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## Foreword: The Jurisprudence of Reconstruction

Angela P. Harris†

### INTRODUCTION

For me, Critical Race Theory (CRT) began in July of 1989, at the first annual Workshop on Critical Race Theory at St. Benedict's Center, Madison, Wisconsin. CRT looked like a promise: a theory that would link the methods of Critical Legal Studies (CLS) with the political commitments of "traditional civil rights scholarship" in a way that would both revitalize legal scholarship on race and correct the deconstructive excesses of CLS. Five years later, CRT has achieved national prominence, producing debates between and among "insiders" and "outsiders" over its value;<sup>1</sup> annotated bibliographies;<sup>2</sup> book projects;<sup>3</sup> and, finally, symposia such as this one.<sup>4</sup>

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† Professor of Law, University of California, Berkeley, Boalt Hall School of Law. My thanks to Sheila Foster, Ed Rubin, Marjorie Shultz, and Jan Vetter for their helpful comments on previous versions of this essay. Thanks also to the editors at the California Law Review for their patience and persistence. Last, but not least, thanks to Jorge Sánchez for exemplary research assistance and thoughtful, searching commentary. All mistakes, misunderstandings, and misjudgments, of course, are mine.

1. Compare, e.g., Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1161 ("Professor Kennedy does not mention a single idea that critical race theory has produced . . .") with Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1096-97 (1992) (defending "Black Legal Scholarship" and arguing that Posner's essay "manifests the arrogance and unselfcritical nature of white supremacy in the legal academy").

2. See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

3. See, e.g., MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993). This work includes chapters by critical race theorists Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlé Williams Crenshaw.

4. At this rate, I am hopeful that my "First Annual Critical Race Theory Workshop" T-shirt will be worth something someday.

Five years after St. Benedict's, what is CRT, and what has become of its promise?

If the contributors to this Symposium can be said to agree on anything, it is that CRT is something distinct from "traditional civil rights scholarship." Two of the articles ask directly whether CRT has something new to say beyond the contributions of traditional civil rights scholarship. Roy Brooks and Mary Jo Newborn examine a range of issues within antidiscrimination law and conclude that across most of them the CRT perspective is markedly distinct from both "traditional" and "reformist" liberal perspectives.<sup>5</sup> Daniel Farber argues that "[o]ne of CRT's tenets is that the conventional civil rights scholarship has limited application to current racial problems"<sup>6</sup> and agrees with those "race-crits" who doubt the usefulness of affirmative action.

The remaining articles in this Symposium "do" rather than describe CRT, but also clearly distance themselves from "liberal" approaches to race and culture. In two essays, Jean Stefancic and David Yun, each joined by Richard Delgado, examine the hate speech controversy and find a problem of social resistance that law cannot solve. Delgado and Stefancic succinctly state a now-familiar critique of the liberal legal language of objectivity and neutrality: "Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now, deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests."<sup>7</sup> Although Delgado and Yun outline several legal "reformist" strategies for proponents of hate speech regulation, they ultimately suggest that only "the threat of serious social disruption"<sup>8</sup> will change the relevant interpretive communities enough to make such regulation acceptable.

In *Enduring Principle: On Race, Process, and Constitutional Law*, Barbara Flagg takes up the same thesis of the non-neutrality of current law.<sup>9</sup> Flagg argues that the "process perspective" on constitutional jurisprudence is not the set of neutral principles it purports to be, but rather reflects the interests and experiences of white people as a class.<sup>10</sup> And in *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, Daina Chiu argues that in the contemporary debate on the cultural defense in criminal law as applied to Asian Americans, participants on all sides demon-

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5. See Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787, 789-90 (1994).

6. Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIF. L. REV. 893, 894 (1994).

7. Richard Delgado & Jean Stefancic, *Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly*, 82 CALIF. L. REV. 851, 861 (1994).

8. Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objection to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 892 (1994).

9. Barbara Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CALIF. L. REV. 935 (1994).

10. *Id.* at 973-76.

strate the same inability to handle questions of sameness and difference—an inability which reflects the historical treatment of Asian Americans as “strangers” and ultimately works to perpetuate sexism as well as ethnocentrism.<sup>11</sup>

Brooks and Newborn opine that CRT has been “concerned far more with deconstruction than reconstruction.”<sup>12</sup> As a counterweight, Robert Williams, in his contribution to this Symposium, offers a reconstructive vision of cultural dialogue that arises from Iroquois history. Williams argues that Iroquois constitutional thought, and the multicultural constitutionalism that emerged from it, provide a way out of the cultural solipsism that Delgado and Stefancic, Flagg, and Chiu identify as a feature of current legal and political debates about race and culture.<sup>13</sup>

This Foreword is another attempt to respond to Brooks and Newborn’s call for reconstruction. I argue that a tension exists within CRT, a tension that, properly understood, is a source of strength. That tension is between “modernist” and “postmodernist” narratives. The success of what I call a “jurisprudence of reconstruction” lies in CRT’s ability to recognize this tension and to use it in ways that are creative rather than paralyzing.

In Part I, I trace the ways in which CRT is the heir to both CLS and traditional civil rights scholarship. CRT inherits from CLS a commitment to being “critical,” which in this sense means also to be “radical”—to locate problems not at the surface of doctrine but in the deep structure of American law and culture. For race-crits, racism is not only a matter of individual prejudice and everyday practice; rather, race is deeply embedded in language, perceptions, and perhaps even “reason” itself. In CRT’s “postmodern narratives,” racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts. Even ideas like “truth” and “justice” themselves are open to interrogations that reveal their complicity with power.

At the same time, CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. Despite the difficulty of separating legal reasoning and institutions from their racist roots, CRT’s ultimate vision is redemptive, not deconstructive. Justice remains possible, and it is the property of whites and nonwhites alike. In its “modernist narratives,” CRT seems confident that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free.

In the last section of Part I, I argue that CRT’s commitments to radical critique and racial emancipation are in tension with one another. If the very

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11. Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053 (1994).

12. Brooks & Newborn, *supra* note 5, at 801.

13. Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981, 1038-49 (1994).

language we use to describe justice is infected by racism and other hierarchies of power—if truth itself is an effect of power—what in the end is the point of critique? But if CRT is only a reformist project after all, what distinguishes it from the traditional civil rights scholarship that has left us so far from racial justice?

In Part II, I argue that this dilemma is equally a source of strength. The seeming choice between modernism and postmodernism is an impossible one. The task is to live in the tension itself: to continually rebuild modernism in light of postmodernist critique. This is the task of what Mari Matsuda calls a “jurisprudence of reconstruction.”<sup>14</sup>

In this task, CRT, and other forms of “outsider jurisprudence,”<sup>15</sup> are aided by their engagement in what I call the “politics of difference.” One benefit of this engagement is a long and rich tradition of wrestling at a practical level with the questions of identity that legal postmodernists have raised in the abstract. A second, deeper benefit is a commitment to the tension itself. For people of color, as well as for other oppressed groups, modernist concepts of truth, justice, and objectivity have always been both indispensable and inadequate. The history of these groups—the legacy of the politics of difference—is a primer on how to live, and even thrive, in philosophical contradiction.

In Part III, I argue that two ideals of a jurisprudence of reconstruction should be sophistication and disenchantment. Living in “dissensus”<sup>16</sup> in this context means both a commitment to modernism and a willingness to criticize, even reject, its basic assumptions.<sup>17</sup> At the end of the essay, I identify ways in which race-crits have begun this reconstruction project, and, finally, speculate about ways in which we can go even further.

A beginning word of caution: essays like this one inevitably indulge in the anthropomorphic fallacy, creating a unified thinking and speaking subject where none exists. In comparing CRT to Archie Shepp’s “fire music,” John Calmore has emphasized the eclectic, iconoclastic nature of

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14. Mari Matsuda introduced this term in a presentation at the first Critical Race Theory workshop in 1989.

For an attempt to confront modernism with postmodernism in the realm of law practice, see Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993); see also Anthony V. Alfieri, *Stances*, 77 CORNELL L. REV. 1233 (1992).

15. Mari Matsuda coined this term as well. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 & n.15 (1989) (describing “outsider jurisprudence”); see also Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 683-84 (1992) (describing “outsider scholarship” rooted in the concerns of and reflecting the perspectives of groups that have not traditionally been part of legal scholarship”).

16. I got this term, and the concept it describes, from Paulette Caldwell.

17. As Shane Phelan has written in another context, “Whether to ‘be’ modern(ist) or postmodern(ist) finally is less important than how to bring the postmodern continually to presence within the modern. This involves the simultaneous allegiance to categories of truth and reason and the continual disruption and questioning—at times even rejection—of these categories.” Shane Phelan, *(Be)Coming Out: Lesbian Identity & Politics*, 18 SIGNS: J. WOMEN CULTURE & Soc’y 765, 768-69 (1993).

CRT.<sup>18</sup> Five years after its official birth, CRT is still a young intellectual movement; in its very lack of a standard methodology or set of common tenets arguably lies much of its vitality.<sup>19</sup> Like all reductions, then, this one will be misleading; and as before, I invite the critique and subversion of my own generalizations.<sup>20</sup>

## I

### MODERNISM AND ITS DISCONTENTS

Intellectual movements are practices:<sup>21</sup> games whose rules are always evolving, played by communities with fuzzy boundaries. Accordingly, CRT is not amenable to exact definition.<sup>22</sup> Instead, in this Part, I want to sketch the argument that what makes CRT distinctive is its commitment both to the methods of CLS and to the goals of traditional civil rights scholarship. From this dual commitment emerges a tension within the movement between two different kinds of narratives: narratives that sound in the rhetoric of "postmodernism," and narratives that sound in the rhetoric of "modernism."

#### A. CRT and Postmodernist Narratives

Although CRT emerged in part in reaction against CLS,<sup>23</sup> the word "critical" reflects a continuity between CLS and CRT. According to a CLS conference statement, CLS seeks "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian rela-

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18. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2164-65 (1992) (describing CRT as "necessarily eclectic, incorporating what appears to be helpful from various disciplines, doctrines, styles, and methods").

19. Cf. Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 676 (1993) (arguing that CRT should be allowed a degree of further experimentation before it is brought to judgment as a scholarly movement).

20. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

21. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1841 (1988) ("[A]n academic discipline is not a body of objective information, or a set of techniques for discovering such information, but a practice; a system of socially constituted modes of argument shared by a community of scholars.").

22. For various descriptions of CRT, see Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1865-69 (1990); Calmore, *supra* note 18, at 2160-68; Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 6-7 (1991); and Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990). For a "social history" of CRT, see MATSUDA, *supra* note 3, at 4-7.

23. See Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 707 (1992) (describing the 1987 Critical Legal Studies Conference at which "virtually all minority scholars raised serious critici[s]ms of the CLS position").

tions."<sup>24</sup> Although the "first wave" of CLS, like Marxism, saw law as serving the privileged, the crits did not look outside the law to identify the forces that actually determined the content of legal rules. Rather, the crits turned a microscope on the law itself, showing the gaps and fissures in what initially looked like a seamless and solid structure. CLS accounts focused not on the most obvious dimension of legal power—who wins and who loses legal disputes—but on the more subtle dimensions, such as who gets to decide what counts as a dispute and who does not, what kinds of moves are available within a legal framework, and what kinds of moves are considered impermissible.<sup>25</sup>

Drawing variously on continental theories of ideology, structuralist anthropology, and Legal Realism, the crits sought to demonstrate that "law" is not distinct from "politics" in any simple way. The official word, crits argued, is that legal rules, applied with right reason, determine the outcome of all but the very "hardest" cases, and that "the rule of law" is based on reason, not power (and therefore is as neutral and objective as any system invented by humans could be expected to be). In contrast, the crits sought to show that legal doctrine is contradictory;<sup>26</sup> that legal rules are indeterminate;<sup>27</sup> and that the operation of legal institutions is systematically biased in favor of economically and socially privileged elites.<sup>28</sup> Law, according to the crits, is an example of "ideology": the belief that law is separate from and superior to "politics" keeps legal actors from even noticing the hierarchies of power in which they are trapped.<sup>29</sup>

Crits argued that legal categories, by creating and maintaining certain descriptions of social and legal arrangements, foreclose other ways of think-

24. Peter Fitzpatrick & Alan Hunt, *Introduction to CRITICAL LEGAL STUDIES* 1-2 (Peter Fitzpatrick & Alan Hunt eds., 1987) (quoting the Critical Legal Studies Conference statement).

The literature on CLS is immense. Books include MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (Harvard Univ. Press 1986) (1983); *CRITICAL LEGAL STUDIES*, *supra*; and *CRITICAL LEGAL STUDIES* (Allan C. Hutchinson ed., 1989). The account given here draws heavily on Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 614-22, 636 (1989).

25. This discussion draws on Steven Lukes' argument that power has three dimensions: (1) who wins and who loses; (2) who determines the process by which the outcome is decided; and (3) who determines when a conflict or claim even exists. See STEVEN LUKES, *POWER: A RADICAL VIEW* 24 (1974) ("[I]s it not the supreme and most insidious exercise of power to prevent people, to whatever degree, from having grievances by shaping their perceptions, cognitions and preferences in such a way that they accept their role in the existing order of things, either because they can see or imagine no alternative to it, or because they see it as natural and unchangeable, or because they value it as divinely ordained and beneficial?").

26. See KELMAN, *supra* note 24, at 3-4 (discussing the method of contradiction).

27. See, e.g., Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 9-25 (1984) (defending the claim that legal rules are indeterminate); see also Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1683 n.195 (1991) (outlining six different CLS meanings of "indeterminacy").

28. See, e.g., Singer, *supra* note 27, at 6 ("[L]aw is not neutral: It is a mechanism for creating and legitimating configurations of economic and political power.").

29. See, e.g., Robert W. Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 413 (David Kairys ed., 1990).

ing about and organizing human life.<sup>30</sup> Legal language *reifies*: we treat concepts like “property” and “consideration” as existing out there in the world rather than as descriptions of a collection of socially created relations. Legal language also *mystifies*: it encourages us to think of legal arrangements, especially common law arrangements, as natural, normal, and necessary.<sup>31</sup>

An important function of the critical legal intellectual, then, was to expose these normalizing processes. Early CLS work focused on identifying the basic assumptions of legal doctrine and pointing out, “It doesn’t have to be this way.”<sup>32</sup> Through constant and unrelenting critique, CLS aimed at persuading its readers that radical revisions of the world were really possible, not just the stuff of idealistic fantasy.

CRT has taken up this method of internal critique. Like the crits, race-crits have tried to go beyond espousing Doctrine X over Doctrine Y, claiming instead to show that both doctrines are biased against people of color from the outset.<sup>33</sup> For example, as Brooks and Newborn note, the CRT critique of equal protection law challenges not only the “intent” test of *Washington v. Davis*,<sup>34</sup> but the understanding of racism on which that test is based.<sup>35</sup> And, as Farber notes, the CRT critique of affirmative action challenges the very notion of “merit.”<sup>36</sup> This commitment to conceptual as well as doctrinal critique is CRT’s radicalism—its attempt to dig down to the very roots of legal doctrine, in contrast with the more reformist bent of traditional civil rights scholarship.

Following the first wave’s announcement that law is not separate from politics, the second wave of CLS moved to the study of law as “rhetoric”—

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30. CLS writers also argued that legal language and institutions operate on a micro-level to repress the body: to anesthetize desires and emotions and prevent a sense of human interpersonal connectedness. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

31. See Robert W. Gordon, *Law and Ideology*, 3 TIKKUN 14 (Jan./Feb. 1988) (describing the reification process, by which legal concepts come to seem like real objects, and the mystification process, by which the status quo comes to seem necessary).

32. See Minda, *supra* note 24, at 622 (“In critical scholarship, other stories about law are told to evoke in the reader the experience that ‘things could be otherwise’ and that the official stories of the law are just stories, nothing more or less.”).

33. A classic example of this kind of argument from a crit is Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (arguing that equal protection law is rooted in the perpetrator’s view of the world rather than the victim’s). A recent race-crit example is Neil Gotanda, *A Critique of “Our Constitution Is Colorblind,”* 44 STAN. L. REV. 1 (1991) (arguing that the seemingly “neutral” position of colorblindness is really race-conscious in a pernicious way). In this Symposium, Richard Delgado and David Yun make a similar argument. See Delgado & Yun, *supra* note 8, at 892.

34. 426 U.S. 229 (1976).

35. See Brooks & Newborn, *supra* note 5, at 811.

36. Farber, *supra* note 6, at 911.

the ways in which legal reasoning accomplishes its ideological effects.<sup>37</sup> Second wave crits have attempted to examine how binary thinking in the law is produced and how it reflects larger historical processes of bureaucratization and commodification.

In so doing, the second wave of CLS has found no "there" there beneath the rhetoric of law. Where first wave crits assumed that beneath law's indeterminacy was a "fundamental contradiction" in the human condition itself,<sup>38</sup> or relied on the existence of moments of unalienated, authentic "being" in the world,<sup>39</sup> second wave crits have begun to question whether the very assumption of a human condition separate from the language we use to talk about it makes sense. I call this mood of profound doubt and skepticism "postmodernist."

There are as many different definitions of postmodernism as there are postmodernists.<sup>40</sup> As law professors have understood the term,<sup>41</sup> however,

[Postmodernism] suggest[s] that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself.<sup>42</sup>

Postmodernism's strength is in its corrosiveness. First wave crits insisted that law functions as a mask for power; second wave crits question the first wave's faith in "unmasking" itself. The effort to expose law as ideology assumed that it was possible, through the force of critique, to suddenly see the way things "really" are in a flash of enlightenment. But the

37. See Minda, *supra* note 24, at 614 n.66 ("The move from first-wave to the post-modern scholarship of the second wave has been a move from the critique of indeterminacy to the study of argument, rhetoric, and conversation.").

38. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 205, 213 (1979) (describing the "fundamental contradiction" of American legal culture as "that relations with others are both necessary to and incompatible with our freedom").

39. See Schlag, *supra* note 27, at 1703 (describing the highest political-intellectual program of CLS as an ecstatic moment in which one "recognizes one's total freedom").

40. For a useful introduction to postmodernist philosophy in the context of CRT, see Anthony E. Cook, *Reflections on Postmodernism*, 26 *NEW ENG. L. REV.* 751 (1992).

41. I make this qualification mindfully. Cf. Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 *STAN. L. REV.* 1627, 1644 (1993) (referring to "legal academics who pick up a bit of philosophy and do a thing or two in that field"). Deconstruction, a technique of reading texts associated with postmodernism, has in particular been subjected to well-meaning abuse by law professors. See, e.g., Pierre Schlag, "*Le Hors de Texte, C'est Moi*": *The Politics of Form and the Domestication of Deconstruction*, 11 *CARDOZO L. REV.* 1631, 1651 (1990) ("To 'apply' deconstruction on the model of contemporary interdisciplinary work would succeed in putting beyond reach much of what deconstruction would like to challenge and engage.").

42. Gary Peller, *Reason and the Mob: The Politics of Representation*, 2 *TIKKUN* 28, 30 (July/Aug. 1987); see also Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 *NEW ENG. L. REV.* 1173 (1992).



second wave critics doubt this very reliance on a "real reality" underlying ideology. Instead, they suggest that ideology is all there is.<sup>43</sup>

Postmodernist critique is congenial to race-crits, who had already drawn from history the lesson that "racism" is no superficial matter of ignorance, conscious error, or bigotry, but rather lies at the very heart of American—and western—culture. In one of the foundational articles of CRT, Kimberlé Crenshaw notes that the civil rights movement achieved material and symbolic gains for blacks, yet left racist ideology and race-baiting politics intact.<sup>44</sup> In Crenshaw's view, the critics' critiques did not go far enough to expose the racism in legal reasoning and legal institutions. Derrick Bell argues that racism is a permanent feature of the American landscape, not something that we can throw off in a magic moment of emancipation.<sup>45</sup> And in a moment of deep pessimism, Richard Delgado's fictional friend "Rodrigo Crenshaw" has suggested that racism is an intrinsic feature of "The Enlightenment" itself.<sup>46</sup>

The deeper that race-crits dig, the more embedded racism seems to be; the deeper the race-crit critique of western culture goes, the more useful postmodernist philosophy becomes in demonstrating that nothing should be immune from criticism. By calling everything taken for granted into question, postmodernist critique potentially clears the way for alternative accounts of social reality,<sup>47</sup> including accounts that place racism at the center of western culture.

Thus, Gerald Torres has identified postmodernism as a useful position from which to criticize both theories of interest-group and "communitarian" politics.<sup>48</sup> Anthony Cook sees deconstruction, a postmodernist method of reading texts, as potentially "liberatory" for progressive scholars of color.<sup>49</sup>

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43. Cf. J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) (arguing that "ideology" is more or less interchangeable with "the social construction of the subject," and that critics do not always come to terms with the implications of the fact that subjects are always socially constructed).

44. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-81 (1988).

45. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992) ("Black people will never gain full equality in this country.") (emphasis omitted).

46. Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721, 740 (1994) ("Enlightenment notions are for blacks what sexuality is for women, the very means by which society constructs and justifies our subordination.").

47. See Cook, *supra* note 40, at 754 ("Postmodern critique might be thought of as a strategy for bringing to the surface suppressed narratives and voices drowned out by the univocal projections of master narratives.").

48. 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. 993, 995-96 (noting that the use of "community" and the language of "interests" operate to deny cultural differences by politicizing "pluralism").

49. See Cook, *supra* note 40, at 752.

And Robert Chang argues that post-structuralism is useful in order to understand the interaction between Asian American political action and the law.<sup>50</sup>

Postmodernist thought refuses to accept any concept, linguistic usage, or value as pure, original, or incorruptible. Postmodernist narratives, as used by race-crits, contend that concepts like neutrality and objectivity, and institutions like law, have not escaped the taint of racism, but rather are often used to perpetuate it. Postmodernist narratives emphasize the ways in which "race" permeates our language, our perceptions, even our fondest "colorblind" utopias.<sup>51</sup> CRT tells postmodernist narratives when it digs down into seemingly neutral areas of law and finds concepts of "race" and racism always already there.

### B. CRT and Modernist Narratives

Even while it exposes racism within seemingly neutral concepts and institutions, however, CRT has not abandoned the fundamental political goal of traditional civil rights scholarship: the liberation of people of color from racial subordination. Although, like crits, race-crits have questioned concepts of neutrality and objectivity, they have done so from a perspective that places racial oppression at the center of analysis and privileges the racial subject.

This commitment to antiracism over critique as an end in itself has created rifts between CRT and CLS. For example, in a symposium published by the *Harvard Civil Rights-Civil Liberties Law Review*, race-crits broke with crits over the efficacy of "rights talk."<sup>52</sup> CLS writers had argued "that rights were malleable and manipulative, that in practice they served to isolate and marginalize rather than empower and connect people, and that progressive people should emphasize needs, informality, and connectedness rather than rights."<sup>53</sup> Patricia Williams, Richard Delgado, and Mari Matsuda, however, all rejected this yearning to go beyond rights to more

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50. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 *ASIAN L.J.* 1, 46, 81 *CALIF. L. REV.* 1243, 1286 (1993) (arguing that the post-structuralist critique reveals that "political action is all that will be left"). Chang here uses "post-structuralist" where I might have used "postmodernist," but I believe the argument is the same. See *id.* at 38 n.178, 81 *CALIF. L. REV.* at 1278 n.178.

51. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993) (finding concepts of "race" in property law); see also Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 *S. CAL. L. REV.* 2599 (1992) (finding concepts of "race" in procedural rules of jurisdiction and standing).

52. Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 *HARV. C.R.-C.L. L. REV.* 297 (1987).

53. Handler, *supra* note 23, at 707. It is interesting in this context that Robert Williams, whose essay, Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 *LAW & INEQ. J.* 103 (1987), was critical of the CLS rights critique, in the present Symposium offers a view of multicultural constitutionalism that, though less theoretically aggressive than the CLS critique of rights, is in harmony with the crits' desire to stress trust and cooperation rather than "standing on one's rights." See Williams, *supra* note 13, at 1046.

direct forms of human connection, arguing that, for communities of color, "rights talk" was an indispensable tool.<sup>54</sup>

This argument between CRT and CLS was more a matter of strategy and tactics than of fundamental disagreement. Both sides agreed that progressive political action should be antiracist and that human connection was a good thing. But a comparison of CRT work with the second wave of CLS work also indicates a more serious tension. In its commitment to the liberation of people of color, CRT work demonstrates a deep commitment to concepts of reason and truth, transcendental subjects, and "really-out-there" objects. Thus, in its optimistic moments, CRT engages in "modernist" narratives.<sup>55</sup>

Modernist narratives assume three things: a subject, free to choose, who can be emancipated or not; an objective world of things out there (a world "the way it really is" as opposed to the way things appear to be in a condition of false consciousness); and "reason," the bridge between the subject and the object that enables subjects to move from their own blindness to "enlightenment." Modernist narratives thus call on a particular intellectual machinery, a methodology Brian Fay describes as "critical social science." Critical social science requires the following:

[F]irst, that there be a *crisis* in a social system; second, that this crisis be at least in part caused by the *false consciousness* of those experiencing it; third, that this false consciousness be amenable to the process of *enlightenment* . . . ; and fourth, that such enlightenment lead to *emancipation* in which a group, empowered by its newfound self-understanding, radically alters its social arrangements and thereby alleviates its suffering.<sup>56</sup>

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54. See e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987) (describing rights for minorities as "invigorating cloaks of safety that unite us in a common bond"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987) (arguing that the historical context of soldiers of color fighting for America in World War II "lends new meaning to the concept of rights"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432-33 (1987) (arguing that society should create more rights, not fewer); see also Crenshaw, *supra* note 44, at 1384-85 (describing the gains that rights talk has brought about for African Americans).

55. By "modernism" I mean what one commentator has called the project of "political modernism": the struggle of individuals

to be moved by human suffering so as to remove its causes, to give meaning to the principles of equality, liberty, and justice, and to increase those social forms that enable human beings to develop those capacities needed to overcome ideologies and material forms that legitimate and are embedded in relations of domination.

Henry A. Giroux, *Modernism, Postmodernism, and Feminism: Rethinking the Boundaries of Educational Discourse*, in POSTMODERNISM, FEMINISM, AND CULTURAL POLITICS: REDRAWING EDUCATIONAL BOUNDARIES 1, 11 (Henry A. Giroux ed., 1991). Political modernism is to be distinguished from social and aesthetic modernism. *Id.* at 7-11.

56. BRIAN FAY, CRITICAL SOCIAL SCIENCE: LIBERATION AND ITS LIMITS 30 (1987). The discussion that follows draws heavily on Fay's useful analysis of the underlying assumptions of critical social science and their limitations.

In its optimistic moments, CRT is described very well by “critical social science.” The crisis in our social system is our collective failure to adequately perceive or to address racism. This crisis, according to CRT, is at least in part caused by a false understanding of “racism” as an intentional, isolated, individual phenomenon, equivalent to prejudice. This false understanding, however, can be corrected by CRT, which re-describes racism as a structural flaw in our society. Through these explanations, readers will come to a new and deeper understanding of reality, an enlightenment which in turn will lead to legal and political struggle that ultimately results in racial liberation. Under CRT, as Fay remarks of critical social science in general, “the truth shall set you free.”<sup>57</sup>

This project fits well with the kind of scholarship most often found in law reviews. As several scholars have recently argued, one characteristic of conventional legal scholarship is its insistent “normativity”: the little voice that constantly asks legal scholars, “So, what should we *do*?”<sup>58</sup> Normativity is both a stylistic and a substantive characteristic. At the stylistic level, normativity refers to how law review articles typically are structured: the writer identifies a problem within the existing legal framework; she then identifies a “norm,” within or outside the legal system, to which we ought to adhere; and finally she applies the norm to resolve the problem in a way that can easily translate into a series of moves within the currently existing legal system.<sup>59</sup>

At the substantive level, normativity describes the assumption within legal scholarship of a coherent and unitary “we”—a legal subject who speaks for and acts in the people’s best interest—with the power to “do” something. Legal normativity also confidently assumes “our” ability to reason a way through problems with neutrality and objectivity: to “choose” a norm and then “apply” it to a legal problem.<sup>60</sup>

Whereas second-wave CLS work sits very uneasily with this scholarly method,<sup>61</sup> both traditional civil rights scholarship and CRT adhere for the

57. *Id.* at 203 (“[C]ritical social science is a form of the age-old belief that ‘the truth shall set you free.’”).

58. See, e.g., Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 807 (1991) (“What should we do? Where should we go?”).

59. See Rubin, *supra* note 21, at 1847-51 (discussing the “prescriptive voice” of legal scholarship and its typical appeal to moral and legal norms rather than to instrumentalism or authority); see also Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1566-67 (1990).

60. As Pierre Schlag argues, normativity within legal scholarship is the language of “sovereign individual subjects who *choose* their own discursive positions and thought processes and announce these positions within a self-sufficient and weightless medium of communication.” Schlag, *supra* note 58, at 892.

Moreover, “we” have the access to power necessary to implement the recommended changes. Law professors have traditionally imagined their audience to consist primarily of lawyers and judges, people with the institutional power to manage the legal system. See Rubin, *supra* note 21, at 1850. The normative stance assumes that “we” have an unproblematic relationship with the state.

61. For example, Pierre Schlag notes the difficulty but necessity of keeping postmodern critiques of legal argumentation from falling into those very forms of argumentation. See, e.g., Pierre Schlag,

most part to stylistic and substantive normativity. Although the “we” assumed in these articles and essays is often “people of color” and progressive whites rather than a generic “we,” the same confidence is exhibited of “our” ability to choose one norm over another, to apply the new principle to a familiar problem, to achieve enlightenment, and to move from understanding to action.<sup>62</sup> Even when the recommended course of action goes beyond adopting Doctrine X over Doctrine Y, as CRT makes a point of doing, the exhortation to action often still assumes that liberation is just around the corner.

CRT’s commitment to the liberation of people of color—and the project of critical social science (generally) and normative legal scholarship (in particular) as a way to further that liberation—suggest a faith in certain concepts and institutions that postmodernists lack. When race-crits tell modernist stories, they assume that “people of color” describes a coherent category with at least some shared values and interests. They assume that the idea of “liberation” is meaningful—that racism is something that can one day somehow cease to exist, or cease to exert any power over us. Modernist narratives assume a “real” reality out there, and that reason can bring us face to face with it. And modernist narratives have faith that once enough people see the truth, right action will follow: that enlightenment leads to empowerment, and that empowerment leads to emancipation.

Modernist narratives, then, are profoundly hopeful. They assume that people of color and whites live in the same perceptual and moral world, that reason speaks to us all in the same way despite our different experiences, and that reason, rather than habit or power, is what will motivate people. Modernist narratives also can be profoundly romantic. They imagine heroic action by a formerly oppressed people rising up as one, “empowered” to be who they “really” are or choose to be, breathing the thin and bracing air of freedom.

This optimism and romanticism, though easy to caricature, cannot be easily dismissed. As Patricia Williams and Mari Matsuda have pointed out, faith in reason and truth and belief in the essential freedom of rational subjects have enabled people of color to survive and resist subordination.<sup>63</sup> Political modernism, more generally, has been a powerful force in the lives of subjugated peoples; as a practical matter, politically liberal societies are

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*Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 177 (1990) (catching the reader’s discomfort that he doesn’t answer the question: Given the critique of normativity, what should we *do*?).

62. This is so even in the work of those race-crits who embrace postmodernist critique. For example, Robert Chang argues that post-structuralism “deconstructs the category ‘Asian American,’ emancipating us from its limits. Only when we are free of it can we be free to give ourselves our own identity.” Chang, *supra* note 50, at 81, 81 CALIF. L. REV. at 1321. But postmodernist narratives would deny that there is any transcendental subject able to embrace this kind of total “freedom” and bestow identity on itself. Chang recognizes that “this is a modernist hope.” *Id.* at 81 n.415, 81 CALIF. L. REV. at 1321 n.415.

63. See Matsuda, *supra* note 54, at 357; Williams, *supra* note 54, at 433.

vastly preferable to the alternatives.<sup>64</sup> A faith in reason has sustained efforts to educate people into critical thinking and to engage in debate rather than violence.<sup>65</sup> The passionate and constructive energy of modernist narratives of emancipation is also grounded in a moral faith: that human beings are created equal and endowed with certain inalienable rights; that oppression is wrong and resistance to oppression right; that opposing subjugation in the name of liberty, equality, and true community is the obligation of every rational person. In its modernist moments, CRT aims not to topple the Enlightenment, but to make its promises real.<sup>66</sup>

### C. Modernism and Its Discontents

The assumptions of “critical social science,” and the related practice of normative legal scholarship, have been exhaustively criticized elsewhere.<sup>67</sup> Here, I only want to note that modernist narratives sharply contrast with postmodernist ones.

In both its modernist and its postmodernist moments, CRT puts law’s supposed objectivity and neutrality on trial, arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege. But where modernist narratives ultimately place faith in the real existence of subjects, objects, and reason, postmodernist narratives would put each of these concepts in quotes. The narratives of modernism and of postmodernism are at war with one another, not simply in terms of the strategies they use or the conclusions they reach, but also in the way they see the world.<sup>68</sup> Two debates within CRT illustrate the tension between its modernist and postmodernist narratives: the “essentialism” debate and the controversy over “legal storytelling.”

The “essentialism” debate began when Randall Kennedy published an article in the *Harvard Law Review* criticizing the work of Derrick Bell, Mari Matsuda, and Richard Delgado. Kennedy objects to these writers’

64. For a thoughtful defense of political liberalism, see WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* (1991). Galston argues that “purposive liberalism”—the kind he advocates—“comes closer than any other form of human association, past or present, to accommodating human differences. It is ‘repressive’ not in comparison with available alternatives but only in relation to unattainable fantasies of perfect liberation.” *Id.* at 4.

65. I thank Jorge Sánchez for this point.

66. For an argument that feminist legal theory has “returned to liberalism” as a response to similar tensions, see Anne C. Dailey, *Feminism’s Return to Liberalism*, 102 *YALE L.J.* 1265, 1284-85 (1993) (reviewing *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Roseanne Kennedy eds., 1991)) (describing a “renewed feminist liberalism” as the ultimate goal of feminist legal theorizing).

67. For example, Roberto Unger and Stanley Fish describe the philosophy that grounds these practices as “formalism” and engage in an all-out antiformalist attack. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 6 (1989); UNGER, *supra* note 24, at 1. Brian Fay devotes his book to a critique of critical social science. FAY, *supra* note 56.

68. For an argument that modernism and postmodernism are incommensurable “cognitive modes,” see Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 *TEX. L. REV.* 1195 (1989).

identification of a distinct intellectual “voice of color,” arguing that this assertion “elevat[es] racial status to an intellectual credential” and thus undermines neutral and objective standards of academic “merit” and “distinction.”<sup>69</sup> Kennedy also implies that the proposition that people of color share a distinctive outlook on the world is in itself racist, because it shares with racism the faith that the concept of “race” identifies true, timeless, and inherent differences among humans.<sup>70</sup>

Kennedy’s challenge received a great deal of media attention, and it soon produced a fierce debate in the pages of law reviews over whether people of color could be said to speak in a distinctive “voice.”<sup>71</sup> Although the debate perhaps shed more heat than light, at its core was a genuine problem. For example, race-crits have criticized other writers for mistaking the perspectives and experiences of white women for the perspectives of “all women.”<sup>72</sup> But this “anti-essentialist” critique can be understood in one of two ways. Race-crits could be arguing that there is a way to speak for all women, if only the voices of women of color as well as the white women are allowed to be heard. Or, race-crits could be saying that the goal of speaking for all women is an impossible goal to begin with, because all such accounts inevitably and wrongly privilege the experiences of some women over others.

If the latter is the case, this postmodernist critique threatens to dissolve the notion of a distinctive “voice of color” as well. Just as calling upon an essential female condition emptied of racial concerns invites the re-importation of white privilege, calling upon a collective subject called “the person of color” who speaks in a unique and unified voice simply invites the importation of other forms of hierarchy.<sup>73</sup> The postmodernist narrative destabilizes *all* categories, not just the ones that have been historically misused.

A second example of the clash between modernist and postmodernist narratives is the debate over “legal storytelling,” a method used by feminist<sup>74</sup> and lesbian and gay legal theorists<sup>75</sup> as well as by race-crits. Here, the provocateurs have been Daniel Farber and Suzanna Sherry, whose article in the *Stanford Law Review* criticizing this mode of scholarship, like

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69. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1805 (1989).

70. *Id.* at 1801 (“Although promoted in the name of an insurgent, liberatory, intellectual endeavor, race-based standing doctrine replicates deeply traditional ideas about naturalness, essentiality, and inescapability of race—ideas that have for too long stunted American culture.”).

71. See, e.g., Colloquy, *Responses to Randall Kennedy’s Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990); Delgado, *When a Story Is Just a Story*, *supra* note 22.

72. See, e.g., Harris, *supra* note 20.

73. See, e.g., Kennedy, *supra* note 69, at 1749.

74. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991).

75. See, e.g., William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

Kennedy's, spurred a flurry of responses.<sup>76</sup> Farber and Sherry identify several valid functions for legal storytelling: (1) the engagement of practical reason; (2) ideological transformation; and (3) the identification of biases and blindnesses in the legal system.<sup>77</sup> But when storytelling threatens to overflow the banks of legal reasoning, Farber and Sherry object. Storytelling, they insist, must be confined within modernist narrative: it must be "legal," it must constitute "scholarship," it must contain "reason and analysis," and it must be based on more than mere "emotive appeal."<sup>78</sup>

Farber and Sherry's understanding of legal storytelling has been criticized in detail elsewhere,<sup>79</sup> and I will not repeat those arguments here. But beyond the issue of whether their particular criticisms are valid is a genuine problem for race-crits and other "outsider theorists" who tell stories.<sup>80</sup> Legal storytelling by outsiders often follows a postmodernist narrative. This kind of storytelling emphasizes the extent to which what you see depends on where you stand: the extent to which "subject positions" are multiple, shifting, and ultimately not reducible to language. Storytelling of this kind produces a deliberately induced vertigo, a vertigo of the sort the critics of normativity attempt to produce using a more conventional third-person omniscient voice.<sup>81</sup> These kinds of stories interrupt the familiar lull of normative legal narrative: instead of moving smoothly from problem to norm to solution, they discomfit the reader and call into question the assumption that every problem raised in the law has a legal solution.<sup>82</sup>

76. Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

77. *Id.* at 819-30.

78. See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994) (quoting Farber & Sherry).

79. See, e.g., *id.*; Delgado, *supra* note 19; Eskridge, *supra* note 75. Farber and Sherry have responded to these responses. See Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994).

80. Baron, *supra* note 78, at 260.

81. For example, Patricia Williams's essay, *On Being the Object of Property*, ends with an enigmatic image of polar bears at the very end of the piece, an image that seems both to invite and to confound interpretation:

I allowed myself to be watched over by bear spirits. Clean white wind and strong bear smells. The shadowed amnesia; the absence of being; the presence of polar bears. White wilderness of icy meateaters heavy with remembrance; leaden with undoing; shaggy with the effort of hunting for silence; frozen in a web of intention and intuition. A lunacy of polar bears. A history of polar bears. A pride of polar bears. A consistency of polar bears. In those meandering pastel polar-bear moments, I found cool fragments of white-fur invisibility. Solid, black-gummed, intent, observant. Hungry and patient, impassive and exquisitely timed. The brilliant bursts of exclusive territoriality. A complexity of messages implied in our being.

PATRICIA J. WILLIAMS, *On Being the Object of Property*, in *THE ALCHEMY OF RACE AND RIGHTS* 216, 236 (1991). The polar bears seem to be both themselves—in what Williams calls the "incorruptible simplicity of being," *id.* at 179—and a symbol of something. The reader's efforts to find a place for them puts her into vertigo.

82. For example, an essay by Marie Ashe consists in large part of a series of childbirth stories, vividly described. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989). In *Hearing the Call of Stories*, Kathryn Abrams finds



Within a postmodernist narrative, moreover, the medium of legal storytelling becomes its message. The shock of being addressed suddenly not as disembodied rational consciousness, but as a particular person caught in complex and idiosyncratic webs of emotion and intuition, is itself discomfiting and sometimes disarming. In “showing” rather than “telling,” legal storytelling by outsiders conveys its point that “rationalism” is itself just a particular kind of story.

But outsider legal storytelling also sometimes follows a modernist narrative, telling the reader “what really happened.” This kind of story is offered, not to raise questions about knowledge and the social construction of reality or to cast doubt on the neutrality or comprehensiveness of legal categories, but to move the reader into a shock of truth that will persuade, outrage, and stir to action. Within modernist narrative, storytelling is a way to produce Farber and Sherry’s “ideological transformation”:<sup>83</sup> the moment of enlightenment (what *Ms. Magazine* used to describe as a “click”)<sup>84</sup> at which the story’s audience suddenly understands the situation in a way that is not only different, but better. These stories rely on the assumption of objective truth—the rhetoric of “what really happened”—and use claims of fact to persuade the reader of what must be accepted as a consequence.<sup>85</sup>

The tension between what Jane Baron calls “many realities” stories and “what really happened” stories<sup>86</sup> is a reflection of the tension between postmodernist and modernist narratives. Sometimes, CRT seems to be asking the reader to accept outsider stories as “true” in a conventional sense; other times, CRT seems to call “truth” itself into question.<sup>87</sup>

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herself frankly perplexed by how to evaluate these stories, Abrams, *supra* note 74, at 1009, and ultimately criticizes Ashe for making the reader work too hard to get a normative prescription out of them. *Id.* at 1040. It may be, however, that Ashe was deliberately trying *not* to be normative: that her point was to suggest that law itself, not just the legal regulation of childbirth, must be transformed in order to contain women’s reproductive experiences. See Ashe, *supra*, at 383 (“I want a law that will let us be—women.”).

83. Farber & Sherry, *supra* note 76, at 824.

84. See Jane O’Reilly, *The Housewife’s Moment of Truth*, in *THE FIRST MS. READER* 11, 12 (Francine Klagsbrun ed., 1973).

85. For example, many of the race-crits’ stories describe what it is like to be a person of color in predominantly white institutions. See, e.g., Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Symposium, *Black Women Law Professors*, 6 BERKELEY WOMEN’S L.J. 1 (1990-91); WILLIAMS, *Crimes without Passion*, in *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 81, at 80. The point of these stories is not to question the notion of objective truth; they are intended to be taken as true, and to make racial injustice vivid for the reader.

86. Baron, *supra* note 78, at 283.

87. See Farber & Sherry, *supra* note 79, at 655 (“Inside their pragmatic and social constructionist arguments against objectivity, we find reinscribed the very foundationalism and belief in objectivity that they reject.”). Farber and Sherry argue that William Eskridge succeeds in combining modernism and postmodernism narratives in the same article. See *id.* at 657.

The debates about essentialism and storytelling are so heated in part because, in an era of political backlash against feminism and civil rights, the value of CRT seems to be at stake.<sup>88</sup> But they are also heated because, as Pierre Schlag has pointed out, the clash between modernism and postmodernism does not represent just a difference of opinion about epistemology or interpretation, but a clash between alternative ways of apprehending the world.<sup>89</sup> Modernism does not pretend that truth is easy to see, but it does insist that there is *some* truth, some authentic experience and knowledge. In response, postmodernism doubts the notion of authenticity altogether, even the authenticity of the self. As Steven Winter writes:

At the level of the self and the social community, postmodernism signals dissolution and fragmentation. The self is no longer a unity or even an entity but a field of social action and contestation. Lacking its own special space, the self lacks freedom or intentionality—at least, as traditionally conceived. . . . The self is no longer seen as having originary causal efficacy but is itself an effect of power/knowledge. It no longer uses discourse to express itself but is an effect of discourse. So, too, the unity of a community can be seen to shiver and fragment into a thousand components and competing perspectives. In postmodernity, all is diversity and heterogeneity; any discourse of “community” is suspect as a discourse of oppression. The byword is resistance, the refrain: “Watcha mean ‘we’?”<sup>90</sup>

When my sister was young, she and a friend used to play a recursive language game that for me sums up the message of postmodernism. In response to a truth statement, one of them would suddenly say, “And that’s not necessarily true.” The response by the other would be, “And, *that’s* not necessarily true.” This would continue until they were forcibly interrupted by some exasperated third party. Postmodernist narratives destabilize modernist ones by insisting, “And that’s not necessarily true.” There is no way to silence that voice, except by force.

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88. See Baron, *supra* note 78, at 259 (describing the tone of the debate on how to evaluate outsider scholarship as veering from “vehement” to downright “nasty”). For an argument that Republican politics since the 1960s has increasingly succeeded by repackaging old-fashioned racism as “race-neutral” concerns about issues like welfare, see THOMAS B. EDSALL & MARY D. EDSALL, *Race, Rights and Party Choice*, in CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 137, 152 (1991). For an argument that a political and cultural backlash against feminism is in progress, see SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

89. See Schlag, *supra* note 68, at 1207.

90. Steven L. Winter, *For What It’s Worth*, 26 LAW & SOC’Y REV. 789, 794-95 (1992) (footnotes omitted). From a CRT perspective, Winter’s refrain could be rephrased as Tonto’s response to the Lone Ranger as they stood surrounded by hostile Indians: “Who ‘we,’ white man?”

## II

## CRITICAL RACE THEORY AND THE POLITICS OF DIFFERENCE

I have thus far argued that CRT takes as its goal the liberation of people of color while adopting a method of critique that questions the confident certainties embedded in the very concepts "people of color" and "liberation." As the debates over racial essentialism within CRT and the value of legal "storytelling" illustrate, when these postmodernist and modernist narratives clash, postmodernist skepticism threatens to undermine modernist narratives completely.

I do not mean to argue, however, that CRT's reliance on both modernist and postmodernist narratives makes it incoherent. This tension between perspectives is not unique to CRT; it also plagues feminist legal theory<sup>91</sup> and, in a sense, legal scholarship itself.<sup>92</sup> The recent bitter debates throughout academia about the value of deconstruction and postmodernism's "nihilism" and "relativism" suggest the pervasiveness of the problem.

Reacting to the nihilist threat, some writers have argued that postmodernism is antithetical to feminism and should be rejected by feminist theorists.<sup>93</sup> Race-crits could take a similar position, rejecting postmodernist philosophizing in favor of the certainties of universal truth and justice. In my view, however, this response would be a mistake for two reasons. First, postmodernism does not represent an independent alternative to modernism that can be accepted or rejected; it is the voice of modernism's discontents, and as such is not easily stilled. Second, part of the reason why race-crits have tried to distance themselves from traditional civil rights scholarship is precisely that the old verities, the old optimistic faith in reason, truth, blind justice, and neutrality, have not brought us to racial justice, but have rather left us "stirring the ashes."<sup>94</sup> History has shown that racism can coexist happily with formal commitments to objectivity, neutrality, and colorblindness. Perhaps what CRT needs is simply a redoubled effort to reach true objectivity and neutrality. But, then again, perhaps those concepts themselves need reexamination.

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91. For a useful summary of the debate between feminism and postmodernism in the legal context, see Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992).

92. Thus the emergence of articles written from a "mainstream" perspective that attempt to make sense of outsider jurisprudence by putting it back into a conventional framework. Jane Baron persuasively argues that Farber & Sherry's *Telling Stories Out of School* is one example of this genre. See Baron, *supra* note 78, at 272-73. For an attempt to construct standards for evaluating legal scholarship that can be applied to outsider jurisprudence and mainstream scholarship alike, see Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889 (1992).

93. Robin West, for example, has argued that feminists should reject the antiessentialism of "critical social theory" because it denies women their knowledge of an "antisymbolic, uncultured, natural, loving, female self." Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59, 95 (1989).

94. Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1040-50 (1989).

If race-crits can neither reject postmodernism nor accept it wholeheartedly without undermining the CRT project itself, what (to ask the legal scholar's perennial normative question) should we do? To talk as if one has the choice to "accept" or "reject" these world views is certainly misleading. We live in a political and legal world shaped by modernism; we cannot step out of it. Nor can we, as good modernist intellectuals, ignore modernism's discontents. As Anthony Cook and others have written, the task should not be to try to somehow resolve the philosophical tension between modernism and postmodernism, but rather consciously to inhabit that very tension.<sup>95</sup> This work requires both a commitment to modernism and a willingness to acknowledge its limits. At its best, it inspires a jurisprudence of reconstruction—the attempt to reconstruct political modernism itself in light of the difference "race" makes.

Race-crits, along with other outsider scholars, have a distinctive contribution to make to this endeavor. The source of this contribution, I argue in this Section, is an engagement with "the politics of difference." Through their commitment both to anti-racism and to affirming the cultural "differences" that the concept of "race" has produced, race-crits bring a distinctive perspective to the jurisprudential "problem of the subject."<sup>96</sup> More broadly, this dual commitment to eliminating oppression and celebrating difference impels race-crits to live in the tension between modernism and postmodernism, transforming political modernism in the process. In this latter project, race-crits are part of a global movement by intellectuals in previously colonized nations, not to abandon the Enlightenment ideals of freedom and liberal democracy, but to make good on their promises.

#### A. *CRT and the Problem of the Subject*

Unlike crits, whose primary intellectual-political commitment is to criticism itself, race-crits hold a dual commitment to anti-racist critique and to maintaining the distinctive cultures formed in part by concepts of "race." This dual commitment engages CRT in what I call the "politics of difference."

One notable characteristic about contemporary American left political movements is their obsession with issues of identity.<sup>97</sup> The second wave of

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95. See, e.g., Cook, *supra* note 40, at 752 (arguing for a reconstructed philosophical framework that "challenges, though never completely overcomes, the dichotomies of self and other, individualism and altruism, and private and public"); see also Phelan, *supra* note 17, at 768 ("Whether to 'be' modern(ist) or postmodern(ist) finally is less important than how to bring the postmodern continually to presence with the modern.").

96. See *infra* text accompanying notes 103-104.

97. For example, from a sociological point of view, Joel Handler describes "new social movements" as follows:

These movements advocate a new form of citizen politics based on direct action, participatory decisionmaking, decentralized structures, and opposition to bureaucracy. They advocate greater attention to the cultural and quality-of-life issues rather than material well-being. They advocate greater opportunities to participate in the decisions affecting one's life, whether

the women's movement and the Civil Rights Movement, for example, built their strength on reconceiving their constituents' collective identities; subsequent movements such as Gay Liberation and its contemporary descendants have similarly engaged in "identity politics."<sup>98</sup> In these movements, the construction of one's identity has been both a personal and a political act, linking the individual with a distinct social and political community.<sup>99</sup>

Rather than supporting assimilation to the dominant culture, the new social movements have demanded a recognition of their members' "difference." This claim to equality based not on sameness but rather on difference is at the heart of the politics of difference. Intellectuals' engagement in the politics of difference has resulted in a rejection of the binary distinction between "same" and "different" itself. Instead, these scholars see "identity" as a complex and changing interaction between internal and external forces, between individual agency and structures of power.<sup>100</sup> For example, by complicating the notion of "female identity," feminist theorists have tried to move beyond the proposition that gender equality requires either "the same" treatment or "different" (usually meaning "special," and hence disfavored) treatment.<sup>101</sup> Instead, feminist theorists have explored how both "sameness" and "difference" are based on a non-neutral, male

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through direct democracy or increased reliance on self-help groups and cooperative styles of social organization. They appeal to value- and issue-based cleavages instead of group-based or interest group issues.

Handler, *supra* note 23, at 719. Other writers have identified the politics of difference by its distinctive practices or demands. See, e.g., CORNEL WEST, *The New Cultural Politics of Difference, in KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* 3, 3 (1993) ("Distinctive features of the new cultural politics of difference are to trash the monolithic and homogeneous in the name of diversity, multiplicity and heterogeneity; to reject the abstract, general and universal in light of the concrete, specific and particular; and to historicize, contextualize and pluralize by highlighting the contingent, provisional, variable, tentative, shifting and changing."); IRIS M. YOUNG, *Social Movements and the Politics of Difference, in JUSTICE AND THE POLITICS OF DIFFERENCE* 156, 158 (1990) ("A politics of difference argues . . . that equality as the participation and inclusion of all groups sometimes requires different treatment for oppressed or disadvantaged groups"); see also Kobena Mercer, "1968": *Periodizing Politics and Identity, in CULTURAL STUDIES* 424, 424-25 (Lawrence Grossberg et al. eds., 1992) ("Over the past decade, developments in black politics, in lesbian and gay communities, among women and numerous feminist movements, and across a range of struggles around social justice, nuclear power, and ecology have pluralized the domain of political antagonism.").

98. For a clear and cogent discussion of identity politics, see Frances Lee Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of an Identity Politician*, 59 TENN. L. REV. 593, 599 (1992).

99. For a useful capsule history of racial identity movements, see MANNING MARABLE, *RACE, REFORM, AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-1990*, at 137-45 (2d ed. 1991).

100. For an argument that "practice theory" can reconcile the tension between structure and agency in CLS, see Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOCIAL INQUIRY 69 (1989). For a concise and useful examination of various theories that attempt to explain the interaction of social forces and individual or collective will in the negotiation of "race," ethnicity, and nation, see Edward J. McCaughan, *Race, Ethnicity, Nation, and Class within Theories of Structure and Agency*, 20 SOCIAL JUSTICE 82 (1993).

101. See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (arguing that male and female "differences," perceived or real, biological or social, should be costless).

standard.<sup>102</sup> Equality in this formulation demands transformation of the existing structure, not just tolerance of or remediation for those who are "different."

Second-wave crits have argued that the reconstruction of political modernism in light of postmodernist critique requires addressing the problem of the subject.<sup>103</sup> Just whom is being spoken of when law review authors recommend that "we" do this or that? What issues are being avoided when legal writers seek to understand the legal system without asking how understanding changes the self?<sup>104</sup> Race-crits, like other intellectuals engaged in the politics of difference, are well situated to speak to "the problem of the subject." The language of race creates, maintains, and destroys subjects, both inside and outside the law. The study of race is in part the study of how individual personalities are melted down into collective subjects. It is also the study of how racialized subjects can be subjected to, yet not represented in, the law. In coming to terms with the long exclusion of people of color from full legal "belonging," race-crits seek not just to expand the subject "we the people," but to turn a critical eye on the legal subject itself. Just as feminist demands for equality require a transformation of traditional understandings of families and markets,<sup>105</sup> race-crit demands for equality under law require a transformation of traditional understandings of the legal subject.

This task forces intellectuals to live in the conflict between modernism and postmodernism. The new social movements based on "difference" have renounced assimilation as the path toward equality and are suspicious of the old faith in integration.<sup>106</sup> At the same time, most of these movements are committed to seeking equality, justice, and pluralism within the nation rather than as separate political sovereigns.<sup>107</sup> This political task of

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102. See, e.g., CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 34 (1987).

Martha Minow has elegantly explored the ways in which "difference" is always a question of context. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

103. Schlag, *supra* note 27, at 1628; see also J.M. Balkin, *Understanding Legal Understanding: The Legal Scholar and the Problem of Legal Coherence*, 103 *YALE L.J.* 105 (1993); James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 *U. COLO. L. REV.* 489 (1991); Hutchinson, *supra* note 42.

104. See Balkin, *supra* note 103, at 107 ("Instead of seeing legal coherence as a preexisting feature of an object apprehended by a subject, we should view legal understanding as something that the legal subject brings to the legal object she comprehends."). As Balkin points out, the question of the "subject" is not simply a psychological inquiry into individuals' "subjective" conceptions of law. Rather, the investigation assumes that "subjects" are members of a common culture, possessing the same or similar "cultural software." *Id.* at 108.

105. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

106. See YOUNG, *supra* note 97, at 159.

107. The great exception is the movement of indigenous peoples for greater sovereignty. For a legal argument in favor of greater sovereignty for Indian nations, see Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 *HARV. C.R.-C.L. L. REV.* 507

giving a new meaning to the phrase "e pluribus unum" thus demands both a commitment to political modernism and a deep skepticism of it.

### B. CRT and Resistance Culture

For people of color, the politics of difference within the United States can be understood within the broader context of global post-colonialism. Edward Said has made a study of how the West justified colonialism, how colonized peoples resisted it, and how the cultural dialogue between colonizer and colonized is evident in the art and literature of each.<sup>108</sup> Since the end of formal colonialism,<sup>109</sup> Said argues, a distinctive "resistance culture" has emerged from formerly colonized peoples.

Resistance culture, as Said describes it, consists of three projects. First is the reconstitution of the formerly colonized nation through consolidating a national language and national culture (a project that is always the product of invention rather than simple "recovery").<sup>110</sup> Second is what Said calls "the voyage in": the "conscious effort to enter into the discourse of Europe and the West, to mix with it, transform it, to make it acknowledge marginalized or suppressed or forgotten histories."<sup>111</sup> Third, according to Said, resistance culture involves "a noticeable pull away from separatist nationalism toward a more integrative view of human community and human liberation."<sup>112</sup>

Reading the history of "racial minorities" in the United States as part of the larger history of western colonialism,<sup>113</sup> race-crits are involved in the

(1987). For an account of the rise and fall of black nationalism in favor of an integrationist paradigm, see Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. For a defense of the reemergence of nationalism for communities of color, see Williamson B.C. Chang, *The "Wasteland" in the Western Exploitation of "Race" and the Environment*, 63 U. COLO. L. REV. 849 (1992).

108. EDWARD W. SAID, *CULTURE AND IMPERIALISM* 209-20 (1993).

109. Some critics have argued, however, that colonialism never ended, but merely has assumed a new form. See, e.g., Masao Miyoshi, *A Borderless World? From Colonialism to Transnationalism and the Decline of the Nation-State*, 19 CRITICAL INQUIRY 726, 749 (1993) (arguing that transnational corporations continue colonialism).

110. SAID, *supra* note 108, at 215. For a meditation on the invention of "nationhood" by colonizers, see BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991) (1983).

111. SAID, *supra* note 108, at 216 (emphasis omitted). Said notes that this process of "writing back" to the metropole is only the most self-conscious and theoretically sophisticated version of an interaction between the colonized and the colonizer that has been continuous throughout the colonial and post-colonial periods. See *id.* at xii. He argues that the cultures of Western Europe were and have been profoundly affected by the cultures of the nonwestern "others" that were formally suppressed under colonialism. *Id.* at xxv ("Partly because of empire, all cultures are involved in one another; none is single and pure, all are hybrid, heterogenous, extraordinarily differentiated, and unmonolithic."). Resistance culture, then, is an attempt to transform the dominant culture by adding back in what was suppressed, disguised, or ignored.

112. *Id.* at 216. This last component of resistance culture is arguably more prescription than description.

113. For an argument that the United States should be considered a colonial society with respect to its racial minorities, see BENJAMIN B. RINGER & ELINOR R. LAWLESS, *RACE-ETHNICITY AND SOCIETY* (1989) (arguing that the American political structure is divided by race into white citizens and nonwhite

project of "resistance culture" as well. Situated within the United States, where separatist nationalism has never been a viable alternative,<sup>114</sup> the domestic politics of difference has focused on Said's first and second projects: the constitution or reconstitution of the subordinated community and the transformation of the dominant community.

Storytelling has contributed to much of the first project. Storytelling serves to create and confirm identity, both individual and collective.<sup>115</sup> As William Eskridge has argued, storytelling helps build new communities: stories of what it means to be gay and lesbian, for example, help individual gay and lesbian people locate themselves within a community and give the gay and lesbian community a collective sense of itself as an agent.<sup>116</sup> At the personal level, this community-building function is similar to what 1970s feminists termed "consciousness raising."<sup>117</sup> Storytelling in this sense is myth-making: the creation of a new collective subject with a history from which individuals can draw to shape their own identities.

Literary and cultural critics have participated in the second aspect of resistance culture, the project of "writing back." For example, in the context of American literary studies, Toni Morrison argues that "Africanism"—the reference in literary works to an imaginary "Africa"—

has become, in the Eurocentric tradition that American education favors, both a way of talking about and a way of policing matters of class, sexual license, and repression, formations and exercises of power, and meditations on ethics and accountability. Through the simple expedient of demonizing and reifying the range of color on a palette, American Africanism makes it possible to say and not say, to inscribe and erase, to escape and engage, to act out and act on, to historicize and render timeless. It provides a way of contemplating

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"others"). For a detailed legal and political history of racial minorities in American society based on this premise, see generally BENJAMIN B. RINGER, "WE THE PEOPLE" AND OTHERS: DUALITY AND AMERICA'S TREATMENT OF ITS RACIAL MINORITIES (1983).

114. Again, the history of the Indian nations represents at least a partial exception. See *Toward Consent and Cooperation*, *supra* note 107. For criticism of the colonialist structure of Indian law, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993).

115. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989) ("[S]tories build consensus, a common culture of shared understandings, and deeper, more vital ethics.").

116. Eskridge, *supra* note 75, at 624-25.

117. See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 601-04 (1986) (describing consciousness-raising); see also CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989) (describing consciousness-raising as a way for individual women to create their own identity and develop a collective identity); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 764-65 (1989) (reviewing MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 102).



chaos and civilization, desire and fear, and a mechanism for testing the problems and blessings of freedom.<sup>118</sup>

Morrison's project is to transform the reader's understanding of the American literary canon by calling her attention to how complexities within American social and political culture have been made into questions of "race."<sup>119</sup> Her effort, however, is not to throw certain works out of the canon and replace them with others, but rather to deepen the reader's understanding both of the works within and without the canon and of how and why canon formation itself takes place.

Robert Williams is engaged in a similar task in his article in this Symposium. Williams points out that the history of the Encounter era in North America is not only one of conflict but also one of mutual accommodation.<sup>120</sup> In telling the story of the English-Iroquois Covenant Chain alliance, Williams does the historical work of adding back to the American legal and political tradition a story of Iroquois creativity and power that has been forgotten or suppressed. Williams engages in the transformational work of "explor[ing] the commensurability of this North American indigenous vision of law and peace between different peoples with contemporary understandings of the problem of achieving human solidarity and accommodation in a multicultural world."<sup>121</sup> By recovering this and other neglected dialogues, race-crits can begin to reconstruct modern political theory.

### C. CRT as Reconstruction Jurisprudence

Within legal studies, the attempt to use the dissonance between modernism and postmodernism creatively on behalf of people of color is what I call "reconstruction jurisprudence." Mari Matsuda, who coined this term, describes it as having a double meaning.<sup>122</sup> First, reconstruction jurisprudence is meant to distinguish CRT from CLS's project of deconstruction. Race-crits have rejected the project of "total critique" and are committed to transforming modernist paradigms as well as criticizing them. Second, the word "reconstruction" refers to the legacy of slavery in the New World and the unfinished revolutions of the First and Second Reconstructions.

My third connotation for "reconstruction jurisprudence" is the project of "writing back" to white-dominated legal rules, reasoning, and institutions. The first step is the self-conscious formation of identity groups that

118. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* 7 (Vintage Books 1993) (1992).

119. Said's project is similarly to re-read classics of Western "high" culture in the context of the West's history of imperialism, colonialism, and anti-colonial struggle. See SAID, *supra* note 108, at 57-61.

120. Williams, *supra* note 13, at 985-86.

121. *Id.* at 995.

122. The following account is based on my recollection of Matsuda's presentation at the first Critical Race Theory Workshop in 1989, and therefore may be misremembered.

have been subject to racial oppression and now demand equality—a formation accomplished by collective myth-making. The second step involves the recovery and reworking of what has been lost or suppressed concerning “race” in legal doctrine and policy. The third step is the work of transforming existing jurisprudence and political theory.

These steps do not follow one another in order, but rather are continuous and simultaneous processes. For example, while African America is currently a relatively stable community with a shared sense of history and tradition, Asian American scholars are engaged in the process of community creation.<sup>123</sup> Moreover, the development of Asian American political consciousness will have an effect on African American political consciousness, and both will transform the meaning of “race” itself.

The work of this reconstruction jurisprudence has just begun, and it is too soon to say whether CRT and other forms of outsider jurisprudence will succeed in the ambitious goal of reformulating political modernism. In the next Section, however, I suggest aspirations for CRT toward this end, identify some of the tentative steps race-crits have taken toward this goal, and finally suggest ways in which CRT might further this project.

### III

#### TOWARD A JURISPRUDENCE OF RECONSTRUCTION

Patricia Williams has written of African Americans’ complex relationship to legal “rights”:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations.<sup>124</sup>

Williams suggests that African American ambivalence about legal rights led not to paralysis but to alchemy: the transformation of a society in what is now called the Second Reconstruction. Williams’ account suggests two aspirations for a contemporary jurisprudence of reconstruction: *sophistication* and *disenchantment*.

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123. Thus, both Robert Chang in his recent article and Daina Chiu in this Symposium devote a substantial amount of their articles to telling stories about Asian American history. See Chang, *supra* note 50, at 46-67, 81 CALIF. L. REV. at 1286-307; Chiu, *supra* note 11, at 1057-78.

124. WILLIAMS, *The Pain of Word Bondage*, in *THE ALCHEMY OF RACE AND RIGHTS*, *supra* note 81, at 146, 163 (footnote omitted).

The effort to be sophisticated is a response to the clash between modernist and postmodernist narratives. In Section A of this Part, I suggest that race-crits have begun to develop a theory of the racialized subject that is potentially transformative of existing jurisprudence, and I identify post-structuralist “discourse theory” as a useful tool in this task.

By the aspiration toward disenchantment, I mean a mood that is always conscious of the limits of rational reason and the ways in which intellectual and legal formulations will always fall short of their intended aims. Disenchantment implies a certain distance from the struggle to further social change through creative, more complex, and sophisticated social theory—even as we are wholly committed to it. Disenchantment also implies a certain suspicion of the romantic excesses of modernist faith. In Section B, I identify paths that race-crits might explore in search of a more disenchanted jurisprudence.

### A. *A Jurisprudence of Sophistication*

#### 1. *Notes Toward a Theory of the Subject*

Three concepts have emerged within CRT that grapple with the problem of the subject from the perspective of “race”: intersectionality, multiple consciousness, and “race” as culture. These concepts, though still underdeveloped, point the way toward a more sophisticated understanding of the subject of law and suggest the possibility of fruitful collaboration between race-crits and scholars elsewhere in the academy.

##### a. *Intersectionality*

In a well-known article, Kimberlé Crenshaw criticizes the law of Title VII insofar as it forces women of color to choose between “race” and “gender” paradigms, or leads judges to reject them as unrepresentative of “race” or “gender” classes.<sup>125</sup> Crenshaw identifies the problem as one of “intersectionality”: because the representative victim of sex discrimination is white and the representative victim of race discrimination is male, women of color—at the intersection of race and gender—vanish as legal subjects.<sup>126</sup> Crenshaw argues that this doctrinal situation does a disservice to the unique experiences of women of color, and she calls for a more complex and nuanced jurisprudence that could incorporate this “subject position.”<sup>127</sup>

In their article in this Symposium, Roy Brooks and Mary Jo Newborn argue that the concept of intersectionality adds little to traditional civil

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125. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

126. *Id.* at 145.

127. Similarly, in this Symposium, Daina Chiu argues that the debate over the cultural defense as applied to Asian Americans wrongly forces Asian American women into choosing between allegiance to their “culture” and allegiance to “feminism.” Chiu, *supra* note 11, at 1120-25.

rights scholarship, which had already incorporated the concept of “compound discrimination” into Title VII law.<sup>128</sup> But a larger purpose of Crenshaw’s work is to reveal how “female” experience is covertly coded white, and “black” experience is covertly coded male in all sorts of contexts. For example, Crenshaw has shown how Anita Hill’s allegations concerning Clarence Thomas were met with confusion and incomprehension because they failed to fit easily within either a white female “rape narrative” or a black male “lynching narrative.”<sup>129</sup> The tendency to think about oppression as an all-or-nothing concept—one is either “an oppressor” or “a victim”—prevents us from seeing how groups can be oppressed and privileged at the same time. When women are constructed solely as victims of male supremacy and people of color are constructed solely as victims of white supremacy, the ways in which both groups are able to exert their privilege to the disadvantage of women of color disappear.

These insights are not exhausted with the concept of compound discrimination, or even by a new doctrinal category called “women of color.”<sup>130</sup> Crenshaw’s concept of intersectionality brings a postmodernist skepticism about the transparency of language to bear on legal doctrine and social policy. In demanding a jurisprudence that can recognize women of color as proper legal subjects in themselves, Crenshaw destabilizes the familiar categories of “race” and “gender.”

#### *b. Multiple Consciousness as Jurisprudential Method*<sup>131</sup>

As Gerald Early has written, “One of the most famous quotations in American literature, and probably the most famous in all African American literature, is from W.E.B. Du Bois’ opening chapter of his landmark 1903 book, *The Souls of Black Folk*.”<sup>132</sup>

After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the

128. Brooks & Newborn, *supra* note 5, at 838-39.

129. Kimberlé Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 402, 405-06 (Toni Morrison ed., 1992); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

130. For an argument that such “sub-categories” could nevertheless be useful in constitutional law, see Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989).

131. See Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989).

132. Gerald Early, *Introduction to LURE AND LOATHING* xvii-xviii (Gerald Early ed., 1993).

tape of a world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.<sup>133</sup>

Mari Matsuda, adopting Du Bois' concept, has refigured it not as a source of pain but rather as a source of strength. Matsuda argues that people of color have available a critical perspective on America that is valuable for jurisprudence. Just as the servant knows more than the master, those "on the bottom" of American society see more than those at the top.<sup>134</sup> This "standpoint epistemology", however, as Robert Chang has pointed out, still operates within a modernist narrative.<sup>135</sup> More recently, Patricia Williams has elaborated on the notion of multiple consciousness in a way that brings postmodernist critique into play.

Williams' essay, *On Being the Object of Property*, explores her own "dual consciousness" as a descendant of both slaves and slaveowners.<sup>136</sup> For Williams, however, her multiple identity does not put her closer to "the" truth, but rather serves as a way into the complex ways in which truths are created. Williams describes how her mother intends to create an empowering identity for her out of family history: in telling her of her white ancestry, Williams' mother means her to understand that she can succeed in law school.<sup>137</sup> But Williams makes clear that this story operates only by suppressing other stories of identity. In Williams' words, her mother's story worked by "devaluing the part of herself that was not-Harvard and refocusing my vision to the part of herself that was hard-edged, proficient and western."<sup>138</sup>

The multiple consciousness Williams works with here is a troubled, complex one. Later in the essay she describes moments when staying a "whole person" is only possible through a sheer act of will.<sup>139</sup> The "self" she imagines as an object of property and also as the site of creative agency

133. *Id.* (quoting W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903)); for a more recent version of the same passage, see W.E.B. DU BOIS, *THE SOULS OF BLACK FOLKS* 5 (Penguin Books 1989) (1903).

134. Matsuda, *supra* note 54, at 333-42 (describing the possibility of transforming mainstream consciousness to one's own advantage); see also Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1395-96 (1991) (identifying the concept of "positioned perspective"); Matsuda, *supra* note 131, at 9 (describing multiple consciousness as "a deliberate choice to see the world from the standpoint of the oppressed"). Robin Barnes argues that this "dual consciousness" is a key feature of Critical Race Theory. See Barnes, *supra* note 22, at 1865.

135. See Chang, *supra* note 50, at 41-42, 81 *CALIF. L. REV.* at 1281-82. For a critique of feminist standpoint epistemologies, see Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, 14 *SIGNS: J. WOMEN CULTURE & SOC'Y* 533 (1989).

136. WILLIAMS, *supra* note 81, at 216.

137. *Id.* at 216-27.

138. *Id.* at 217.

139. See *id.* at 228-29 ("I have to close my eyes at such times and remember myself, draw an internal picture that is smooth and whole . . .").

is neither simply the intersection of larger forces as a postmodernist narrative might have it, nor a point of pure will as a modernist narrative might have it. The concept of multiple consciousness suggests that no identity category should be treated as stable or unproblematic; but it also suggests how the categories we use make a difference.

c. *"Race" as Culture*

A third step toward a theory of the racialized subject is the examination of the central concept of CRT itself: "race." This examination begins with a recognition of the limitations of existing legal language to comprehend racial subjects. For example, in her Comment in this Symposium, Daina Chiu argues that all sides of the debate over Asian Americans and the cultural defense use a language that collapses "difference" into "sameness."<sup>140</sup> In this language, Asian Americans are either "the same" as "us" and need to conform to our moral principles, or they are wholly "different" and are impelled by their culture to act in exotic ways we cannot understand.<sup>141</sup>

Race-crits have taken up the problem of refiguring "equality" in ways that go beyond "sameness" versus "difference." Starting from Martha Minow's admonition that "difference" is always relational,<sup>142</sup> the exploration of race as culture examines how racial "others" are created in society and how the meanings of "race" change over time. For example, John Calmore argues that CRT begins with a conception of race as "a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle."<sup>143</sup> This definition attempts to get beyond the impasse of "sameness" and "difference" by thinking of race not as a fixed quality that can be judged as creating "difference" or not, but rather as a dynamic, relational process.

Race-crits have also described "racism" as a cultural phenomenon in order to refute the common assumptions that racism is a mistake born of ignorance and curable by education, or that it is a grave moral defect of "bad" people. In a pioneering article, Charles Lawrence argued that the Supreme Court, in deciding cases under the equal protection clause, should analyze governmental behavior as a cultural anthropologist might: by looking to see whether it "conveys a symbolic message to which the culture

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140. See Chiu, *supra* note 11, at 1119.

141. Renato Rosaldo's observation seems apropos here: it is always other people who have culture. See RENATO ROSALDO, *CULTURE AND TRUTH* 198 (1989) ("[F]ull citizenship and cultural visibility appear to be inversely related. When one increases, the other decreases. Full citizens lack culture, and those most culturally endowed lack full citizenship.")

142. See MINOW, *supra* note 102, at 22 ("Difference, after all, is a comparative term. It implies a reference: different from whom?").

143. Calmore, *supra* note 18, at 2160; see also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S* 68 (1986).

attaches racial significance.”<sup>144</sup> In this view, racism is a defect in the collective unconscious, not just a character trait of certain evil or ignorant people. More recently, race-crits have gone further. D. Marvin Jones treats race as a “cognitive structure,” inextricably woven into western culture.<sup>145</sup> From a different perspective, Ian Haney López has focused on the shifting meanings of “race” over time to illustrate how people of color deliberately construct their own racial identities, even while these identities are imposed on them by the weight of history.<sup>146</sup> The work of these and other writers moves toward an understanding of how racialized subjects are produced, beyond a simple modernist conception of race as either an illusion or a material reality. But it also rejects a postmodernist conception of the racialized subject as the mere crossroads of larger social forces. The study of race as culture, like the concepts of multiple consciousness and intersectionality, pushes modernist jurisprudence and social theory toward a greater sophistication in light of postmodernist critique.

## 2. *Building Bridges*

In further developing a sophisticated theory of the racialized subject, race-crits might usefully continue to draw on scholarship from other disciplines. “Post-structuralist” theory, for example, focuses on the connection between language and power in a way that may be illuminating for the study of race. More generally, less respect for disciplinary boundaries might further more sophisticated theories of race and racism.

### a. *Post-Structuralism and the Concept of “Discourse”*

Post-structuralist theorists have attempted to reconstruct notions of identity in light of postmodernist critique by focusing on identity as an historical dynamic—a process of social construction rather than an internal essence.<sup>147</sup> “Social constructionists,” like some theorists of ideology, emphasize the extent to which culture, not nature, is responsible for what we see, hear, and think about.<sup>148</sup> “Race” is a peculiarly well-suited candidate for a social constructionist analysis: unlike “class,” “gender,” or even

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144. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 356 (1987).

145. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437 (1993).

146. See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. I (1994).

147. See Phelan, *supra* note 17, at 768 (distinguishing succinctly “postmodernism” and “post-structuralism”).

148. This understanding of “culture” is broader than the distinctive practices of a particular group of people; it refers to everything that is humanly created rather than given by nature or by God. See generally Haney López, *supra* note 146.

“sexual orientation,” it is nowadays widely seen as having little or no objective existence.<sup>149</sup>

That something is “socially constructed,” however, does not make it therefore unreal, eradicable through the good-faith application of colorblind policies and practices.<sup>150</sup> To describe how practices that are socially constructed are nevertheless “real” and difficult to change, a post-structuralist theorist might use the concept of a “discourse.”

Discourse theory relies on a social constructionist understanding of the concepts “language” and “power.”<sup>151</sup> The central insight of discourse theory with respect to language is the blurring of the line between the “real” and the “ideal.”<sup>152</sup> Discourse theory puts language at the center of human experience by asserting that language not only describes the world, it *makes* it.<sup>153</sup> We only make sense of experience through the conceptual categories

149. See, e.g., Lucius Outlaw, *Toward a Critical Theory of “Race,”* in ANATOMY OF RACISM 58, 68 (David T. Goldberg ed., 1990) (“Racial categories are fundamentally *social* in nature and rest on shifting bands of biological heterogeneity. The biological aspects of ‘race’ are conscripted into projects of cultural, political, and social construction. ‘Race’ is a *social* formation.”) (footnote omitted). For works examining in detail the many historical uses to which notions of “race” have been put, see, e.g., MICHAEL BANTON, RACIAL THEORIES (1987); THOMAS F. GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA (1963); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968); ROBERT MILES, RACISM (1989). For case studies of the uses of “race” in other countries, see PAUL GILROY, “THERE AIN’T NO BLACK IN THE UNION JACK’: THE CULTURAL POLITICS OF RACE AND NATION (Univ. of Chicago Press 1991) (1987) (depicting uses of “race” in contemporary English society); MARGARET WETHERELL & JONATHAN POTTER, MAPPING THE LANGUAGE OF RACISM 117-48 (1992) (describing uses of “race” in contemporary New Zealand society).

150. See EVE K. SEDGWICK, EPISTEMOLOGY OF THE CLOSET 41 (1990) (applying this principle to “gay-affirmative work”).

151. Post-structuralist theorists in the humanities have explored the relationship between these concepts in great detail. Theorists commonly cited for “discourse theory” accounts of language and power are Pierre Bourdieu, Mikhail Bakhtin, Jurgen Habermas, Antonio Gramsci, and especially Michel Foucault, who has generated a bustling market of academic criticism and appropriation all by himself. Other fellow travelers who are often cited include Edward Said and Raymond Williams. See, e.g., JOAN COCKS, THE OPPOSITIONAL IMAGINATION: FEMINISM, CRITIQUE, AND POLITICAL THEORY 39-62 (1989) (discussing the work of Gramsci, Williams, Said, and Foucault). Discourse theory can be seen as a response to postmodernist thought.

A distinct tradition of poststructuralist thought also referred to as discourse theory is psychologically oriented and relies upon theorists such as Derrida, Lacan, and Kristeva. See, e.g., JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” (1993); DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE (1993). For a brief but spirited rejection of this tradition for feminist politics, see Nancy Fraser, *The Uses and Abuses of French Discourse Theories for Feminist Politics*, 9 THEORY, CULTURE, AND SOC’Y 51 (1992). My discussion is oriented toward the first rather than the second strand of discourse theory.

152. See CORNELL, *supra* note 151, at 15. The explication that follows draws heavily on ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 7-10 (1988).

153. Thus the title of an early, lucid account of social constructionism within a phenomenological tradition: PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966).

There is a debate between proponents of what has been termed “strong” social constructionism and what has been termed “weak” social constructionism. A “strong” social constructionist position would be the position (identified with philosophical nominalism) that nothing exists beyond human language and perception (or that “reality” may exist but is completely inaccessible to humans). A “weak” social constructionist position would be that there is a “reality” with which we all interact, represented by such



we use to interpret and classify it. Even sensory perception itself, which we tend to think of as an unmediated encounter with pure "reality," is better described as a process of interpretation in which our brains pick and choose the stimuli to which to pay attention on the basis of preestablished conceptual frameworks.<sup>154</sup>

This view of language suggests an important role for "power" in creating and maintaining the world.<sup>155</sup> As theorists have recognized, one of the most potent kinds of power one can have is the power to label experience.<sup>156</sup> The struggle over what to call things, and hence how to understand and ultimately experience them, is a struggle over social power. Just as history is written by the winners, language is shaped by the socially dominant.<sup>157</sup>

In post-structuralist theory, however, "power" is not only negative or repressive—an infringement on prior liberty—but also productive and creative. If "power" is understood simply as the human interactions that stabilize social meanings and practices, then the concept includes the power to do something as well as power over someone.<sup>158</sup> In this broad account of "power," there is no individual or social group completely lacking in power.<sup>159</sup> Power circulates, in Foucault's terms, from the bottom up, not

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limitations as the structure of our physical being and that of our environment, but that this interaction necessarily and always takes place through a network of human-designed meanings, understandings, actions, and values.

For my purposes here, nothing turns on the distinction between strong and weak social constructionism. Whether there is a "real reality" or not, it seems generally agreed by most contemporary Americans that even if "race" is primarily a God-given and/or biological phenomenon, it is also profoundly sociocultural in character.

154. For an exploration of cognitive theory in the context of legal theory, see Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

155. The concept of "power" remains relatively undertheorized, in part because theorists perceive it as an "essentially contested concept," a term so fundamental that no general agreement can be reached on a precise definition. See THOMAS E. WARTENBERG, *THE FORMS OF POWER: FROM DOMINATION TO TRANSFORMATION* 12 (1990). The account of "power" that follows draws heavily on 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 92-96 (Robert Hurley trans., Random House 1978) (1976). For a discussion and criticism of prevailing social theorist accounts of power, see WARTENBERG, *supra*.

156. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81); see also KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 99-103 (1988) (discussing ambivalence some victims express about claiming discrimination).

157. In this Symposium, Delgado and Stefancic make a similar argument. See Delgado & Stefancic, *supra* note 7, at 861.

158. See WARTENBERG, *supra* note 155, at 17-19 (discussing the distinction between "power over" and "power to").

159. Foucault, for example, understands "power" so broadly as to include the smallest human micro-interactions as well as the grandest gestures of the state. See, e.g., 1 FOUCAULT, *supra* note 155, at 94-95. He has been criticized, however, for making "power" so omnipresent that the concept of subordination disappears. See EDWARD W. SAID, *THE WORLD, THE TEXT AND THE CRITIC* 221-22 (1983); see also Cook, *supra* note 40, at 759.

just from the top down; resistance is always possible even when power is at its most repressive.<sup>160</sup>

In discourse theory, then, language is implemented through power relations which, in turn, are shaped by social understandings created through language. A "discourse" refers both to a system of concepts—the set of all things we can say about a particular subject—and to the relations of power that maintain that subject's existence. The project of post-structuralist theory is to tell stories about how certain discourses emerge, shift, and submerge again.

Under a post-structuralist account, then, "race" is neither a natural fact simply there in "reality," nor a wrong idea, eradicable by an act of will. "Race" is real, and pervasive: our very perceptions of the world, some theorists argue, are filtered through a screen of "race."<sup>161</sup> And because the meaning of "race" is neither unitary nor fixed, while some groups use notions of "race" to further the subordination of people of color, other groups use "race" as a tool of resistance.<sup>162</sup> The task of a discourse theory of race would be to chart this history. In Omi and Winant's phrase, "race" is "an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle":<sup>163</sup> the concept with which, John Calmore says, CRT begins.<sup>164</sup>

### *b. Trans-Disciplinary Linkages*

The relevance of post-structuralist theory to CRT suggests a related avenue of exploration: the linkages between racism and other forms of oppression such as sexism and homophobia. Race-crits, for example, clearly have much to gain from a dialogue with feminist legal theorists, who have been able to develop a broad and sophisticated literature not only in law but in social theory more generally. Feminist legal theorists, in turn, have much to gain from an understanding of how the category "women" is marked by "race." Feminist race-crits have begun the work of understanding how the categories of "race" and "gender" shape one another,<sup>165</sup> but

160. See 1 FOUCAULT, *supra* note 155, at 95-96 (describing "resistances" as "everywhere in the power network . . . distributed in irregular fashion").

161. Thus, D. Marvin Jones urges us to think of "race" not as a moral issue, but rather as a "cognitive" issue. See Jones, *supra* note 145.

162. See Manning Marable, *Race, Identity, and Political Culture*, in BLACK POPULAR CULTURE 292, 295 (Gina Dent ed., 1992) (distinguishing between blackness as an imposed identity and blackness as a self-constructed cultural identity); see also Jerome M. Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 63-65 (1992) (distinguishing between "black voice" imposed on scholars from the outside and "black perspective" consciously claimed by scholars); Haney López, *supra* note 146, at 57 (commenting that despite the illusion of biological race, "[r]ace matters because community ties link our faces to our souls").

163. OMI & WINANT, *supra* note 143, at 68 (emphasis omitted).

164. See Calmore, *supra* note 18, at 2160.

165. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 125; Crenshaw, *Whose Story Is It, Anyway?*, *supra* note 129; Adrienne D. Davis & Stephanie M.

much remains to be done. In addition, as "queer theory" emerges as an area of legal scholarship,<sup>166</sup> race-crits should gain a better understanding of "race" by approaching it in the context of sexual identity formation.<sup>167</sup> Together, these various strands of "outsider jurisprudence" can contribute to a general theory of the legal subject for a reconstructed modernism.<sup>168</sup>

Race-crits' understanding of "race" and "racism" might also benefit from looking beyond the struggle between black and white. African American theorists have, until now, dominated CRT, and African American experiences have been taken as a paradigm for the experiences of all people of color. But as Asian American and Latina/o voices begin to be heard within CRT, new dimensions of the discourse of "race" will continue to appear.<sup>169</sup>

Another move toward increased sophistication may come from the inclusion of indigenous peoples' perspective in CRT. For example, Williamson Chang has identified a tension between the goals of peoples of color who view themselves as minorities within a national community and peoples of color who view themselves as members of conquered nations.<sup>170</sup> Chang argues that the terms "race" and "people of color" obscure the diverging interests of those whose goal is equality within a larger nation and those who want sovereignty, not civil rights. Further investigation of these issues may re-open the dialogue between "nationalist" and "civil rights" approaches to racial equality.<sup>171</sup> In pursuit of a jurisprudence of

Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Scales-Trent, *supra* note 130; Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 FLA. L. REV. 81 (1990); Adrien K. Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990-91).

166. See Francisco X. Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of Sex, Gender, and Sexual Orientation in Euro-American Law and Society*, 83 CALIF. L. REV. (forthcoming Jan. 1995); see also Eskridge, *supra* note 75, at 609 n.12 (1994) (citing sources).

167. For example, gay and lesbian theorists have developed a sophisticated understanding of social constructionism. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 550-53 (1994).

168. Cf. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (To understand the interconnection of all subordination, one must "ask the other question."); Valdes, *supra* note 166 (Afterword) (describing "connectivity").

169. As Daniel Farber points out in this Symposium, traditional civil rights scholarship, and to a great extent CRT as well, has understood "race relations" as a two-party problem involving only blacks and whites, ignoring other racial minorities in this country. Farber, *supra* note 6, at 893 n.2, 932; see also Chang, *supra* note 50, at 27, 81 CALIF. L. REV. at 1267 ("To focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States.").

170. Chang, *supra* note 107, at 860-62 (arguing that native Hawaiians are disserved by the rhetoric of "people of color" insofar as indigenous peoples do not seek a voice within America but rather independence from America).

171. For a call for reexamination of nationalism in the domestic United States context, see Chang, *supra* note 107; Gary Peller, *Notes Toward a Postmodern Nationalism*, 1992 U. ILL. L. REV. 1095 (suggesting an orientation to cultural identities which does not essentialize those identities). For an

reconstruction, race-crits might look beyond the legal academy toward disciplines in the humanities that share similar critical approaches and concerns.<sup>172</sup> Two likely candidates are “cultural studies” and “post-colonial theory.”

“Culture,” for the purpose of cultural studies, has been described as “all those practices, like the arts of description, communication, and representation, that have relative autonomy from the economic, social, and political realms and that often exist in aesthetic forms, one of whose principal aims is pleasure.”<sup>173</sup> Cultural studies focuses on the productions of “high” and “low” or “popular” culture, and attempts to understand (and intervene in) their relation to political domination and resistance.<sup>174</sup> Cultural studies might bring to CRT a broader range of methods with which to approach legal texts, from psychoanalytic to anthropological to literary. For its part, CRT might bring to cultural studies a stronger grounding in economic and political arrangements and an opportunity to introduce more “policy” into that discipline.<sup>175</sup>

A second academic linkage for CRT might be with the emerging field of post-colonial studies: the “critique of colonialist knowledge and repre-

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attempt to construct an international concept of black cultural and political solidarity, see PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 1-40 (1993). For two examinations of contemporary black nationalism in popular culture, see Paul Gilroy, *It's a Family Affair* and Angela Y. Davis, *Black Nationalism: The Sixties and the Nineties*, in *BLACK POPULAR CULTURE*, *supra* note 162, at 303, 317.

For examples of international work that incorporate some of the insights of CRT, see Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 *NOTRE DAME L. REV.* 615 (1991) (arguing for a model of “critical pluralism” in democratic theory); Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 *COLUM. HUM. RTS. L. REV.* 189 (1992).

172. The risk, of course, is that legal scholars will misunderstand and misuse concepts from these disciplines, just as they have misunderstood and misused philosophy and literary theory. See *supra* note 41. The potential benefits, however, are great.

173. SAID, *supra* note 108, at xii. This narrower definition of “culture” is at war with the broader anthropological definition. One attempt to define cultural studies puts this tension at the center of cultural studies itself: “[C]ultural studies is an interdisciplinary, transdisciplinary, and sometimes counter-disciplinary field that operates in the tension between its tendencies to embrace both a broad, anthropological and a more narrowly humanistic conception of culture.” *CULTURAL STUDIES*, *supra* note 97, at 4 (footnote omitted).

174. One account of cultural studies describes it this way: “Cultural Studies is concerned with describing and intervening in the ways discourses are produced within, inserted into and operate in the relations between people’s everyday lives and the structures of the social formation so as to reproduce, resist and transform the existing structures of power.” LAWRENCE GROSSBERG ET AL., *IT’S A SIN: ESSAYS ON POSTMODERNISM, POLITICS AND CULTURE* 22 (1988), quoted in Jennifer D. Slack & Laurie A. Whitt, *Ethics and Cultural Studies*, in *CULTURAL STUDIES*, *supra* note 97, at 571, 572.

For a description of the history and development of cultural studies in Britain and the United States, see Stuart Hall, *Cultural Studies and Its Theoretical Legacies*, in *CULTURAL STUDIES*, *supra* note 97, at 277.

175. See Tony Bennett, *Putting Policy into Cultural Studies*, in *CULTURAL STUDIES*, *supra* note 97, at 23.

sentation of subject populations."<sup>176</sup> Edward Said argues that "scarcely any attention has been paid to what I believe is the privileged role of culture in the modern imperial experience, and little notice taken of the fact that the extraordinary global reach of classical nineteenth- and early-twentieth-century European imperialism still casts a considerable shadow over our own times."<sup>177</sup> This work overlaps with cultural studies in its focus on "culture," but diverges from it in its narrower thematic focus. Much of this work is also theoretically sophisticated and concerned with reconstructing political modernism.<sup>178</sup> Both CRT and post-colonial studies might benefit from a careful examination of the relationship between "people of color" in the United States and in Third World countries.<sup>179</sup>

Another fruitful exchange between CRT and post-colonial studies might concern the global economy. Post-colonial studies focuses not only on questions of national and international culture, but on the material relations between metropole and (former) colonies both during colonialism and after. An understanding of the implications of, for example, the North-South divide for contemporary capitalism might usefully place CRT work in a less parochial context.

This point raises a more general one: it might be useful for race-crits to return to the vexed question of the relationship between race and class. The current interest in theories of culture has all but crowded out materialist work on race and racism. Part of the problem may be the unproductive nature of the Marxist-inspired debate over whether race or class is more central in the oppression of people of color.<sup>180</sup> Another part of the problem may be the sheer absence of language in which to talk about interactions between economic relations and symbolic representation, in light of the marginalization of Marxist theory in the United States and traditional economics' lack of interest in "culture" as an independent variable determining human behavior. Nevertheless, although explorations of culture clearly have an important role to play in creating and maintaining racial oppression, a full understanding of "race" and "racism" also requires an understanding of economic relations. A jurisprudence of reconstruction would

176. Lata Mani, *Cultural Theory, Colonial Texts: Reading Eyewitness Accounts of Widow Burning*, in *CULTURAL STUDIES*, *supra* note 97, at 392, 394. For a useful collection in this area see *COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER* (Patrick Williams & Laura Chrisman eds., 1994).

177. SAID, *supra* note 108, at 5.

178. See generally GAYATRI C. SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* (1988); Gayatri C. Spivak, *Criticism, Feminism, and The Institution*, in *THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES 1* (Sarah Harasym ed., 1990).

179. One bridging concept is the concept of diaspora. See, e.g., GILROY, *supra* note 171, at 15 ("I want to develop the suggestion that cultural historians could take the Atlantic as one single, complex unit of analysis in their discussions of the modern world and use it to produce an explicitly transnational and intercultural perspective.") (footnote omitted).

180. See Ansley, *supra* note 94, at 1040-50 (criticizing both "race" and "class" models of white supremacy). As race-crits abandon the notion that there is one "fundamental" source of oppression in the world, they may be able to avoid repeating the same debate. See *id.* at 1073 (urging civil rights scholars to "commit themselves to dealing simultaneously and interrelatedly with race and class").

ideally have some understanding of how material relations of production and consumption and discourse affect one another.

Several writers associated with CRT have paid particular attention to the interactions of race and class. John Calmore, for example, is careful to trace the interactions of economics and racism in his study of African American segregation patterns.<sup>181</sup> Lisa Ikemoto has similarly explored the interactions of race and class in the context of reproductive regulation and the social construction of motherhood.<sup>182</sup> And Regina Austin has called for black feminist legal scholars to take up an agenda that addresses the material needs of poor black women.<sup>183</sup> These writers and others who address issues of race and class, however, could benefit from theoretical formulations of "class" that move beyond the modernist paradigms of classical and Marxist economic theory.

### B. *Jurisprudence and Disenchantment*

In the previous Section, I identified the development of a theory of the racialized subject as one way in which a jurisprudence of reconstruction might aspire toward a more sophisticated modernism. Another message of the clash between modernism and its discontents, however, is that a jurisprudence of reconstruction should aspire to disenchantment. Both the postmodern critique and the history of "race relations" cast doubt on the ability of newer and more enlightening theories to vanquish racism. In their commitment to anti-subordination, race-crits should not abandon rationalist reason; but rationalism may come to represent just one among many tools of social change.

Disenchantment also entails giving up a certain romanticism about the rhetorical apparatus of modernism: the belief in liberation, in the efficacy of "revolution,"<sup>184</sup> and in racial communities as unproblematic, harmonious "homes." A disenchanted jurisprudence of reconstruction focuses instead on the moment to moment struggles to alleviate suffering and alienation.

#### 1. *The Disenchanted Intellectual*

One response to the postmodernist reduction of knowledge to power is a new—and disenchanted—attention to the function of professional intel-

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181. See John O. Calmore, *Exploring The Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); see also John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487 (1993).

182. See Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992); see also Ikemoto, *supra* note 165.

183. See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 546 (describing the mechanics of "undertaking a research project based on the concrete material and legal problems of black women").

184. See Guyora Binder, *What's Left?*, 69 TEX. L. REV. 1985 (1991) (rejecting both the modernist pursuit of revolution and s] 69 TEX. L. REV. 1985 (1991) (rejecting both the modernist pursuit of revolution and the nihilism of postmodernism as incompatible with radical politics, and offering instead the pursuit of democracy as a way to transform human nature).

lectuals as a class. The post-colonialist theorist Gayatri Spivak, for example, is careful to examine the double effects of her own intellectual practices. Writing about a conference of humanist scholars that she attended, Spivak comments, "I thought the desire to explain might be a symptom of the desire to have a self that can control knowledge and a world that can be known."<sup>185</sup> The scholar's zeal for providing explanations is itself a modernist symptom: "the possibility of explanation carries the presupposition of an explainable (even if not fully) universe and an explaining (even if imperfectly) subject. These presuppositions assure our being."<sup>186</sup> In this way, Spivak calls attention to the conflict between postmodernist intellectual theories and modernist intellectual practices.

Spivak goes on to argue that the academic humanist project of providing explanations for everything serves a particular function in contemporary capitalist society: "[O]ur role is to produce and be produced by the *official* explanations in terms of the powers that police the entire society, emphasizing a continuity or a discontinuity with past explanations, depending on a seemingly judicious choice permitted by the play of this power."<sup>187</sup> Spivak's response is to propose that the pedagogy of the humanities become self-critical and enter "the arena of cultural explanations that question[s] the explanations of culture."<sup>188</sup>

This awareness of the role of universities and professional academics in keeping a particular set of political and economic relations in place is one effect of postmodernist disenchantment, and it brings us back to the critique of normativity. As Gerald Wetlaufer has noted, the pressure of legal normativity—the demand that legal academics propose solutions that can be implemented within the existing legal system—impels legal scholars to take the law as their client.<sup>189</sup> A disenchanted jurisprudence of reconstruction would not conclude that providing legal answers to legal questions is therefore futile or "counterrevolutionary"; but as Spivak suggests, it would put on the agenda the need to keep in mind the larger political and economic context of law professing as race-crits continue their theory-building.

One consequence might be a reconsideration of the "race for theory" itself. If the price for admission to the academy (say, the admission by Richard Posner that CRT really does have an idea or two to offer, after all)<sup>190</sup> is a hyperabstract theorizing that makes a public debate about race and racism impossible, race-crits may want to hold assimilation into the

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185. SPIVAK, *supra* note 178, at 104.

186. *Id.* at 105.

187. *Id.* at 108.

188. *Id.* at 117.

189. Wetlaufer, *supra* note 59, at 1596 ("[I]nsofar as law is our client, there is an unavoidable tendency to put other things, truth among them, in a secondary position."); *see also* Schlag, *supra* note 58, at 866 (noting that normative legal thinkers "spend their intellectual energies rationalizing . . . whatever it is the courts are doing").

190. *See supra* note 1.

bureaucracy of the university at arm's length. Here CRT's engagement in the politics of difference may help keep it suspended in creative balance. A jurisprudence of reconstruction cannot afford to become enchanted with either "theory" or "practice"; its work instead is to refuse that dichotomy.

## 2. *The Politics of Joy*

Another symptom of disenchantment might be a healthy recognition of rationalism's limitations in anti-racist struggle. One consequence of this recognition is an appreciation of scholarship as an aesthetic practice, and the positive role that emotion, joined with reason, can play in intellectual work. A second consequence of recognizing rationalism's limitations is a greater focus on empowerment as a goal in itself, rather than simply a step toward emancipation. The third and broadest consequence of greater attention to the limitations of rationalism might be a greater acknowledgement of the importance of spirituality in human life generally and in racial struggle in particular. Cornel West has argued that despite the conflicts between modernism and postmodernism, both the "bourgeois" and the "Foucaultian" models of intellectual life keep intellectuals safely away from insurgent change.<sup>191</sup> West urges black intellectuals to reject this self-image, and instead to articulate "a new 'regime of truth' linked to, yet not confined by, indigenous institutional practices permeated by the kinetic orality and emotional physicality, the rhythmic syncopation, the protean improvisation and the religious, rhetorical and antiphonal repetition of African American life."<sup>192</sup>

One way to unpack this statement is to read West as blurring the traditional line between mind and body: between intellectuals, who work only "in the head," and artists, who are sensitive to the needs of emotions, the body, and the spirit.<sup>193</sup> A serious disenchantment with rationalism might mean an expansion of what it means to be an "intellectual," to embrace music, art, dance, and preaching as equally honorable as traditional "theorizing."

Legal storytelling contains possibilities for this kind of expansion. Part of the power of storytelling lies in its capacity to create pleasure and other emotions. Stories can be told that do more than inform the reader of "what really happened," or challenge the reader's assumptions about truth

191. See WEST, *The Dilemma of the Black Intellectual*, in KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA, *supra* note 97, at 67, 82 (describing the postmodern model as "encapsulat[ing] black intellectual activity within the comfortable bourgeois academy of postmodern America").

192. *Id.* at 82. West argues that the emergence of this new regime of truth is "inseparable from the emergence of new cultural forms which prefigure (and point toward) a post-Western civilization." *Id.*; see also Calmore, *supra* note 18, at 2194-206 (outlining the work of E. Franklin Frazier, Harold Cruse, and Cornel West regarding the role of the black intellectual).

193. For an argument in the legal education context that rationality and the emotions should not be viewed as mutually exclusive, see Angela P. Harris & Marjorie M. Shultz, "A(nother) Critique of Pure Reason": *Toward Civic Virtue in Legal Education*, 45 STAN. L. REV. 1773 (1993).



and objectivity. As Martha Nussbaum has argued, literature is prized not only because of the rational information it imparts, but because it speaks to the emotions and to the soul.<sup>194</sup> Legal storytelling thus has the capacity not just to engage the rational faculty, but other faculties as well.<sup>195</sup>

The concept of empowerment is a second avenue to disenchantment with reason. A key word within the politics of difference has been "empowerment": a shift of focus away from conceptions of "power" as power *over* someone toward power as ability or capacity, the power *to do* something.<sup>196</sup> Barbara Christian argues that "one must distinguish the desire for power from the need to become empowered—that is, seeing oneself as capable of and having the right to determine one's life."<sup>197</sup>

Empowerment is crucial within the politics of difference because of its function in resisting what Cornel West calls nihilism: "the lived experience of coping with a life of horrifying meaninglessness, hopelessness, and (most important) lovelessness."<sup>198</sup> Legal concepts such as rights "empower" at least in part by creating and reinforcing a collective subject, an action through which subordinated groups resist their subordination.<sup>199</sup> Through collective action in the name of the law and through literature, individuals who are members of subordinated groups can come to understand that they are not crazy, that they are not alone, that they have the capacity to act in the world. Empowerment in this context is an end in itself, not a way station on the path to modernist emancipation. The search

194. See MARTHA C. NUSSBAUM, *LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 96 (1990) (arguing that novels "engag[e] the reader in emotions of compassion and love that make the reader herself a participant in the society in question, and an assessor of what it offers as material for human life in the world").

195. Imagine the transformational possibilities if reading works of legal scholarship was expected to be pleasurable, not just good for you.

196. See WARTENBURG, *supra* note 155, at 17-19.

197. Barbara Christian, *The Race for Theory*, in *MAKING FACE, MAKING SOUL, Haciendo Caras: Creative and Critical Perspectives by Women of Color* 335, 343 (Gloria Anzaldúa ed., 1990). Christian further describes literature's role in empowerment: "For me literature is a way of knowing that I am not hallucinating, that whatever I feel/know is. It is an affirmation that sensuality is intelligence, that sensual language is language that makes sense." *Id.*

198. Cornel West, *Nihilism in Black America*, in *BLACK POPULAR CULTURE*, *supra* note 162, at 37, 40 (emphasis omitted).

199. Elizabeth Schneider argues that rights talk can have this kind of function:

Rights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity. Rights discourse can also have a dimension that emphasizes the interdependence of autonomy and community. It can play an important role in giving individuals a sense of self-definition, in connecting the individual to a larger group and community, and in defining the goals of a political struggle, particularly during the early development of a social movement.

Schneider, *supra* note 117, at 611-12. In the context of the environmental justice movement, Luke Cole urges legal services lawyers to rediscover "empowerment as a goal of lawyering and as a means of social change." Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 659 (1992).

for empowerment thus draws not only on the capacity for reason, but also on the capacity for joy.<sup>200</sup>

A third possible outcome of a disenchanted jurisprudence of reconstruction is an acknowledgement of the role of spirituality in human life. Anthony Cook argues that CRT can avoid “the charybdis of postmodern nihilism and the scylla of modern universalism” by drawing on the legacy of Dr. Martin Luther King, Jr.<sup>201</sup> Cook calls for theory that is inspired by “prophetic vision” and that in particular draws on humility and love, arguing that these qualities enable intellectuals to draw on postmodernist critique without being overwhelmed by it, and to draw on modernist conceptions while still being aware of their flaws.<sup>202</sup>

Cook argues that humility is a postmodernist value: “The arrogance and potential dominance associated with knowing the right answer and knowing what is best for the oppressed must be tempered with the postmodern contingency, relativity and potential deconstruction of our own foundations of knowledge.”<sup>203</sup> Love, however, is a value that transcends both modernism and postmodernism. Love in the sense of the Greek term *agape*, “the responsibility that accompanies being our brother’s keeper,”<sup>204</sup> is the necessary ingredient for reconstructive transformation.

CRT for Cook, and for West, is part of a larger movement toward spiritual wholeness for the self and for the beloved community, a movement that cannot be ultimately achieved by human effort and struggle alone. This movement toward wholeness, however, is not a conventionally religious one reserved for Christians. Rather, as Cook explains:

Spirituality is the sincere *striving* for unalienated and unfractured human connection. Spirituality is understanding the limits of our knowledge and allowing the humility fostered by such understanding to open us to the possibilities of knowledge once impeded by the arrogance of our self-contained worlds. The spirituality that flows from a critical and open engagement with the hyphenated space is one that focuses our attention and concern on those less fortunate—

200. See AUDRE LORDE, *Uses of the Erotic: The Erotic as Power*, in *SISTER OUTSIDER* 53, 58 (1984) (arguing that “the erotic” is a powerful tool against oppression). For a more academic discussion of “joy” as an ethical concept, see Gina Dent, *Black Pleasure, Black Joy: An Introduction*, in *BLACK POPULAR CULTURE*, *supra* note 162, at 1.

201. Cook, *supra* note 40, at 752-53.

202. In this endeavor, Cook follows Cornel West, who similarly draws together postmodern critique and Christian spirituality. See, e.g., Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007; CORNEL WEST, *The Historicist Turn in Philosophy of Religion*, in *KEEPING FAITH*, *supra* note 97, at 119, 133 (“The synoptic vision I accept is a particular kind of prophetic Christian perspective which comprehensively grasps and enables opposition to existential anguish, socioeconomic, cultural and political oppression and dogmatic modes of thought and action.”).

Cook explicitly urges a spiritual, Christian perspective on CRT as a way of avoiding postmodernism’s threat of “nihilism.” See Cook, *supra* note 40.

203. Cook, *supra* note 40, at 767.

204. *Id.* at 773.

the least of these, the wretched of the earth, the despised, dejected, and downtrodden. In understanding our own marginality, we are prompted to understand the marginality of others who, because they are not forgotten in our critiques, are not forgotten in our visions of a better tomorrow.<sup>205</sup>

Here both the promise and the peril of "disenchantment" are stark. The history of religious intolerance reminds us that the arrogance of modernism in presuming that rationalist reason is superior to every other human faculty can easily reappear in an arrogance that presumes one's actions to be sanctified by one's spirituality. Mindful of this danger, Cook insists that King's humility and willingness to revise his own beliefs demonstrates that spirituality need not entail demagoguery or tyranny.<sup>206</sup> It remains to be seen, however, whether race-crits will adopt Dr. King's particular Christian spirituality along with his concern for social justice.

### 3. *The End of the Innocence?*

Finally, one aspect of a disenchanted jurisprudence of reconstruction is a disenchantment with the romance of "race" itself. One of the comforts of belonging to a racially subordinated community has often been the sense of being "home," the sense that everyone in the community shares a unified perspective on the world. Modernist narratives that speak of "people of color" or subgroups thereof as a unified force draw on this powerful yearning for home. In a postmodern world, however, it is clear that no such unity exists. How, then, can race-crits and others speak of racial communities in ways that acknowledge this disunity?

Regina Austin's disenchanted vision of the black community provides one glimpse. Austin consistently places the phrase "the black community" in quotes, in a postmodernist acknowledgement that to speak of one unified community is problematic. As she points out, "[t]hrough the ubiquitous experience of racism provides the basis for group solidarity, differences of gender, class, geography, and political affiliations keep blacks apart."<sup>207</sup>

Nevertheless, Austin does not reject the concept of the black community altogether. Rather, she asserts that though there may not be one black community, there are black communities, consisting of "blacks who are bound by shared economic, social, and political constraints, and who pursue their freedom through affective engagement with each other."<sup>208</sup> Even these bonds do not create an automatic utopia of racial harmony. Rather, the members of black communities must practice a "politics of identification." Quoting Stuart Hall, Austin describes the politics of identification as

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205. Cook, *The Spiritual Movement Towards Justice*, *supra* note 202, at 1018.

206. See Cook, *supra* note 40, at pp. 766-82.

207. Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1817 (1992) (footnote omitted).

208. *Id.*

[a] politics . . . which works with and through difference, which is able to build those forms of solidarity and identification which make common struggle and resistance possible but without suppressing the real heterogeneity of interests and identities, and which can effectively draw the political boundary lines without which political contestation is impossible, without fixing those boundaries for eternity.<sup>209</sup>

Practicing a politics of identification recognizes that the dream of perfect unity is only a dream. It also emphasizes that racial communities, like other human communities, are the products of invention, not discovery. There are no "people of color" waiting to be found; we must give up our romance with racial community.<sup>210</sup> Abandoning romance, however, does not mean ending commitment. If any lesson of the politics of difference can yet be identified, it is that solidarity is the product of struggle, not wishful thinking; and struggle means not only political struggle, but moral and ethical struggle as well.

#### CONCLUSION

In Derrick Bell's book, *Faces at the Bottom of the Well*, Bell adopts the position that "racism is a permanent component of American life."<sup>211</sup> Surprisingly, however, Bell does not intend to counsel despair to anti-racist activists. Rather, he looks to African American slavery as a model for the attitude he wishes us to adopt. "Knowing there was no escape, no way out, the slaves nonetheless continued to engage themselves. To carve out a humanity. To defy the murder of selfhood. Their lives were brutally shackled, certainly—but *not without meaning despite being imprisoned.*"<sup>212</sup>

Similarly, Bell urges contemporary anti-racists to struggle against racism in order to make their lives meaningful rather than in the hope of someday magically sweeping racism away. The logic Bell uses in this argument is not the familiar "either/or" logic, but a "both and" logic:

[I]t is not a matter of choosing between the pragmatic recognition that racism is permanent no matter what we do, or an idealism based on the long-held dream of attaining a society free of racism. Rather, it is a question of *both, and*. *Both* the recognition of the futility of action—where action is more civil rights strategies destined to fail—*and* the unalterable conviction that something must be done, that action must be taken.<sup>213</sup>

209. *Id.* at 1775 (quoting Stuart Hall, *New Ethnicities, in BLACK FILM, BRITISH CINEMA 27-28* (Lisa Appignanesi ed., 1988)).

210. *Cf.* Dent, *supra* note 200, at 18 (arguing that blackness is "still a mythic construction; and our love of it must be recognized as the fantasy that it is—which is not to say that we must now fall out of love").

211. BELL, *supra* note 45, at 13.

212. *Id.* at 197.

213. *Id.* at 199.

Bell's urgings fit with the religious orientation of Anthony Cook and Cornel West. They also fit with the reconstruction jurisprudence I have been imagining in this Foreword. Reconstructing modernism requires both sophistication and disenchantment—both a commitment to building intellectual structures that are strong, complex, capacious, and sound, and a knowledge that reason and logic alone will never end racism, that words alone can never break down the barrier between ourselves and those we set out to persuade.<sup>214</sup> The jurisprudence of reconstruction, like the world the slaves made, is only one of meaning—neither magic nor the abyss.

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214. See Delgado & Yun, *supra* note 33, at 892 (arguing that changes in interpretive community precede persuasion).

