prevalent structures of legal and social inquiry are inadequate to the task of ending injustice.

Critical race theorists therefore start with a different problem: not whether discrimination is taking place in contemporary society, but what it is like to have as part of one's everyday experience the possibility that one is the target of discrimination—the possibility, that is, of becoming without warning the victim of “spirit murder.”<sup>17</sup> One aspect of that subjective experience is epistemological vertigo, as Professor Williams captured so movingly in her book, and as Professor Case confirms in her review.<sup>18</sup> Another aspect is the awareness that one's own perceptions and experiences may at any moment be put on trial, as Professor Williams also documents.<sup>19</sup> To be part of a pattern of discrimination that we can “prove” at the aggregate level but never at the individual level is to be a subject the truth of whose experience is always in doubt. For critical race theory, this analytical structure is the Catch-22 of prevalent forms of antidiscrimination discourse, both on the right and left.

Ian Ayres can tell me whether as a member of a social group I am the subject of discrimination—that is, as a black type-B person on the kidney donor list. Yet he cannot tell me which decisions made by my health care provider are part of the overall subordination asserted by a health care system that consistently treats black ESRD patients differently. Is it racial subordination that leaves kidney dialysis at “the bottom” of the medical social system at my hospital?<sup>20</sup> Critical race theory cannot answer these questions either. But the

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16. Case, *supra* note 9, at 2274.

17. WILLIAMS, *supra* note 15, at 73; *see also* Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987).

18. WILLIAMS, *supra* note 15, at 228-29; Case, *supra* note 9, at 2274.

19. WILLIAMS, *supra* note 15, at 44-51.

20. I say at the bottom of the system advisedly. Duke University Health System recently built and opened a new medical pavilion that was to house, among other things, the

narrative tradition of critical race theory provides a way to explore the dilemma of the uncertain subject of subordination. Rather than asking, "Is Jerome the subject of discrimination, or is he crazy," critical race theory tells stories of various sorts about what it is like to be the (perpetually possible) subject of discrimination, and to constantly wonder whether one is crazy or appears so to others. Critical race theory takes seriously, in other words, the subject in crisis.

In so doing, it recognizes that the subject who can take a distanced perspective on whether discrimination is occurring or not, and demand an affirmative answer before acting, is not an unraced subject. From a critical race perspective, to experience oneself as purely an innocent onlooker to the act of discrimination is to experience oneself as white.<sup>21</sup> In this context, "white," of course, is not a biological identity. It is rather a subject position constructed with race, gender, class, sexual orientation, and other axes of identity as social power. Liberals say to me, "You are a black middle class professional"; they invite me to experience my whiteness. However, I experience the invitation as part of the problem. The invitation seeks to have me join in the transcendence of the liberal order, but to accept the invitation means to enforce the boundaries of subordination for those not able to transcend it. Thus, when my doctors and nurses make sure everyone in the operating room knows that I am a law professor at Duke University, I wonder what it is like for those who are not professors of law.

Now, we have argued only that critical race theory provides a way to explore the subjective dilemma of the uncertainty of subordination, not that it provides a solution to that dilemma. Yet the stories told by critical race theorists recognize that those who experience institutionalized, normalized subordination must live their lives without the "proof" of discrimination that economic analysis and liberal analysis demand. Indeed, critical race theory makes it plain that the luxury of demanding such proof is differentially distributed in our society. Critical race theory in this way locates race<sup>22</sup> at the very center of personal, "subjective" experience. The subject of subordination is an unstable one; it constantly doubts and is doubted by others. The

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outpatient kidney dialysis unit. At the last second, the space designed for that purpose was turned over to other health care needs not as central to black patients. Were those decisions influenced by racial subordination in the health care system? Ayres can never ask that question. It is outside the discourse of statistical discrimination, but to the participants in the medical system—the kidney dialysis patients who are predominately black—it may be the most important question.

21. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-300 (1990) ("The rhetoric of innocence is used most powerfully by those who seek to deny or severely to limit affirmative action, the 'white rhetoricians.'").

22. For examples of the careful and multi-textured way that the contributors to this book treat race, see the essays in our volume by Devon W. Carbado, CROSSROADS, p. 221, Robert S. Chang, CROSSROADS, p. 87, Anthony Paul Farley, CROSSROADS, p. 97, Robert L. Hayman, Jr. & Nancy Levit, CROSSROADS, p. 159, Kevin R. Johnson, CROSSROADS, p. 187, and Sharene H. Razack, CROSSROADS, p. 199.

economist and the liberal separate their perspectives from the minor vagaries of life to examine “objectively” or “neutrally” the question of “discrimination”—and the disjunction between the individual and the institutional—from a comforting scholarly distance. Critical race theory claims that this move is always already raced.

The attacks by an unidentified sniper in the Washington, D.C., area in October 2002 may provide an example that may speak to those of you who are unfamiliar with the subject position of radically not-knowing. All of us in or near that geographical area understood the fear created by this series of killings and woundings.<sup>23</sup> As individuals of all races, genders, ages, and walks of life were cut down seemingly at random by this perpetrator, all of us understood individually how it changes all of the things that we think about doing in our everyday lives. As the range of activities at risk expanded—pumping gas, going to shop, going to school, stopping to eat—most of us felt the oppression of not being able to plan for, or to eliminate, the pervasive risk of individual attack. It was oppressive at the macro-level for all of the individuals in the metropolitan Washington, D.C., area, and people traveling through it. The risk for any individual may have been quite small, but its impact on the lives of everyone was omnipresent. The impact of that omnipresent feeling, of being subject to the unknown and unknowable acts of two snipers, provides a glimpse into the kind of fear experienced by those of us who are kidney patients in the health care system.

Does this discussion provide an answer to the various questions posed in the reviews such as, “What is ‘discrimination?’” Yes. It says that “What is discrimination?” is the wrong question. After recognizing that many practices produce discrimination, the right question is, “What are the analytical consequences of taking the subject in crisis seriously, of recognizing the question of epistemology as raced?” Ian Ayres and the traditional legal model established by liberal equality jurisprudence say to individuals at risk everywhere, “Accept the risks of the system and assume justice unless you can prove ‘discrimination’ either through overwhelming statistical evidence or the smoking gun of subjective intent.” Critical race theory says, “Assume the opposite: Unless the system proves it is not subject to or complicit in entrenched structures of subordination, trust no one and question everything.” And in the rising wake of corporate globalization, critical race theory increasingly says to each of us, “Understand that the histories and legacies of multiple subordinations in this country, and their historic and current interconnection with globalized neocolonial systems of subordination, also can affect your mistreatment in manifold, and sometimes in as-yet undetected,

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23. Laura Parker, *Elusive Sniper Makes a Few Names for Self*, USA TODAY, Oct. 16, 2002, at 3A.

ways.”<sup>24</sup> This stance, of course, is not neutral; but neither, we would argue, is any other.

### III. THE PUZZLING PERSISTENCE OF LIBERAL THOUGHT: CLAIMING THE JURISPRUDENTIAL MOMENT

In his original article, Schlag meant by “formalism” a series of rhetorical and substantive commitments to seeing the law as “stable, self-identical, foundationally secure and bounded; . . . in other words, just like an object.”<sup>25</sup> In this final Part, we take as critical race theory’s foil not formalism but a particular form of liberalism—a set of rhetorical and substantive commitments ultimately linked with a certain political stance toward racism.<sup>26</sup> We would rewrite Schlag’s earlier quote to suggest that “sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of liberalism and the problem is the problem of the subject. The story of liberalism is that it never deals with the problem of the subject. The problem of the subject is that it has never been part of the liberal story.”

Three recurrent themes in the reviews of our book illustrate the point. The first, already introduced above, is the attention given in the reviews to the quest for definitional clarity, even certainty, regarding the evil under pressure—is it “discrimination,” and if so, what does that mean? Is the phenomenon a game of ingroup inclusion requiring “general” prescriptions or a game of outgroup exclusion requiring “specific” interventions?<sup>27</sup> The second and third themes flow from this definitional quest and its discontents. The second theme evident in the reviews is the perceived sense of tension between critical race theory’s interrogation of race and a simultaneous interrogation of its interplay with other identity constructs that help to structure multidimensional forms of social or legal subordination. The third theme is the turn to social science to provide both “real” proof of “discrimination” and an empirically sound basis for definitional clarity. We see the concern for definitional clarity and about analytical tension, as well as the re/turn to empirical truth, as an evasion of the challenge critical race theory poses—a challenge that ultimately is not only epistemological but also political.

The quest for definitional clarity is elusive because the evil—subordination—comes in many sizes, shapes, identities, and colors.

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24. For beginning explorations of the racialized and gendered dynamics of globalization, see the essays by Enrique R. Carrasco, *CROSSROADS*, p. 366, Isabelle R. Gunning, *CROSSROADS*, p. 337, Berta Esperanza Hernandez-Truyol, *CROSSROADS*, p. 345, Elizabeth M. Iglesias, *CROSSROADS*, p. 310, and Celina Romany, *CROSSROADS*, p. 303.

25. Schlag, *supra* note 2, at 1635.

26. Indeed, we would suggest that formalism in Schlag’s sense may emerge as one response to the kind of political dilemma we describe below.

27. In our view, these are the questions upon which Moran and Freshman focus. Freshman, *supra* note 9; Moran, *supra* note 9.

Subordination also comes in many forms, and operates simultaneously across multiple axes of identity in complex, oftentimes mutually reinforcing, ways. Thus, as we noted earlier, there is not, and there cannot be, any single definition or description of the discrimination problem. Coming to grips with this dynamic social reality during its first decade, critical race theory has helped to pioneer the shift from traditional unidimensional methods of analysis that reduce complicated issues to either/or dichotomies from which judges and policymakers are forced to make a selection. As the reviewers recognize, one aspect of this daunting quest to wean the law from the limitations of the past has been critical race theory's effort to simultaneously interrogate "race" and its relationship to other forms of subordination. Concepts such as intersectionality, antiessentialism, multidimensionality, and the like have at various times expressed this struggle for definition, a struggle that has reflected both the residual pull of unidimensional categories and the practical and conceptual difficulties—"tensions"—triggered by efforts to break loose of established jurisprudential habits.<sup>28</sup>

Out of critical race theory's collective struggle with those tensions has come the embrace of multidimensional analyses that take critical race theory's pioneering work on the "intersection" of race and gender into identity and policy domains previously untouched or neglected in legal scholarship. As reflected in our book, that first-decade struggle now leads critical race theory into investigations that retain race as well as gender, but that also incorporate class, sexual orientation, ethnicity, disability, immigration status, and other interlocking constructs of identity and hierarchy to produce a more contextual and substantive account of the conditions under inquiry.<sup>29</sup> This ongoing work on multidimensionality recognizes that, to dismantle any one form of neocolonial supremacy, including white supremacy, critical race and allied scholars must expose both the historical and contemporary workings of multiple forms of neocolonial subordinations as well as how they mutually reinforce each other in systematic, normalized, and oftentimes hidden ways.<sup>30</sup>

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28. For readings pioneering these and similar concepts, see, for example, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991), and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see also *infra* note 30 and sources cited therein on scholarship that follows on these path-breaking articles.

29. For examples, see the essays by Mari Matsuda, CROSSROADS, p. 393, Julie A. Su & Eric K. Yamamoto, CROSSROADS, p. 379, and Francisco Valdes, CROSSROADS, p. 399.

30. See Peter Kwan, *Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673 (2000); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997). This kind of scholarship, of course, stems from the "intersection" of race and gender in critical race scholarship. See, e.g., *supra* note 28 and sources cited therein on intersectionality and antiessentialism. Since then, various RaceCrit and LatCrit scholars have continued to develop concepts and tools of critical legal theory to build on foundational concepts, striving progressively to better capture the dynamics of "identity politics" in law and society. See, e.g., E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30

Less important for critical race theory, as we noted earlier, is the effort to define “discrimination”—much less to produce a “unifying” definition of the phenomenon—in part because, as we have already seen, the subject of critical race theory is no longer “discrimination” but “subordination.” Thus, for example, liberal theory’s “antidiscrimination principle,” invoked by Moran and evoked in the other reviews,<sup>31</sup> has been of interest to critical race theorists only as a starting point; the movement’s subsequent evolution from antidiscrimination to ant子ordination has dispensed with the need to fret (whether strategically or sincerely) over individualized subjective “intents” as a key concept in devising equality policy.<sup>32</sup> Similarly, the question antecedent to Freshman’s definitional concentration on ingroup versus outgroup types of discrimination and the most potent remedies for them<sup>33</sup> is whether either of these group dynamics produces subordination. Critical race theory’s “problem” of definition, as Moran correctly notes, is, rather, rooted in the effort to chart the interconnected structures and ideologies of subordination that might be described as Euroheteropatriarchy.<sup>34</sup> The continuing interest in “discrimination” is a residue of liberal theory; critical race theory, as our book confirms, has changed the subject.

The third common theme reflected in the reviews—the turn to social science—in some key, perhaps ironic, ways helps to corroborate some of critical race theory’s foundational insights. These insights include the proposition that much of racial subordination in the United States is practiced in “unconscious” ways; the corollary that social patterns constituting white supremacy in the United States have been institutionalized and normalized in ways that pervade everyday life; and the conclusion that racial subordination in the United States therefore tends to pose a set of structural problems that must

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CONN. L. REV. 441 (1998) (on wholism); Berta Esperanza Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (on multidimensionality); Darren Lenard Hutchinson, *Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997) (on multidimensionality); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995) (on interconnectivity). See generally Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 834-35 (1995) (urging greater efforts along these lines to promote multifaceted projects of social transformation). This work continues in our volume. See, for example, the essays by Sumi Cho & Robert Westley, CROSSROADS, p. 32, Julie A. Su & Eric K. Yamamoto, CROSSROADS, p. 379, Francisco Valdes, CROSSROADS, p. 399, and others for similar ongoing efforts.

31. Moran, *supra* note 9, at 2400-06.

32. Our sense is that the fretting of the right is strategic, and that of the left is sincere.

33. Freshman, *supra* note 9, at 2312-14.

34. Moran, *supra* note 9, at 2378. See generally Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 172-201 (1996).

be studied through context-sensitive critical analysis.<sup>35</sup> Thus, for example, the studies of law firm culture and the grand jury system cited by Moran seem to document empirically how subordination may be carried out through individual and collective action absent any individual or institutional “intent” whatsoever.<sup>36</sup> The literature cited by Freshman similarly confirms that much subordinating behavior may be motivated by unconscious adherence to, or near-Pavlovian responses to, past patterns of social thought and conduct.<sup>37</sup> While the reviews turn to social science to satisfy the need of some for definitional clarity on the subject of critical race theory’s work, they uncover a wealth of scholarship documenting glimpses of life that effectively “prove” the structural and individual workings of the social reality about which critical race theory has expostulated for the past ten years. Indeed, the Case discussion of statistics and anecdotes effectively makes this very point: The two methods work best in tandem to capture glimpses of social reality missed by the limits of the other, and in the instance of discrimination, the two mutually confirm the virulence of the historic and ongoing epidemic.<sup>38</sup> Without doubt, then, the reviews are right: While continuing with the work that makes it a distinctive and crucial jurisprudential force as it enters a second decade of struggle, critical race theory also must learn from the insights of the reviewers relating to the antisubordination uses of social science—as well as other cross-disciplinary forms of—contemporary scholarship.

The turn to social science generates a more serious set of questions, more serious because they draw us nearer to the political crux of the matter and away from the epistemological questions that otherwise might preoccupy our attention. If many of critical race theory’s foundational insights are being confirmed empirically, why are its descriptive accounts of contemporary life and its prescriptive solutions—its standing calls for structural change and social transformation—not even on the table for contemporary policy debate? Why does critical race theory remain “outsider jurisprudence” while another jurisprudence, one of backlash and retrenchment, continues to rule with impunity from the legislature and the bench? The answer, in a word—but a word that mightily scares the world of law—is politics: most recently and notably, the politics of cultural warfare.

During critical race theory’s brief lifetime, the culture wars—or, to quote Justice Antonin Scalia, a national “kulturkampf”<sup>39</sup>—have profoundly disturbed the nation’s political economy. Both critical race theory and the culture wars

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35. See generally Lawrence, *supra* note 14.

36. Moran, *supra* note 9, at 2397-98, 2414 (citing Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996)).

37. Freshman, *supra* note 9, at 2317-23.

38. Case, *supra* note 9, at 2290-91.

39. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

arose in the mid- to late-1980s, as the “angry white male” reacted to equality gains on behalf of women, racial minorities, and other subordinated groups, and as politicized identities arose to demand further gains on behalf of those very same groups.<sup>40</sup> Indeed, the jurisprudence of backlash and the jurisprudence of critical race theory are responses to the same historical tides, unleashed or ridden by traditional liberalism under the sign of the antidiscrimination principle. For the political right, the culture wars have been a vehicle of backlash against the effort to realize egalitarian commitments through affirmative action and similar liberal projects. The jurisprudence of backlash in the federal courts represents the right’s victory within electoral politics. For the political left, the culture wars have formed the crucible within which many people of color have composed their social identities. In this crucible, critical race theorists and others have begun to fundamentally reconsider conventional ways of thinking, knowing, and doing. This reconsideration has involved rejection of the expected allegiance to liberal legacies and premises, and the decision to offer the nation an alternative both to backlash frenzy and to liberal business-as-usual, an alternative anchored in the antisubordination principle and its practice.

In a sense, then, the culture wars have been fought on the prone body of traditional liberalism. Nonetheless, that body remains at the center of debate. Its desire remains—as has been the case since the nation’s founding, when the lives and hopes of African Americans were used as the currency with which the colonial elites forged their nation-building compromise—to end inequality without causing any social pain. As Freshman puts it,

To return to the disease metaphor, if a patient complains of pain in the shoulder and fears he tore a rotator cuff, the doctor wants to treat the complaint with respect. At some point, however, if the doctor determines that the source of the pain is really radiating from the neck, then the doctor will suggest that the patient exercise with his neck in different ways. So, too, even if the doctor cannot identify the precise nature of a problem, such as the precise infection, the doctor may know that she knows enough to recommend the patient use an antibiotic that fights many different infections, regardless of their type and regardless of their source.<sup>41</sup>

But ending social inequality inflicted historically by law, and presently by entrenched or institutionalized legacies, will not be painless. History teaches that it cannot be so.

The right recognizes this lesson, fiercely resisting all pain, striving to postpone perpetually the day of reckoning while all the time professing polite embrace of the antidiscrimination principle as such. Critical race theory

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40. See Francisco Valdes, *Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat ed., forthcoming 2003) (manuscript on file with authors).

41. Freshman, *supra* note 9, at 2341.



likewise recognizes this reality, and insists on its realization now, without further procrastination to circumvent the pain of social reform to implement social equality and justice—nearly half a century since the Nation began to proceed along the path of formal equality reluctantly, yet with “all deliberate speed.” The lingering hope for a painless transition to equality endures mostly as a liberal mirage. And this hope props up the sincere fretting of the left, which has permitted the right to capture the jurisprudential moment and implement a strategic jurisprudence of backlash designed explicitly to “roll back the New Deal.” In other words, to erase liberalism itself.

Since the 1970s, the electoral politics of the culture wars increasingly have installed the warriors and foot soldiers of the right into legislative and executive offices of government, thus putting into place the machinery that restocked the federal bench and imposed the jurisprudence of backlash from on high. In the process, the legal scholarship of the right has transmuted itself into law itself. While liberalism frets complacently over matters relating to intent, pain, and policy, the once-extreme writings of ivory tower scholars allied with right wing causes now are copied and pasted onto the pages of *United States Reports*. In the midst of this social and legal devolution, critical race theory stands for an alternative account of the processes unfolding before our very eyes, of how these processes perpetuate historic neocolonial skews and subjections in law and society, and of the radical surgeries needed to cure this long-sick patient, the subject of our critical analysis and prognosis.

#### IV. PREVENTION OR CURE: SUBJECT AT REST

It is possible to read these reviews as asking that critical race theory give up its subject unrest in all or many of its current and potential forms. When, for example, Freshman’s review asks one of its central questions—why the lack of focus on the “prevention” of discrimination within critical race theory?<sup>42</sup>—does this query ask the subjects of history and current subordination to accept the basics of society as they are? Does the subtext of such queries that a few (more) reforms can prevent the problem of subordination and thus quiet all or most forms of subject unrest? In historical terms, the answer to such queries of course is that it is simply too late for prevention. Critical race theory begins with the premise that subordination is a historical *fait accompli*, and indeed that white supremacy and Euroheteropatriarchy have proven remarkably supple, resistant to the bromides and panaceas of each era. It is too late to prevent either the transplantation of Euroheteropatriarchy across the globe’s oceans or its cultural inculcation across the continents and generations. It is even too late to remove it from the interstitial places in our own lives as academics—as Freshman notes about Ayres. Whether one views the patient as every newly born individual or the collective corpus of society and its habits, the only

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42. Freshman, *supra* note 9, at 2309.

possible, even if improbable, path lies forward—in continuing to carry forward the histories of subject unrest rooted in resistance to colonial arrangements and reflected today in our volume and this Review.

But to go forward requires an understanding of the moment and how we arrived here—precisely where we began this response, and where critical race theory helps to make a difference. As we look at the devastation and destruction left in the wake of antiequality campaigns across the country, we cannot help but conclude that “prevention” is at best an impossible hope, either in historic or current terms. The forces of disease enjoy the momentum of history, wealth, and power.

The reviews are correct that critical race theory, standing at this juncture in its short history, has yet to articulate a “postsubordination” vision of an alternative future, much less a complete account of the variegated forms of subordination that pervade the present and project the past. But one thing that its first decade makes clear, and that our book confirms, is that any such future vision necessarily includes structural and social transformation: no less than the substantive disestablishment of Euroheteropatriarchy in law, life, and culture; no less than the establishment of substantive security and social dignity for all. This demand may seem outlandish while retrenchment, even against the timid offerings of liberalism, reigns supreme. But, in our view, this is where critical race theory stands.

These reviews have helped bring into better focus how critical race theory contributes to the historical trajectories of legal theory and equality jurisprudence in the United States. They have helped us better understand how critical race theory aids both individuals and institutions to navigate the disjunctions in the workings of subordination that affect both individuals and institutions. They have helped us better to appreciate the context from which critical race theory sprang, and in which it now evolves. They have helped to affirm that our first decade is cause for celebration and, more importantly, for perseverance in the historic struggle toward a postsubordination future.

As we wrote in our *Editors' Introduction*, critical race theory already has had “an extraordinary impact on popular as well as on legal discourse.”<sup>43</sup> As we have argued, a great deal of this work has involved fomenting subject unrest. If there is ever to be more than one story within American law—if the subjects of critical race theory are ever to be laid to rest—it will only be after we have given up on the liberal dream of “prevention,” and have come to terms with the unrest at the heart of the American racial struggle.

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43. CROSSROADS, p. 3.