

In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship

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I. INTRODUCTION

One of the central tenets of several legal theories that oppose the received tradition in Anglo-American law—particularly, Critical Race Theory¹ as configured primarily by Richard Delgado and Jean Stefancic,² Latino/a Critical Legal Studies (LatCrit),³ Asian/Crit Theory,⁴ and QueerCrit Theory⁵

1. For a more detail discussion of Critical Race Theory, including its history, see DERRICK A. BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008); DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS* (2003); *CRITICAL RACE THEORY PERSPECTIVES ON THE SOCIAL STUDIES: THE PROFESSION, POLICIES, AND CURRICULUM* (Gloria Ladson-Billings ed., 2003); *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 23 (Kimberle Williams Crenshaw, Neil Gotanda, Garry Peller & Kendall Thomas eds., 1995); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329 (2006); Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing about Race"*, 82 *TEX. L. REV.* 717 (2004); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 *TEX. L. REV.* 121 (2003); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 *HARV. BLACKLETTER L.J.* 1 (2002); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 *U. MIAMI L. REV.* 855 (1999); Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 *CALIF. L. REV.* 741 (1994); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 *VA. L. REV.* 461 (1993).

2. See, e.g., *THE LAW UNBOUND!: A RICHARD DELGADO READER* (Adrien Katherine Wing & Jean Stefancic eds., 2007); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 67 (2001); Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 *NW. U. L. REV.* 805 (Winter 2005); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 *TEX. L. REV.* 1181 (1997).

3. Lat/Crit Theory derives from Critical Race Theory. For a more detailed discussion of Lat/Crit Theory, see *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997); Francisco Valdes, Symposium, *Eighth Annual LatCrit Conference, City and The Citizen: Operations of Power, Strategies of Resistance: Foreword: City and Citizen: Community-Making as Legal Theory and Social Struggle*, 52 *CLEV. ST. L. REV.* 1 (2005); Charles R.P. Pouncy, *Class, Economics, and Social Rights: Institutional Economics and Critical Race/LatCrit Theory: The Need for a Critical "Raced" Economics*, 54

(hereinafter collectively referred to as “critical theory” or “critical theorists”)—is the idea that legal scholars, including black scholars,⁶ and civil rights law in

RUTGERS L. REV. 841 (2002); Richard Schur, *The Dialogic Criticism of Richard Delgado: Chicano/a Literature, Equality, and the Rhetoric of Form*, 19 LAW & INEQ. 129 (2001); George A. Martinez, *Constructing LatCrit Theory: Diversity, Commonality, and Identity*, 33 U.C. DAVIS L. REV. 787 (2000); Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247 (1999); Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575 (1999); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999); Margaret E. Montoya, *Mapping Intellectual/Political Foundations and Future Self Critical Directions*, 53 U. MIAMI L. REV. 1119, 1124-26 (1999).

4. Like Lat/Crit Theory, Asian/Crit Theory is derived from Critical Race Theory. For a more detailed discussion of the latter, see Adrien Katherine Wing, *USA 2050: Identity, Critical Race Theory, and the Asian Century*, 99 MICH. L. REV. 1390 (2001); John Hayakawa Török, *Asian American Jurisprudence: On Curriculum*, 2005 MICH. ST. L. REV. 635; Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 8 (1996); Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 21 (1994) [hereinafter Reticent Minority]; Harvey Gee, *Perspective: Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement*, 30 ST. MARY’S L.J. 759 (1999); Elisabeth M. Iglesias, *Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 19 B.C. THIRD WORLD L.J. 349 (1998); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles”*, 66 S. CALIF. L. REV. 1581 (1993); Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L.J. 81 (1995); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); Alfred C. Yen, *Foreword: Making Us Possible*, 4 ASIAN L.J. 1 (1997); Jerry Kang, Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993). For a four volume collection on Asians and the law, written mainly by nonlegal scholars, see ASIAN AMERICANS AND THE LAW: HISTORICAL AND CONTEMPORARY PERSPECTIVES (Charles McClain ed., 1994).

5. Queer/Crit Theory, like Lat/Crit Theory and Asian/Crit Theory, is an offshoot of Critical Race Theory. For a more detailed discussion of Queer/Crit Theory, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999); Henry F. Fradella, *Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Courses*, 57 J. LEGAL EDUC. 60 (2007); Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177 (2007); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of Sexual Orientation*, 48 HASTINGS L.J. 1293 (1997); Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161 (1996); Francisco 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. 3 (1995); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN’S L.J. 103 (1994); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992).

6. Richard Delgado, *Critical Race Theory & Constitutional Law: The Current Landscape of Race: Old Targets, New Opportunities*, 104 MICH. L. REV. 1269, 1283 (2006) (criticizing Charles Ogletree, Troy Duster, and others for failing to “consider the complex dynamics that the demise of

general should reject the “black/white binary.”⁷ This binary, according to its critics, represents the view that “blacks constitute the prototypical minority group” in today’s society,⁸ or that “the black-white relation [is] central to racial

the black-white binary of race brings to light”); Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283 (2000) (faulting Professor Derrick Bell for his focus on the black-white binary); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1253 (1997) [hereinafter *Black/White Binary*] (“[T]he exclusive focus of most scholarship on the Black-White relationship, constitutes a paradigm which obscures and prevents the understanding of other forms of inequality, those experienced by non-White, non-Black Americans.”).

7. For Critical Race Theory, see DELGADO & STEFANCIC, *supra* note 2; Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187, 1202 (2004) (“Ultimately, however, the exclusive deployment of a binary black/white paradigm artificially narrows racial discourse and harms racial justice efforts.”); John O. Calmore, *Our Private Obsession, Our Public Sin: Exploring Michael Omi’s “Messy” Real World of Race: An Essay for “Naked People Longing to Swim Free,”* 15 LAW & INEQ. 25, 56-57 (1997) (relying on demographic data to demonstrate the declining relevance of the black/white paradigm); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 696 (1996) (“An historical assessment of the relationship of other groups of color to a black/white paradigm reveals the paradigm as not only undescriptive and inaccurate, but debilitating for legal analysis, as well as civil rights oriented organizing.”); Harris, *supra* note 1 at 775, 775 n.169 (“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.”). For Lat/Crit Theory, see Perea, *supra* note 6; Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L. J. 1012 (2007) (discussing various scholarly criticisms of the shortcomings of the black/white binary with respect to Asian and Latino groups); Mutua, *supra* note 3; Deborah Ramirez, *Multicultural Empowerment: It’s Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 957-59 (1995) (describing demographic trends that challenge the traditional focus of color-conscious legal remedies on black/white racial dynamics); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22 (1993). For Asian/Crit Theory, see MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 152 (2d ed. 1994) (“U.S. society is racially both more diverse and more complex today than at any previous time in its history. Racial theory must address this reality....”); ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 47-61 (1999); Neil Gotanda, *Multiculturalism and Racial Stratification*, in *MAPPING MULTICULTURALISM* 238-50 (Avery F. Gordon & Christopher Newfield eds., 1996); William R. Tamayo, *When the “Coloreds” Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 7-9 (1995) (challenging the contemporary Civil Rights Movement to take better account of America’s changing racial dynamics); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 248 (1995) (“Bipolarity is an organizational scheme both imposed by and reflected in the law. Bipolarity has been associated with essentialism in the conception of race. Race is conceptualized as breaking down into two all-encompassing and mutually exclusive categories, black and white.”); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1267 (1993) (arguing that “to focus on the black-white racial paradigm is to misunderstand the complicated racial situation in the United States”). For Queer/Crit Theory, see Francisco Valdes, *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1 (1999).

8. DELGADO & STEFANCIC, *supra* note 2, at 67.

analysis” today.⁹ Looking beyond the black ethos, critics of the paradigm see a hegemonic power structure in American society that allows “insiders” (essentially straight white males) to dominate not only blacks and other people of color, but also women and homosexuals. Thus these critics believe that each minority group should be treated *pari passu*—each belonging to a single group of “outsiders.”¹⁰

We know of no respectable African American scholar who would argue that non-black racial groups should be relegated to second-class civil rights treatment.¹¹ Instead, these scholars simply focus on what Orlando Patterson refers to as “America’s historic emphasis on black-white relations”¹² (hereinafter referred to as “the black/white binary”). This historic emphasis provides important context in the ongoing political and academic discourse on race, and does not diminish the very real and important needs and experiences of other subordinated groups.

Furthermore, by arguing that black scholars should abandon the black/white binary (i.e., not focus on white-on-black racial problems), critical theorists, most of whom are non-black,¹³ are unintentionally disrespecting a venerable tradition of black scholarship.¹⁴ African American scholars as

9. *Id.* at 142. See also sources cited *supra* note 7 and *infra* note 35; Devon W. Carbado, *The Ties That Bind*, 12 CHICANO-LATINO L. REV. 283, 288 (1998) (“...racial subordination and Black subordination are [not] one in the same thing.”).

10. See sources cited *supra* note 7; see generally CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 1; cf. PAUL GILROY, AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE (2000) (arguing against the traditional conceptualization of “race”).

11. See, e.g., sources cited in notes 13-19 *infra*; see also *infra*, Part III.

12. Orlando Patterson, *Race and Diversity in the Age of Obama*, N.Y. TIMES BOOK REV., Aug. 16, 2009, at 23. In this one-page essay, Patterson seems to argue that the black/white binary should be the central focus of civil rights scholarship even if “Hispanics . . . are now the largest ethnic group in the nation.” Citing research compiled in Richard Alba & Victor Nee REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION (2003), Patterson observes that “for nonblacks, assimilation is alive and well in America.” Indeed, Patterson asserts that “about 80 percent of the population” define themselves as exclusively white,” and that this sociological category is growing “thanks to the fact that almost half of all Hispanics now define themselves as ‘white alone.’” By contrast, Patterson writes, “The great exception to this process of social incorporation is black Americans....In private life blacks are almost as isolated from whites today as they were under Jim Crow. Whatever the reason—persisting covert racism, black racial preferences abetted by identity politics, or both—their isolation means that the problem of ethno-racial relations in America remains, at heart, a black-white issue. As the example of Henry Louis Gates Jr. demonstrates, even prominent upper-middle-class blacks risk being racially profiled and subjected to humiliating treatment by white policemen, as well as explicit racist abuse.” Patterson wonders whether “Barack Obama, who delicately straddles both worlds of immigrant success and black identity, [will] be able to broaden the inclusion of African-Americans.” See also URBAN INEQUALITY: EVIDENCE FROM FOUR CITIES (Alice O’Connor, Chris Tilly & Lawrence D. Bobo eds., 2001). Patterson’s argument is quite powerful. Yet, as we indicate in the conclusion, we do not go so far as to claim that the black/white binary should be given priority in civil rights matters.

13. See sources cited *supra* note 7.

14. See sources cited *infra* notes 14-21; see, e.g., MICHAEL ERIC DYSON, APRIL 4, 1968:

diverse as (at times) Derrick Bell, the “father” of Critical Race Theory,¹⁵ Michael Eric Dyson and Cornel West, civil rights liberals,¹⁶ Glenn Loury, a civil rights moderate-conservative,¹⁷ and John Hope Franklin, perhaps the greatest African American scholar of the last half of the twentieth century¹⁸ (whose public disagreement with an Asian scholar over the black/white paradigm was highly publicized),¹⁹ not only write within this tradition but also have helped to shape it. Equally essential to this scholarly tradition are the enduring works of the late Judge A. Leon Higginbotham, the nation’s first scholarly African American judge²⁰ and the seminal writings of W. E. B. Du

MARTIN LUTHER KING JR.’S DEATH AND HOW IT CHANGED AMERICA (2008); BILL COSBY & ALVIN F. POUSSAINT, COME ON, PEOPLE: ON THE PATH FROM VICTIMS TO VICTORS (2007); CHARLES J. OGLETTREE JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION (2004); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS (2005); JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS (2000); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE (1997); SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA (1990).

15. See DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW (1st ed. 1973). This innovative book is now in its sixth edition. By the time the fourth edition came out, Professor Bell had given in to his critics and included a new chapter titled “Racism and Other Nonwhites.” See Delgado, *supra* note 6; DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW xii, xxii (4th ed. 2000).

16. See, e.g., MICHAEL ERIC DYSON, CAN YOU HEAR ME NOW? THE INSPIRATION, WISDOM, AND INSIGHT OF MICHAEL ERIC DYSON 130 (2009) (“Many colors were present in Hurricane Katrina’s multicultural stew of suffering, but the dominant color was black.”); CORNEL WEST, RACE MATTERS 2-3 (1993) (“[W]e confine discussions about race in America to the ‘problems’ black people pose for whites rather than consider what this way of viewing black people reveals about us as a nationBoth [liberals and conservatives] fail to see that the presence and predicaments of black people are neither additions to nor defections from American life, but rather *constitutive elements of that life.*”).

17. See GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 11 (2002) (“My view is that the case of African Americans is sufficiently distinctive—politically, historically, and sociologically—to warrant the focused analysis offered here.”).

18. For a biography of Professor Franklin, see <http://scriptorium.lib.duke.edu/franklin/bio.html> (last visited Feb. 1, 2010).

19. Serving as chairman of President Clinton’s race relations commission in the 1990s, John Hope Franklin disagreed with an Asian American commission member, Angela Oh, who argued that the commission, which was convened in the wake of the Rodney King beating by the Los Angeles police, should look “beyond” the black/white binary. John Hope Franklin is reported to have replied: “This country cut its eyeteeth on racism in the black-white sphere.” Gregg Zoroya, *Beautiful Dreamer*, L.A. TIMES MAG., Feb. 1, 1998, at 10 (citation omitted); see also Doyle McManus & Sam Fulwood III, *Panel on Race Urges Nothing but More Talk*, L.A. TIMES, Sept. 18, 1998, at A1 (noting that the commission members disagreed about framing the focus of their inquiry); Warren P. Strobel, *Panelists Argue over What To Focus on*, WASH. TIMES, Sept. 21, 1997, at A8 (same).

20. See, e.g., A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS I: THE COLONIAL PERIOD (1978); see also Roy L. Brooks, *Aristotle and Western Liberalism: The Fundamental Tenets of Judge A. Leon Higginbotham’s Scholarship*, 9 LAW & INEQ. 419 (1991) (analyzing Judge Higginbotham’s scholarly work).

Bois, the nation's first (and still greatest) civil rights scholar.²¹ This tradition of African American scholarship laid the foundation for the NAACP's successful litigation strategy against school segregation.²²

In addition to civil rights scholarship, criticism of the black/white binary extends to civil rights law. Delgado and Stefancic explore the following scenario:

Imagine, for example, that Juan Dominguez, a Puerto Rican worker, is told by his boss, 'You're a lazy Puerto Rican just like the rest. You'll never get ahead as long as I'm supervisor.' Juan sues for discrimination under a civil rights-era statute designed with blacks in mind. He wins because he can show that an African American worker, treated in a similar fashion, would be entitled to redress. But suppose that Juan's coworkers and supervisor make fun of him because of his accent, religion, or place of birth. An African American subjected to these forms of discrimination would not be able to recover, and so Juan would go without recourse.²³

Thus, the critique of the black/white binary proceeds on two levels—civil rights scholarship and civil rights law. This article considers both critiques.

We consider the critique based on civil rights law in Part II. There, we contend that the critics of the binary have misread the extant law. As one of the authors has noted in a previous work, "Courts generally recognize that discrimination on the basis of a foreign trait, such as accent, is actionable under Title VII as discrimination on the basis of national origin."²⁴ The point is, our

21. See, e.g., W. E. B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903); see also, STANLEY CROUCH & PLAYTHELL BENJAMIN, *RECONSIDERING THE SOULS OF BLACK FOLK: THOUGHTS ON THE GROUNDBREAKING CLASSIC WORK OF W. E. B. DUBOIS* 6 (2000) ("The Souls of Black Folk must be seen as the most influential of the literary texts that forged the racial consciousness of . . . the 'Black Atlantic' world.").

22. See, e.g., HORACE MANN BOND, *THE EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER* (1934); CHARLES S. JOHNSON, *SHADOW OF THE PLANTATION* (1934); HORACE MANN BOND, *NEGRO EDUCATION IN ALABAMA: A STUDY IN COTTON AND STEEL* (1939); W.E.B. DUBOIS & AUGUSTUS DILL, *THE COMMON SCHOOL AND THE NEGRO AMERICAN* (1911); Thurgood Marshall, *Teacher Salary Cases*, in *THE NEGRO HANDBOOK 1946-1947* 40-50 (Florence Murray ed. 1947). White scholars have contributed to a black-specific civil rights agenda. See, e.g., GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944). For a more detailed discussion of this tradition, see JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965* 37-257 (1987); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 1-256 (1st ed. 1976); Roy L. Brooks, *Affirmative Action in Law Teaching*, 14 COLUM. HUM. RTS. L. REV. 15, 35-38 (1982).

23. DELGADO & STEFANCIC, *supra* note 2, at 68. For a critique of this claim, see Part II, *infra*.

24. 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, 824 (1994); see also *Gold v. FedEx. Freight East, Inc. (In re Rodriguez)*, 487 F.3d 1001 (6th Cir. 2007); *Baba-Singhri v. Central State Univ.*, 2008 WL 656497 (S.D. Ohio, 2008); ROY L. BROOKS, GILBERT PAUL CARRASCO, & MICHAEL SELMI, *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES*, 968-1013 (3d ed. 2005) [hereinafter *CIVIL RIGHTS* 3d ed.] (discussing discrimination on the basis

most important civil rights laws apply to all racial groups, including whites, without any precondition that non-black racial groups analogize their situation to that of blacks. The Reconstruction Amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments²⁵—which provide the foundation for modern civil rights law,²⁶ the 1964 Civil Rights Act,²⁷ and modern-day case law²⁸ all reach far beyond the black/white binary. To the extent that asymmetrical civil rights statutes have been enacted in the decades after the 1964 Civil Rights Act, these laws have been responsive to non-blacks, including the disabled,²⁹ women,³⁰ and older workers.³¹ Civil rights law recognizes multiple binaries rather than a single binary.

We turn in Part III to the theoretical arguments regarding the black/white binary. Here, we argue that African-American scholars have not suggested that non-black racial groups should be accorded second-class civil rights status. Rather, African-American scholars of any stature embrace the multiple-binary approach reflected in civil rights law. The fact that black scholars focus on white-on-black racial problems in their scholarship is natural given their experiences as black Americans and the tradition of black scholarship. Yet, critical theorists have attacked this tradition of black scholarship on anti-binary grounds. We address the three most compelling anti-binary criticisms offered by critical theorists: (1) the binary ignores the histories of other racial groups, thereby distorting our understanding of civil rights history;³² (2) it ignores interest convergence and thus threatens natural alliances among outsiders, especially people of color;³³ and, related to the latter criticism, (3) it is predicated upon a false notion of “black uniqueness.”³⁴ In considering each of these criticisms, we argue that the black/white binary—which, again, is most properly understood to mean the focus on white-on-black racial problems—makes very good sense to African Americans based on *their* racial reality. Those who would reject the binary, and would have black scholars do likewise, have simply ignored this fact of life. *Why can't binaries co-exist in civil rights scholarship as they do in civil rights law?*

We conclude with two arguments in Part IV. First, contrary to what they

of national origin or alienage).

25. See *infra* text accompanying notes 62-67.

26. See, e.g., ROY L. BROOKS, GILBERT PAUL CARRASCO & MICHAEL SELMI, CIVIL RIGHTS LITIGATION: CASES AND MATERIALS 856-57 (2d ed. 2000) (discussing the constitutional sources for modern civil rights statutes).

27. See *infra* text accompanying notes 74-75.

28. See *infra* text accompanying notes 77-79.

29. See *infra* text accompanying note 83.

30. See *infra* text accompanying note 84.

31. See *infra* text accompanying notes 86.

32. See *infra* text accompanying notes 102-110.

33. See *infra* text accompanying notes 111-143.

34. See *infra* text accompanying notes 144-196.

claim, critics of the black/white binary are, in reality, not arguing for the dissolution of all binaries, but, instead, are arguing for a *particular* binary. They seek to replace the black/white binary in civil rights scholarship with an *insider/outsider* binary. The latter not only reflects a monolithic view of racial identity,³⁵ it also subordinates African Americans by trivializing the black ethos and presuming to tell African-American scholars what to write about.

Second, criticism of the black/white binary is, at bottom, a claim regarding racial priority. While some critics of the black/white binary may have hoped that the priority issue could be avoided by simply moving beyond the black/white binary,³⁶ that simply has not been the case. Among outsider groups, competing claims and conflicts have not and will not disappear.³⁷ Hence, the questions become: Does it make moral, historical, political, or sociological sense to give priority to African Americans in the realm of civil rights when their interests clash with the interests of other civil rights groups? Have the descendants of slaves earned the right to claim priority because they have suffered the longest and still remain at “the very bottom of the well,” to borrow a metaphor from critical theory? Former President Bill Clinton, a liberal, and James Q. Wilson, a conservative scholar, answer these questions in the affirmative. Clinton states, “If we can address the problems between black and white Americans, then we will be better equipped to deal with discrimination in other areas.”³⁸ Similarly, Wilson writes in the aftermath of Katrina that: “The main domestic concern of policy-engaged intellectuals, liberal and conservative, ought to be to think hard about how to change these social weaknesses. Lower-class blacks are numerous and fill our prisons, and among all blacks the level of financial assets is lower than it is for whites.

35. See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305 (2002) (“The starting point for this Article was the idea that looking to the bottom in order to capture and ameliorate the experiences of discrimination is far more complicated than Critical Race Theorists openly discuss. To the extent that racial identity is not monolithic and there is more than one race on the bottom, it is difficult to know precisely where on the bottom to look and how to make sense of what one sees. At least one current debate in CRT reflects these difficulties: the critique of the Black/White paradigm.”).

36. See Imani Perry, *Of Desi, J. Lo and Color Matters: Law, Critical Race Theory, and the Architecture of Race*, 52 CLEV. ST. L. REV. 139, 141 (2005) (“Expansion beyond the black white binary...should not simply consist of creating new binaries...but instead should be the impetus for reconstructions of race discourse with national and international understandings of how groups have figured historically with respect to each other and the white supremacy....”).

37. See *infra* text accompanying notes 118-143.

38. LENA WILLIAMS, IT’S THE LITTLE THINGS: EVERYDAY INTERACTIONS THAT ANGER, ANNOY, AND DIVIDE THE RACES 244 (2000) (quoting the former president); See Rogelio A. Lasso, *Some Potential Casualties of Moving Beyond the Black/White Paradigm to Build Racial Coalitions*, 12 WASH. & LEE J. CIV. RTS. & SOC. JUST. 81, 86 (2005) (“To prevail over white supremacy we must understand how it operates. The best method for understanding how it operates is through the use of the Black/White Paradigm. Only through this lens will we understand how white supremacists developed their political view that the world is either white (and right), or not white (and wrong). The Black/White Paradigm also offers a unique instrumentality to understand race-based domination and subordination.”).

Many blacks have made rapid progress, but we are not certain how.”³⁹ While saving until another day the construction of a formula that might facilitate the ranking of civil rights claims in particular situations, we do argue here that any such formula should not necessarily favor African Americans because of the simple fact that they are not at the very bottom of the well across the board. However, such a formula should take into account the relative severity and duration of each group’s deprivation of rights or equality in various situations.

II. CIVIL RIGHTS LAW

Devon Carbado correctly notes that “[t]he Black/White paradigm critique is almost always employed to suggest that non-Black people of color have been harmed by the Black/White paradigm. Critics argue that, as a result of the Black/White paradigm, antidiscrimination laws and antidiscrimination efforts more broadly do not always respond to racial harms Asian Americans, Latinas/os, and Native peoples experience.”⁴⁰ As an illustration of this doctrinal subordination, Carbado points to three Supreme Court cases.

In the first case, *People v. Hall*, decided in 1854,⁴¹ the California Supreme Court reversed the murder conviction of a white defendant secured by the testimony of Chinese witnesses. The testimony violated a state statute that provided, “no black or mulatto person, or Indian shall be allowed to give evidence for or against a white person.”⁴² Despite the court’s interpretation of the statute as including non-blacks in its scope, Carbado reads the court’s reasoning as an affirmation of the black/white binary, stating, “Under the Court’s view, the Chinese witnesses were, for purposes of California law, Black.”⁴³ However, the court’s reasoning can just as easily be read as a reflection of a Native American/white axis⁴⁴ or a non-white/white binary, for the court reasons, “We are not disposed to leave this question in any doubt. The word ‘white’ has a distinct signification, which *ex vi termini*, excludes

39. James Q. Wilson, *American Dilemma: Problems of Race Still Cry to be Solved*, NAT’L REV. (Special 50th Anniversary Issue), Dec. 19, 2005, at 62; see *infra* text accompanying notes 165-170. Thus, I am in general agreement with Professor Carbado who asserts: “to say that we ought to recognize and to pay attention to the multiracial manifestations of racial subordination, is not to say that all or our discussions about race should be multiracially focused.” Carbado, *supra* note 35, at 1306; see also, Janine Young Kim, *Are Asians Black? The Asian-American Civil Rights Agenda and The Contemporary Significance of The Black/White Paradigm*, 108 YALE L.J. 2385 (1999) (“the black/white paradigm is a complex theory of race relations and should be recognized as such. . . . Moreover, the paradigm’s persistence in race relations and discourse attests to its continuing relevance and growing complexity.”).

40. Carbado, *supra* note 35, at 1310 (sources cited therein).

41. *People v. Hall*, 4 Cal. 399 (1854).

42. *Id.* at 403 (internal quotations omitted).

43. Carbado, *supra* note 35, at 1308.

44. *Hall*, 4 Cal. at 400 (“the American Indians and the Mongolian, or Asiatic, were regarded as the same type of the human species.”).

black, yellow, and all other colors.”⁴⁵ Hence, Chinese witnesses were disadvantaged, which is to say, they were barred from giving testimony, not because they were deemed to be “black,” but because they were deemed to be not white. Under California’s racist statute, as construed by the court, the opposite of white was not black, mulatto, or Indian, but “inferior races”—in other words, non-whites. The statute sought “to exclude all inferior races”⁴⁶ so as to protect the white superior race. As the court stated: “The evident intention of the Act was to throw around the citizen a protection for life and property, which could only be secured by removing him above the corrupting influences of degraded castes.”⁴⁷

This discussion is, however, academic. Even assuming, *arguendo*, a black/white binary existed in this case, that binary has not been brought forth into modern civil rights law. Soon after the Civil War, the witness statute and *People v. Hall* were overturned by both state law and federal law.⁴⁸

Carbado cites *Ozawa v. United States*,⁴⁹ a 1922 Supreme Court case, next. Unlike the statute in *Hall*, the statute in question in this case was crafted in what Professor Carbado calls “Black/White racial terms”⁵⁰—this immigration statute limited naturalization to aliens who were “free white persons” and to aliens of African descent.⁵¹ As the Court noted, a “‘White person,’ as construed by this Court and by the state courts, means a person without negro blood.”⁵² A person of Japanese descent who had been living in the United States for twenty years applied for and was denied naturalization under the statute because he was neither “a free white person” nor of African descent. Binary disadvantage here is clear beyond peradventure. The law in question did not provide relief for a racial minority who does not fit within the black/white paradigm.⁵³ Our immigration laws have been and continue to be a sordid mess.⁵⁴ But the black/white binary in naturalization has no bearing on race relations today. This binary was abandoned in 1952 with the passage of the Immigration and Naturalization Act, which reads: “The right of a person to

45. *Id.* at 403-404.

46. *Id.* at 404.

47. *Id.* at 403.

48. See *Don Wilson Builders v. Super. Ct. of Los Angeles County*, 220 Cal. App. 2d 77, 90-91 (1963).

49. *Ozawa v. United States*, 260 U.S. 178 (1922).

50. Carbado, *supra* note 35, at 1308.

51. Act of July 14, 1879, ch. 255, § 7, 16 Stat. 254 (1942) (superseded by 8 U.S.C. § 703 (1943)).

52. *Ozawa*, 260 U.S. at 179 (cases cited therein).

53. See Carbado, *supra* note 35, at 1308.

54. For different views of this history, particularly of the immigration cases, compare IAN F. HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) with John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817 (2000); see Jennifer Gordon, *Citizenship Talk: Bridging The Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493 (2007).

become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.”⁵⁵

The final evidence of binary disadvantage presented by Professor Carbado is the Supreme Court’s opinion in *Gong Lum v. Rice*.⁵⁶ In this 1927 decision, the Court upheld a Mississippi constitutional provision that provided as follows: “Separate schools shall be maintained for children of the white and colored races.”⁵⁷ Martha Lum, who argued that “she is not a member of the colored race nor is she of mixed blood, but that she is pure Chinese,”⁵⁸ was denied the right to attend an all-white high school in her town. The Court accepted the reasoning of the state supreme court—the state constitution “divided the educable children into those of the pure *white or Caucasian race*, on the one hand, and the *brown, yellow and black races*, on the other hand, and therefore...Martha Lum of the Mongolian or yellow race could not insist on being classed with the whites under this constitutional provision.”⁵⁹ Professor Carbado sees a black/white binary at work here.⁶⁰ Although the term “colored” was often used synonymously with the term “black” or “Negro” during Jim Crow,⁶¹ it took on a broader meaning in Mississippi. It incorporated several racial groups: “the brown, yellow and black races.”⁶² Thus, the binary was colored/white, not black/white. Indeed, people of color were grouped together in opposition to whites—a grouping which has an interesting familiarity to critical theory today. But the more important point is that *Gong Lum* is no longer good law.⁶³ Consequently, the discussion of a black/white binary based on this case is purely academic, even if it were correct.

There is no black/white binary in civil rights law today. To the extent that one existed in the past, it was the exception rather than the rule. The Reconstruction Amendments,⁶⁴ Reconstruction statutes,⁶⁵ and the 1964 Civil Rights Act,⁶⁶ arguably the most important civil rights statute in the history of our republic, were all crafted symmetrically rather than asymmetrically. The Thirteenth Amendment bans “slavery” in general, not just black slavery.⁶⁷ The

55. 8 U.S.C. § 1422 (2003).

56. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

57. *Id.* at 82 (quoting MISS. CONST. of 1890, § 207).

58. *Id.* at 81.

59. *Id.* at 82 (emphasis supplied).

60. See Carbado, *supra* note 35, at 1308-09.

61. See, e.g., HENRY LOUIS GATES, JR., *COLORED PEOPLE: A MEMOIR* (1994).

62. See *supra* text accompanying note 57.

63. See *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.

64. U.S. CONST. amends. XIII, XIV, XV.

65. Civil Rights Act of 1866, Act of April 9, 1866, Ch. 31, § 1, 14 Stat. 27, *reenacted by* Enforcement Act of 1870, Act of May 31, 1870, Ch. 114, §§ 16 & 18, 16 Stat. 140, 144 (codified as 42 U.S.C. §§ 1981, 1982); Civil Rights Act of 1871, Act of April 20, 1871, Ch. 22, §§ 1 & 2, 17 Stat. 13-14 (codified as 42 U.S.C. §§ 1983, 1985).

66. Ch. 20, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971 to 2000h-6).

67. U.S. CONST. amend. XIII, § 1; see, e.g., *Civil Rights Cases*, 109 U.S. 3, 22 (1883); see

Fourteenth Amendment provides that, “No state shall...deprive any *person* of life, liberty, or property without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws.”⁶⁸ The Fifteenth Amendment guarantees that “[t]he right of *citizens* of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁶⁹ Similarly, the Civil Rights Act of 1866 (popularly known as Sections 1981 and 1982) gives contractual rights to “[a]ll persons within the jurisdiction of the United States”⁷⁰ and property rights to the same class of persons.⁷¹ Furthermore, the Civil Rights Act of 1871 (also known as Sections 1983 and 1985(3)) provides a right of action to “[e]very person” whose federal rights are denied under the color of state law⁷² and to “any person or class of persons” victimized by a conspiracy to violate certain federally protected rights.⁷³ Finally, the 1964 Civil Rights Act⁷⁴ prohibits discrimination not just on the basis of being black, but on the basis of the broader categories of “race, color, religion, sex, or national origin.”⁷⁵ Although inspired by the African-American struggle for racial equality, these laws reach beyond any supposed black/white binary.

Professor Richard Delgado suggests that the courts require Latinos/as (and other racial minorities) to analogize their experiences to those of blacks as a

also Roy L. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258, 262 n.30 [hereinafter Brooks, *Employment Discrimination*] (“[I]t cannot be said that only blacks can benefit from the [T]hirteenth [A]mendment’s protection . . .”).

68. U.S. CONST. amend. XIV, § 1 (emphasis added); see, e.g., Board of the County Commissioners v. Brown, 520 U.S. 397 (1997); Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

69. U.S. CONST. amend. XV, § 1; see e.g., City of Mobil v. Bolden, 446 U.S. 55 (1980); South Carolina v. Katzenbach, 383 U.S. 301 (1966). Note that although this Amendment is racially symmetrical, unlike the other Amendments and laws discussed in this section, it is not symmetrical with regard to sex, as the term “citizens” was not inclusive of women at the time of passage. Sexual symmetry in suffrage was finally achieved with the adoption of the Nineteenth Amendment in 1920. U.S. CONST. amend. XIX.

70. Act of April 9, 1866, Ch. 31, § 1, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1981 (a)); see, e.g., Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Brooks, *supra* note 67, at 262, 267-68.

71. Act of April 9, 1866, Ch. 31, § 2, 14 Stat. 27 (1866) (codified at 42 U.S.C. § 1982); see, e.g., City of Memphis v. Greene, 451 U.S. 100 (1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968); Patterson, *supra* note 70.

72. Civil Rights Act of 1871, Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13-14 (codified as 42 U.S.C. § 1983); see, e.g., Monell, *supra* note 68; see also Brooks, *supra* note 67, at 262-63, 269-71.

73. Civil Rights Act of 1871, Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13-14 (codified as 42 U.S.C. § 1983). See, e.g., United Bd. of Carpenters, Local 610 v. Scott, 463 U.S. 825 (1983); Griffin v. Breckenridge, 403 U.S. 88 (1971). See Brooks, *supra* note 67, at 263, 271-75.

74. Ch. 20, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971 to 2000h-6).

75. Title VII, § 703(a), 42 U.S.C.2000e-2(a); see also Title VI, 42 U.S.C. 2000d (prohibiting discrimination “on the ground of race, color, or national origin . . . in program or activity that receiving federal financial assistance”).

precondition for gaining the benefit of these civil rights laws—a requirement that hinders the assertion of Latino/a civil rights claims.⁷⁶ However, this assertion is not supported by existing legal doctrine. The law does not require other racial minorities to analogize their situations to blacks, but rather to show that they have been discriminated against because of their relationship to a category larger than blacks. Many cases illustrate this point. In *Saint Francis College v. Al-Khazraji*,⁷⁷ the Supreme Court held that Arabs are entitled to protection under an important civil rights statute, Section 1981, not because they were deemed to be “black” or “black-like,” but because they were considered to be a racial group when Section 1981 was enacted after the Civil War. Using similar reasoning, the Court extended the same protection to Jews in *Shaare Tefila Congregation v. Cobb*,⁷⁸ and to whites in *McDonald v. Santa Fe Trail Transportation Company*.⁷⁹ Affording these groups civil rights protections contradicts Delgado’s argument because their experiences are far from being analogous to that of African Americans.⁸⁰

Similarly, Latinos/as or Hispanics, who receive civil rights protection, are not “black” or “black-like.” While blacks in the United States constitute a single race and many ethnicities (e.g., Nigerian, Jamaican, and African American, or slave descendent), Latinos/as constitute a single ethnicity and many races (some have white skin, while others have dark skin; some look indigenous to the Americas while others look Asian). All have a shared heritage, including a common language.⁸¹ Also, some disadvantages, such as the lack of English language proficiency, are not race-based but are ethnicity-based. Therefore, certain employment practices based thereon are actionable not because the lack of language proficiency is analogous to disadvantages suffered by African Americans, but rather in spite of such analogy. In an attempt to speak to the unique needs of Latinos/as and other language

76. Professor Delgado argues, for example, that, as compared to equal protection, due process is “legally more efficacious, more suited to the harms that need redressing.” Delgado, *supra* note 2, at 829-31. It should be pointed out, however, that blacks use both legal strategies, and that both are based on the Fourteenth Amendment to the Constitution, an amendment adopted to address the needs of newly freed black slaves. See CIVIL RIGHTS 3d ed., *supra* note 24, at ch. 2, 3, 5.

77. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

78. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

79. *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273, 287 (1976).

80. Unlike blacks, whites are not a racial minority, and Jews comprise a complex group whose identity is ethnic and religious, not only racial.

81. The government classifies Latinos/as as white, and distinguishes them from “white, non-Hispanic” people. See ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA 128 (2009) (discussing the government’s statistical definitions). As mentioned in note 12, *supra*, “almost half of all Hispanics now define themselves as ‘white alone.’” The Latino/a classification is highly controversial. For a general discussion of the race versus ethnicity question regarding Latinos/as, see STEPHEN E. CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD (2007); CLARA E. RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES (2000).

minorities, Title VII of the 1964 Civil Rights Act employs a language binary. Thus, Latinos have civil rights based on language, which is a protection that most African Americans, because they are not a language minority, do not have.⁸²

In fact, most of the civil rights statutes enacted since the 1964 Civil Rights Act have embraced binaries *other than* the black/white binary. These binaries include disabled/able,⁸³ women/men,⁸⁴ immigrant/U.S. born citizen,⁸⁵ and older/younger.⁸⁶ Even though the experiences of African Americans may have inspired these provisions,⁸⁷ none are black-specific or otherwise deprive Latinos/as or any other non-black racial group civil rights protection. No racial minority loses legal protection as a result of a supposed black/white binary, for there are multiple binaries in civil rights law.⁸⁸

82. Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on race, color, sex, religion, and national origin. *See* 42 U.S.C. § 2000e-2(a)(2006); Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 88 (1973). Language minorities receive civil rights protection under the race, color, and national origin bases. African Americans receive protection only under the race and color prongs. *See generally* CIVIL RIGHTS 3d ed., *supra* note 24, Ch. 8.

83. *See, e.g.*, Rehabilitation Act, 29 U.S.C. § 790 et seq.; Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 et seq.; Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. Laws that establish or protect the civil rights of disabled Americans attempt to advance “the equal-citizenship stature” of persons with disabilities. *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (citing Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 471 (2000)); *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006); *Ass’n for Disabled Ams. Inc. v. Fla. Int’l Univ.*, 405 F.3d 954 (9th Cir. 2005).

84. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1683; *see also* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982); *Wills v. Brown Univ.*, 184 F.3d. 20 (1st Cir. 1999).

85. The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324b, “was designed to, in part, allow hundreds of thousands of undocumented aliens [then] present in the United States to become citizens.” *League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist.*, 662 F. Supp. 443 (S.D. Tex. 1987). Also the Due Process Clauses of the Fifth and Fourteenth Amendments provide protection to undocumented aliens. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Flores by Galvez-Maldonado v. Meese*, 913 F.2d 1315 (9th Cir. 2005)

86. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; *see, e.g.*, *Smith v. City of Jackson*, 544 U.S. 228 (2005); *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996).

87. *See, e.g.*, *Shotz v. City of Plantation*, 344 F.3d 1161, 1169 (11th Cir. 2003) (“*Section 794a* incorporates the ‘remedies, procedures, and rights set forth’ in Title VII..., as well as the ‘remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964.’... For a violation of § 12203 in the context of public services, then, we ultimately look to Title VI for the remedies available.”).

88. In the parallel context of sexual orientation law, the Supreme Court is slowly bringing gays and lesbians within the ambit of full civil rights protection. But the failure to extend full protection more quickly has nothing to do with an alleged black/white binary in civil rights law. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning a Texas statute that made it a crime for two persons of the same sex to engage in intimate sexual conduct); *Romer v. Evans*, 517 U.S. 620 (1996) (overturning a state statute that excluded homosexuals from state civil rights protections); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (holding that “Don’t Ask, Don’t Tell” statute does not violate First Amendment); *but see* *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (allowing parade organizers to exclude

Some scholars argue that this diversity of binaries in civil rights law creates its own problem. These scholars suggest that a binary approach is too one-dimensional to address satisfactorily cases where an individual possesses more than one trait that could lead to discrimination.⁸⁹ As an example, Bradley Areheart points to *DeGraffenreid v. General Motors Assembly Division*.⁹⁰ In that case, black women were unable to prove a violation of Title VII of the 1964 Civil Rights Act because the court forced them to bring their claim based on “race discrimination, sex discrimination, or alternatively either, but not a combination of both.”⁹¹ By forcing black women to analogize their situation to either white women or black men, the court ignored the way these traits interact to create a more complex and unique form of discrimination.⁹²

A solution to this problem proposed by Areheart and others is an “intersectional” approach to identity.⁹³ Intersectionality is the idea that each aspect of an individual’s identity is important to civil rights analysis—individual characteristics cannot be viewed in isolation.⁹⁴ At first glance, this seems to be a compelling argument against binaries. Areheart is certainly correct in pointing out that “a person’s identity is comprised of much more than simply a race, class or sex” and that “rightly considered, a person’s identity includes characteristics of sex, race, and socioeconomic standing.”⁹⁵ Upon

participants on the basis of sexual orientation); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (allowing Boy Scouts to deny membership to scout master who was openly gay).

89. Bradley Allan Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J. 199, 201 (2006); see also Kimberle 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 (1989).

90. Areheart, *supra* note 89 at 199; *DeGraffenreid v. General Motors Assembly Division*, 413 F. Supp. 142 (E.D. Mo. 1976), *aff’d in part, rev’d in part on other grounds*, 558 F.2d 480 (8th Cir. 1977). Although it did not base its decision on this ground, the Eighth Circuit suggested that it disapproved of the District Court’s rejection of intersectional claims, saying, “We do not subscribe entirely to the district court’s reasoning in rejecting appellant’s claims of race and sex discrimination under Title VII.” *Id.* at 484.

91. Areheart, *supra* note 89 at 199-200 (quoting *DeGraffenreid*, 413 F. Supp. at 143).

92. *Id.*

93. *Id.* at 206-07; see also Crenshaw, *supra* note 88; Mary Eaton, *At the Intersection of Gender and Sexual Orientation: Toward Lesbian Jurisprudence*, 3 S. CAL. REV. L. & WOMEN’S STUD. 183 (1994). A number of courts seem to have recognized the intersectional approach to Title VII claims to varying degrees. See *Olmstead v. L.C.*, 527 U.S. 581, 598 n.10 (1999) (citing *Jefferies v. Harris County Cmty. Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980)); *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999); *Moore v. Hughes Helicopter, Inc.*, 708 F.2d 475 (9th Cir. 1983); *Lam v. Univ. of Hawaii Law School*, 40 F.3d 1551 (9th Cir. 1994); *Nagar v. Found. Health Sys.*, 57 Fed. App’x 304 (9th Cir. 2003); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991); *Judge v. Marsh*, 649 F. Supp. 770 (D.D.C. 1986); *Jeffers v. Thompson*, 264 F. Supp. 2d 314 (D. Md. 2003); *Domb v. Metropolitan Life Ins. Co.*, 2003 U.S. Dist. LEXIS 13790 (2003). Other courts have rejected intersectional claims. See e.g., *DeGraffenreid*, 413 F. Supp. at 143; *Lee v. Waters*, 1988 U.S. Dist. LEXIS 11336 (E.D. Pa. 1988); *Chaddah v. Harris Bank*, 1994 U.S. Dist. LEXIS 2693 (N.D. Ill. 1994).

94. Areheart, *supra* note 88 at 206-07.

95. *Id.* at 206.

closer examination, however, the principle of intersectionality does not present a true departure from binary analysis. Though Areheart suggests that the women were suffering “multiple forms of discrimination,”⁹⁶ this was not what the plaintiffs themselves argued.⁹⁷ The women in *DeGraffenreid* were not arguing for protection as unique individuals each with different sets of characteristics that led to multiple layers of discrimination. Rather, they sought protection as a single class—black women.⁹⁸ Thus, they were using a binary argument to show that their shared combination of traits made them more vulnerable than other groups to discrimination. By arguing that traits combine to create unique types of discrimination, intersectionists seem to be seeking the flexibility to create additional binaries (e.g., black women/others, homosexual Jewish men/others, etc.) rather than the abolition of a binary approach. As already demonstrated, nothing in the black/white binary tradition precludes the creation of such additional binaries.

III. AFRICAN-AMERICAN SCHOLARSHIP

Well-respected African-American scholars who write within the black/white binary, such as Derrick Bell, Charles Ogletree, Cornel West, and Glenn Loury, support civil rights law’s recognition of multiple binaries. Critical theorists argue that black scholars should abandon the black/white binary for several reasons. Three of the most compelling are: (1) when African-American scholars focus on their own racial group, they ignore the histories of other racial groups and distort our understanding of civil rights history and racism;⁹⁹ (2) the civil rights interests of African Americans and other racial groups (especially Latinos/as) converge, creating a natural alliance that is undermined by a focus on the black/white binary;¹⁰⁰ and, related to that, (3) “black uniqueness”—“the notion that Black people are and historically have been the racially subordinated amongst the racially subordinated”¹⁰¹—is

96. *Id.* at 201.

97. In fact, if they had, they likely would have survived summary judgment. *DeGraffenreid*, 413 F. Supp. at 143 (noting that women needed to demonstrate either sex-based discrimination or race-based discrimination). Thus, if the women had suffered “multiple forms” of discrimination – i.e. sex and race discrimination – they could have prevailed.

98. *DeGraffenreid*, 413 F. Supp. at 143.

99. See, e.g., Perea, *supra* note 6, at 1257 (“The ‘normal science’ of race scholarship specifies inquiry into the relationship between Blacks and Whites as the exclusive aspect of race relations that needs to be explored and elaborated. As a result, much relevant legal history and information concerning Latinos/as and other racial groups is simply omitted from books on race and constitutional law.”).

100. See Delgado, *supra* note 6, at 306 (calling for interracial coalitions).

101. Carbado, *supra* note 35, at 1311 (citing Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596 (1997) (using the term “exceptionalism” rather than “uniqueness”)); see, e.g., DELGADO & STEFANCI, *supra* note 2, at 67 (“blacks [do not] constitute the prototypical minority group”), 142 (“the black-white relation [is not] central to race relations”). As Professor Angela Harris correctly notes, “The argument for black exceptionalism is usually not articulated in mixed

untenable. Each argument is addressed seriatim.

A. Ignoring Other Racial Histories

The idea that African Americans should incorporate other racial histories in their scholarship so as not to ignore those histories is thinly supported. Asian and Latino/a scholars, for example, do not need African-American scholars to validate their work, which is exceptionally good.¹⁰² Similarly, although incorporating other racial histories into African-American scholarship may enrich one's perspective on racism, this exercise is typically not a prerequisite for understanding civil rights or the black ethos—nor is it necessary for addressing black issues.

To illustrate the point, we refer to *Mendez v. Westminster School District of Orange County*.¹⁰³ This case is often cited by LatCrits to illustrate the indispensability of Latino/a history in understanding the history of school desegregation that culminated in *Brown I*.¹⁰⁴ In *Mendez*, the court overturned a school segregation statute applicable to Mexican-American students, a decision that predated *Brown I* by a few years. While interesting, the case is neither necessary nor sufficient in explaining *Brown I* or in understanding the NAACP's legal strategy. *Mendez* was a Ninth Circuit opinion, so its precedential value is low compared to that of the Supreme Court cases traditionally regarded as the predecessors of *Brown I*.¹⁰⁵ Nor was *Mendez* as significant as the scholarship that informed the NAACP briefs.¹⁰⁶ Furthermore, even these Supreme Court cases and scholarly works have little probative value

company in the interests of interracial solidarity." Espinoza & Harris, *supra*, at 1603.

102. See *supra* sources cited in notes 3, 4, 7.

103. *Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (overturning segregation of Mexican-American students in Orange County).

104. See, e.g., Perea, *supra* note 6, at 1244 ("the *Mendez* opinion conveys a powerfully different understanding of equality that ultimately prevails in *Brown*.").

105. The three most important cases are *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), wherein the Court held that the state violated constitutional equal protection when it failed to provide a law school for African Americans. The Court did not question the constitutionality of separate but equal doctrine as laid down in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court only ruled that the state's application of the doctrine was constitutionally insufficient, the effect of which was to chip away some of the doctrine's constitutional protection. In *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950), the Court continued to chip away at the doctrine's legal protection by holding that an African American Ph.D. candidate was denied equal protection when the state legislature required African American students to sit, eat, and study in segregated areas. Finally, in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court came closest to overturning the separate but equal doctrine on its face. The Court held that the African American plaintiff must be admitted to the University of Texas Law School because the state's black law school was unequal in terms of physical facilities, quality of faculty, and academic reputation.

106. See *supra* sources cited in note 22.

in explaining why the Court decided *Brown I* the way it did.¹⁰⁷ Indeed, contemporary scholarship on *Brown I* that omits the geopolitical and other extra-legal factors that underpin the opinion is insufficiently theorized.¹⁰⁸

Authors who write about their own racial experiences are not necessarily signaling ignorance about other racial experiences. These writers are merely taking advantage of their unique position to get the story out more accurately and with greater insight. In fact, Professor Delgado himself rather enthusiastically embraced this position in his influential article, “The Imperial Scholar:”

[I]t is possible to compile an *a priori* list of reasons why we might look with concern on a situation in which the scholarship about group A [outsiders] is written by members of group B [insiders]. First, members of group B may be ineffective advocates of the rights and interests of persons in group A. They may lack information; more important, perhaps, they may lack passion, or that passion may be misdirected. B’s scholarship may tend to be sentimental, diffusing passion in useless directions, or wasting time on unproductive breast-beating. Second, while the B’s might advocate effectively, they might advocate the wrong things. Their agenda may differ from that of the A’s, they may pull their punches with respect to remedies, especially where remedying A’s situation entails uncomfortable consequences for B. Despite the best of intentions, B’s may have stereotypes embedded deep in their psyches that distort their thinking, causing them to balance interests in ways inimical to A’s. Finally, domination by members of group B may paralyze members of group A, causing the A’s to forget how to flex their legal muscles for themselves.¹⁰⁹

There is an even more basic reason for African-American scholars to focus on the black experience. Harold Cruse suggested this reason in his seminal work *The Crisis of the Negro Intellectual*, by raising the following rhetorical question: if African-American intellectuals do not focus on “Negro

107. Professor Mary Dudziak and others have argued that the justices in *Brown* saw the case as an indispensable opportunity to improve the image of elite Americans in the eyes of the world and, thus, earn the loyalties of the Third World during the Cold War, when the spread of Communism threatened to overtake American Democracy. The reality of American racism made it difficult for the United States to market democracy as an enabler of personal freedoms. Thus, *Brown* was less a case based on legal precedent or an act of altruism toward African Americans than a strategic deployment of self-interest on the part of a group of Americans who simply wanted to maintain their power. See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 1st ed. 1995); see also ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 27-28 (1990) (providing a similar analysis of *Brown I*).

108. See *supra* note 101. Professor Delgado admits as much. See, e.g., DELGADO & STEFANCIC, *supra* note 2, at 18-20.

109. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566-67 (1984).

life,” who will?¹¹⁰

B. Natural Alliance

Professor Richard Delgado argues that binary thinking can harm the group whose interest it places at the center. It can, for example, pit one disadvantaged group against another to the detriment of both. This opposition can impair a group’s ability to forge useful coalitions and to learn from other groups’ successes and failures.¹¹¹ What minority groups should do instead, Delgado argues, is set up a secondary market in which they negotiate selectively with each other. This market would take the form of exchanging support for issues important to various groups, creating win-win solutions whenever possible. Thus, a non-binary framework allows for racial minorities to approach whites in full force.¹¹²

Although Professor Delgado’s arguments are not without merit, they are based on an unproven assumption that identities among racial minorities are sufficiently monolithic so as to make interracial alliances natural. “The idea would be,” Professor Delgado asserts, “for minority groups to assess their own preferences and make tradeoffs that will, optimistically, bring gains for all concerned.”¹¹³ However, as Professor Carbado points out, “Non-Black people of color have not always been interested in identifying themselves with the Black or marginalized side of the Black/White paradigm. In fact, there are moments in American history when certain Asian Americans and Latinas/os have attempted to achieve equality by asserting that they are not Black or like Blacks, and/or that they are White.”¹¹⁴ There are costs as well as advantages associated with occupying both ends of the polarity—the black (or subordinated) end as well as the white (or privileged) end—and non-black racial groups have often been able to avoid the costs and exploit the advantages.¹¹⁵ Self-interest is a powerful motivating force.

Thus, it may be, as Professor Delgado maintains, that all binaries, including the black/white binary, are narrow nationalisms calculated to cutting the most favorable possible deal with whites¹¹⁶—a possibility that African Americans can ill-afford to ignore. Therefore it is important to explore this

110. See HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* 3 (1967).

111. See Delgado, *supra* note 6, at 283-307.

112. *Id.* at 307

113. *Id.* at 306.

114. See Carbado, *supra* note 35, at 1310. Professor Carbado cites *Ozawa, Hall, and Gum Lum*, discussed *supra* text accompanying notes 49-63, to support this proposition. More recent examples are provided herein. See *supra* text accompanying notes 77-79.

115. Although there is more to the story, it is unnecessary at this time to delve into the whole story about the political and racial relationship that non-Black people of color have had to the Black/White paradigm. See Carbado, *supra* note 35, at 1310 (discussing more aspects of the story).

116. See, e.g., Delgado, *supra* note 6, at 306.

possibility more closely to get a sense of how risky it would be for African Americans to abandon the black/white binary—which spawned the scholarly tradition and political strategy that together have been responsible for destroying Jim Crow and forging a racial consciousness from which all racial groups have benefitted.¹¹⁷

When one looks closely at the natural-alliance theory—more accurately, the presumed-alliance theory—one comes to the unhappy conclusion that the theory founders on the shoals of racial reality. In a world of limited resources, achieving progress on one group’s agenda can come at the expense of another group’s agenda.¹¹⁸ The game is, indeed, often zero-sum. The racial dynamic between blacks and Latinos/as, the latter of whom have been the most persistent critics of the black/white binary,¹¹⁹ well illustrates this point.

Let us begin with education. Blacks and Latinos/as both hope to see dramatic improvements in the quality of schools their children attend. For blacks, this means increasing educational funds to their schools and providing curricular services that address issues of racial pride, self-esteem, and the other unique needs of African-American students, especially those of young black males.¹²⁰ Likewise, for Latinos/as, improving the quality of education for their children means focusing on the special needs of Latino/as children, including bilingual education and expanded coverage of Latin-American history, which is often tied to immigration concerns.¹²¹ With the nationwide crisis in public school funding, the pool of state and federal funds as well as other resources available to meet these goals is extremely limited. Consequently, funds

117. For a more detailed discussion of this tradition of black-specific civil rights scholarship, see for example, *supra* notes 13-20 and accompanying text. This tradition even extends to slavery, where black literacy was forbidden in many states.

118. Ruben Navarrette, Jr., *Who Will Take the Worst U.S. Jobs?*, SAN DIEGO UNION-TRIBUNE, May 22, 2005, at G3.

119. See Carbado, *supra* note 35, at 1311; see also, Jamie L. Crook, *From Hernandez v. Texas to the Present Doctrinal Shifts in the Supreme Court’s Latino/a Jurisprudence*, 11 HARV. LATINO L. REV. 19 (2008); Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691 (2007); Espinoza & Harris, *supra* note 100; Delgado, *supra* note 2; Perea, *supra* note 6.

120. See, e.g., ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 5-32, 214-234 (1996) (discussing the African American quest for quality education from the Revolutionary War to the post-Brown Era); see also, GARY ORFIELD & CHUNGMEI LEE, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005); R.M. Sellers, et al., *The Relationship Between Racial Identity and Self-Esteem in African American High School and College Students*, 74 J. PERSONALITY & SOC. PSYCH. 715 (1998).

121. See CIVIL RIGHTS 3d. ed., *supra* note 24, at Ch. 8 (dealing with the rights of language minorities); see also Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123 (2008); Michelle R. Wood, *ESL and Bilingual Education as a Proxy for Racial and Ethnic Segregation in U.S. Public Schools*, 11 J. GENDER, RACE & JUST. 599 (2008); Thomas Kleven, *The Democratic Right to Full Bilingual Education*, 7 NEV. L.J. 933 (2007); Jessica Solyom, et al., *Be Careful What You Ask For: Educación Para Todas/os, the Perils and the Power*, 7 NEV. L.J. 862 (2007).

earmarked for one group may have to be diverted from the other group.

Historical relations between these two groups are also an obstacle to building an effective alliance between them. Latinos/as have used laws that sprung from white-on-black oppression to further their own civil rights agenda,¹²² taking advantage of the marginalized end of the binary but have not always returned the favor by supporting African Americans in their civil rights struggles. Further, Latinos/as have at times exploited the privileged end of the black/white binary, not just gaining a “harmless” group benefit but also actively oppressing African Americans. For example, Nicolas Vaca observes that in southern Florida, African Americans, “trapped in Miami’s Latino vortex,” view

themselves not only as indigenous to the region but also as the leaders and thus rightful beneficiaries of the advances made during the civil rights movement of the 1960s. However, beginning in the 1960s with the arrival of Cubans in significant numbers, they stood witness to a transformation of Miami that eventually engulfed them in a Latino maelstrom.¹²³

As one African-American resident of Miami observed, while white Americans “are racists by tradition and...at least know that what they’re doing is not quite right,...Cubans don’t even think there is anything wrong with it.”¹²⁴

The racial conflict between African Americans and Latinos/as is not confined to Miami. In California, African Americans and Latinos/as have clashed over myriad issues. For example, blacks have persistently charged that unauthorized Mexican immigrants take jobs away from them, because white employers feel more comfortable hiring even unauthorized Latinos/as than African Americans.¹²⁵ A report issued by the General Accounting Office supports this point of view. It shows that janitorial firms in downtown Los

122. See, e.g., *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197-198 (1973) (classifying “negros and hispanos” together for purposes of proving segregation).

123. NICOLAS C. VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* 108, 110 (2004).

124. *Id.* at 108.

125. See David C. Koelsch, *Panic in Detroit: The Impact of Immigration Reforms on Urban African Americans*, 5 *GEO. J.L. & PUB. POL’Y* 447 (2007); see also, Kevin R. Johnson, *Hurricane Katrina: Lessons About Immigrants in the Administrative State*, 45 *HOUS. L. REV.* 11, 61-62 (2008). Some “studies confirm that in certain instances, employers discriminate against African Americans in favor of immigrant workers.” Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 *Harv. C.R.-C.L. L. REV.* 99, 124 (2007). But the authors also argue that, as a whole, African American employment is unaffected by immigration. *Id.* at 124; see Rachel Bloomekatz, Comment, *Rethinking Immigration Status Discrimination and Exploitation in the Low Wage Workplace*, 54 *UCLA L. REV.* 1963 (2007). For opposing views see DELGADO & STEFANCIC, *supra* note 2, at 70-74; Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 *OHIO ST. L.J.* 961 (2006) (suggesting that newly arrived immigrants fill undesirable positions in unstable conditions and that employers have created those positions for Latino workers); ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND SOCIAL ORGANIZATION OF LABOR* 163 (2003).

Angeles have almost entirely replaced the unionized African-American workforce with a non-unionized immigrant workforce.¹²⁶ Even when unionization is not an issue, the results are the same. As Jack Miles observes:

If the Latinos were not around to be [gardeners, busboys, chambermaids, nannies, janitors, construction workers], nonblack employers would be forced to hire blacks—but they’d rather not. They trust Latinos. They fear or disdain blacks. The result is unofficial but widespread preferential hiring of Latinos—the largest affirmative action program in the nation, and one paid for, in effect, by blacks.¹²⁷

Because of the employment implications of undocumented immigration, the NAACP, as well as the AFL-CIO, supported the employer sanctions provision under the Immigration Reform and Control Act of 1986. As one NAACP official said, the sanctions were a way “to keep undocumented aliens from taking the food from black children.”¹²⁸ African Americans “were competing more directly with Latinos than with any other ethnic group.”¹²⁹

In addition there have been various political struggles between African Americans and Latinos/as in Los Angeles. A case in point is the 2001 mayoral race in which blacks voted for a white candidate instead of the Latino candidate whom they believed to be more interested in strengthening Latino/a political and economic power than in improving the plight of blacks. For similar reasons, the NAACP objected to the inclusion of Latinos/as in the 1975 Voting Rights Extension.¹³⁰ A black columnist positioned the matter in a broader context: “Though we pride ourselves on our leadership role in civil rights, paradoxically, we guard the success jealously. ‘We’re the ones who marched in the streets and got our heads busted. Where were they? But now they want to get in on the benefits.’”¹³¹

Similar differences exist between African Americans and other racial minorities. For example, some Asians have sought to exploit the privilege pole of the black/white binary at the expense of African Americans. As Professor Frank Wu observes, “Racial groups are conceived of as white, black, honorary whites, or constructive blacks.”¹³² He also reminds us that some Asians have benefited from their “honorary whiteness” and, in so doing, may have “perpetuat[ed] the problem of race.”¹³³

126. See VACA, *supra* note 123, at 12.

127. Jack Miles, *Blacks vs. Browns*, THE ATLANTIC MONTHLY, Oct. 1992, at 53.

128. VACA, *supra* note 123, at 5 (quoting Charles B. Johnson of the Pasadena NAACP). See *id.* at 4, 9.

129. *Id.* at 11.

130. See *id.* at xi, 9.

131. *Id.* at 62 (quoting columnist Benda Payton of the *Oakland Tribune*); see *id.* pp. xi, 9.

132. Wu, *supra* note 7, at 249.

133. FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 18 (2002). For more discussion regarding conflicts between African Americans and other racial groups, see Chang & Gotanda, *The Race Question*, *supra* note 7; Taunya Lovell Banks, *Both Edges of the*

Professor Wu's use of the terms "honorary whiteness" and "constructive blacks" underscores both the constructedness of race and the poles of privilege and subordination in the black/white binary within which Asians have operated. The latter racial dynamic forms the basis for the uneasy relationship that has developed between the African-American and the Asian-American civil rights agendas since the end of the 1960s. Janine Young Kim aptly describes this situation:

Asian Americans have stood on unstable ground between 'black' and 'white,' falling under the honorary white category in anti-affirmative action arguments, but considered constructive blacks for the purposes of school segregation or antimiscegenation laws. To say that Asian Americans have been perceived as honorary whites or constructive blacks is, however, slightly misleading in that it tends to convey a notion of race specificity. It is important to keep in mind that although the status of honorary white does affect identity, recognition, and appellation, its more insidious function is cooptation. For example, within the economy of affirmative action policy, 'whiteness' encompasses victimization through 'reverse racism' and race-based disadvantage in certain educational or occupational opportunities. Insofar as a conservative like Newt Gingrich treats Asian Americans as honorary whites, he refers to common experience under affirmative action, not racial similarity.¹³⁴

African Americans do not have this kind of racial flexibility. Phenotype and experience prevent African Americans from benefitting as much as other racial minorities from the pole of privilege. African Americans constitute the social marker for disadvantage, stuck at the pole of subordination. Indeed, African Americans have watched as other racial and ethnic groups with whom they have aligned in the past¹³⁵ have leapfrogged past them in resources and power, often distancing themselves from African Americans (what Professor Carbado calls "interracial distancing"¹³⁶) once they obtained a certain level of success. There is palpable concern among African Americans that Latinos/as, with their increasing numbers and desire for acceptance, are poised to repeat this process. Like Asians in the context of affirmative action,¹³⁷ Latinos/as

Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building, 5 ASIAN L.J. 7 (1998); Bill Ong Hing, *Immigration Policies: Messages of Exclusion to African Americans*, 37 HOW. L.J. 237 (1994).

134. Kim, *supra* note 39 (emphasis supplied; sources cited therein); see Adria Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391 (2008) (arguing that while affirmative action benefits all racial groups, Asian Americans have suffered negative action, or practices that reduce Asian Americans' chances of admissions).

135. For example, Asian Americans and African Americans have been through both alliance and distancing. For a lively account of the history of these two groups' interactions, see VIJAY PRASHAD, *EVERYBODY WAS KUNG FU FIGHTING: AFRO-ASIAN CONNECTIONS AND THE MYTH OF CULTURAL PURITY* (2002).

136. Carbado, *supra* note 35, at 1310.

137. See *supra* text accompanying note 133; see generally Wu, *supra* note 7.

might find interracial distancing to be within their self-interest. To ask African Americans to put aside this racial history and risk being a stepping-stone for yet another racial group's advancement may be overly optimistic.

This is not to say that African Americans and other racial groups have never successfully collaborated or can never form mutually beneficial coalitions. As Professor Perea correctly points out, *Keyes v. School District No. 1, Denver, Colorado*,¹³⁸ a school desegregation case, provides an example of interest convergence.¹³⁹ Likewise, *Mendez v. Westminster School District of Orange County*,¹⁴⁰ a Mexican-American school desegregation discussed earlier,¹⁴¹ shows that African Americans can support Latino/a interests when those interests converge with African-American interests.¹⁴² But the crucial question is *what happens when the interests clash rather converge?* As Latinos/as continue to gain political strength and as both Latinos/as and Asians continue to become more integrated into the mainstream culture (becoming more "white"¹⁴³), will they find it more advantageous to forge coalitions with whites, whose experiences and interests they now share, than with African Americans, whose experiences and interests have become contraposed? For critical theorists' rejection of the black/white binary to be truly persuasive, they will have to answer these questions. To do so satisfactorily, they must further explore the means by which the historical differences and contraposed interests that have prevented effective collaboration and coalition building in the past can now be resolved.

C. Black Uniqueness

Critical theorists reject the black/white binary in large part because they reject the notion that African Americans have always been and continue to be the most racially subordinated group in America.¹⁴⁴ Professor Delgado, for

138. *Keyes*, 413 U.S. 189 (holding that "a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious").

139. See Perea, *supra* note 6, at 1250.

140. *Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947).

141. See *supra*, text accompanying notes 102-107.

142. See Perea, *supra* note 6, at 1246 (indicating that the NAACP filed an amicus brief in support of the Mexican-American plaintiffs in *Mendez*).

143. See *supra* note 12.

144. See Carbado, *supra* note 35, at 1311 (citing Espinoza & Harris, *supra* note 100). See, e.g., DELGADO & STEFANCIC, *supra* note 2, at 67 ("blacks [do not] constitute the prototypical minority group"), and 142 ("the black-white relation [is not] central to race relations"); see also Neha Singh Gohil, *The Sikh Turban: Post-9/11 Challenges to this Article of Faith*, 9 RUTGERS J. L. & RELIGION 10 (2008) (discussing violence and discrimination suffered by Sikhs in the aftermath of 9-11); Murad Hussain, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920 (2008); Lupe S. Salinas, *Immigration and Language Rights: The Evolution of Private Racist Attitudes into American*

example, argues that all racial minorities must avoid “the [s]iren [s]ong of [u]niqueness.”¹⁴⁵ According to Delgado, the seductive idea of uniqueness can “predispose a minority group to believe that it is uniquely victimized and entitled to special consideration from iniquitous whites.”¹⁴⁶ However, this argument runs contrary to history, as documented by a large body of research. Although rarely stated in public,¹⁴⁷ there is substantial empirical evidence strongly suggesting that African Americans *are* unique and, hence, warrant separate (but not necessarily dominant) attention.¹⁴⁸ We shall focus on a few pieces of this evidence: slavery and Jim Crow; the subordination of African Americans versus Native Americans; lynching; and what can be termed, “the lost American dream.”

1. Slavery and Jim Crow

To begin with, African Americans are the only group to arrive in this country not on, but under Plymouth Rock. African Americans have encountered and continue to encounter unique disadvantages that stem from the very way they were brought into American society.¹⁴⁹ Unlike most immigrants who came to the United States voluntarily, blacks were imported in huge numbers as slaves. Although slavery had existed for thousands of years, the Atlantic slave trade was not slavery as usual:

Slavery in the Americas introduced the troubling element of race into the master/slave relationship. For the first time in history, dark skin became the social marker of chattel slavery. And, as a means of justifying this new face—a black face—given to an ancient practice, the slavers and their supporters created a race-specific ideology of condemnation.¹⁵⁰

Public Law and Policy, 7 NEV. L.J. 895 (2007).

145. Delgado, *supra* note 6, at 299-300.

146. *Id.*

147. “The argument for black exceptionalism is usually not articulated in mixed company in the interests of interracial solidarity.” Espinoza & Harris, *supra* note 100, at 1603.

148. See D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552 (2008); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283 (2008); Rita K. Lomio, *Working Against the Past: The Function of American History of Race Relations and Capital Punishment in Supreme Court Opinions*, 9 J. L. SOC’Y 163 (2008); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007). One of the arguments running through this article is that in the tradition of African American civil rights scholarship, facts are more important than assumptions. See sources cited in notes 13-20 *supra*. It is out of this tradition that we criticized the presumed alliance theory in critical theory. See *supra* text accompanying notes 110-140.

149. There is much literature that adapts our understanding of post traumatic stress disorder to the conditions of African Americans today in which it is argued that blacks suffer from a particular kind of intergenerational trauma called “post traumatic slave syndrome” (or “PTSS”). Perhaps the most well-known writing on the subject is JOY DEGRUY LEARY, *POST TRAUMATIC SLAVE SYNDROME: AMERICA’S LEGACY OF ENDURING INJURY AND HEALING* (2005).

150. See ROY L. BROOKS, *ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK*

This new form of slavery was so much a part of colonial America that the founders addressed it in multiple provisions of the U.S. Constitution.¹⁵¹ Thus, the subjugation of African Americans was written into the fabric of our nation from the very beginning—a situation that no other group has faced.

Although slavery officially ended with the Civil War and the adoption of the Thirteenth Amendment, the systematic economic exploitation of African Americans continued well into the twentieth century. As Douglas Blackmon chronicles in his Pulitzer Prize winning book, “Slavery by Another Name,” southern states used an elaborate system of laws “specifically enacted to intimidate blacks.” They also used a variety of other slave-like practices such as opportunistic arrests, sham trials, convict leasing, and coercive “contracts” to continue supplying white farms and industry with the cheap black labor on which they relied.¹⁵²

In spite of this, critical theorists often dismiss African American uniqueness by noting that other racial minorities have experienced many of the injustices blacks have faced. For example, Professor Perea asserts:

Mexican Americans were also segregated in separate but unequal schools, were kept out of public parks by law, were refused service in restaurants, were prohibited from attending ‘White’ churches on Sundays, and were denied burial in ‘White’ cemeteries, among all of the other horrors of the separate but equal scheme.¹⁵³

While it is true that all racial minorities, particularly Latinos/as, have been victims of white oppression, these racialized experiences are nonetheless quite different from what African Americans have experienced.¹⁵⁴ In our view, the differences between African Americans and other racial minorities are so great as to outweigh the similarities. As one of the authors said on a previous occasion:

[B]lacks were the main target of slavery and Jim Crow. No other American group inhabited the peculiar institution. No other American group sustained more casualties or lengthier suffering from slavery and

REPARATIONS 20 (2004). Chapter Two of this book provides a detailed discussion of this new combination of racism and slavery. *Id.* at 20-35. Chapter Six explores how this insidious combination not only changed the institution of slavery, but outlasted slavery itself.

151. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 3 (counting non-free, non-Indian people as three-fifths of a person for purposes of apportionment); *Id.* at § 9, cl. 1 (preventing Congress from prohibiting the importation of people before 1808, but allowing it to impose a tax of up to \$10 per person imported); U.S. CONST. art. IV, § 2, cl. 3 (requiring states to cooperate in the return of fugitive slaves). Although these provisions do not specifically mention blacks, race was understood as a component of slavery. *See* BROOKS, *supra* note 146.

152. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 7-8 (2008).

153. *See, e.g.*, Perea, *supra* note 6, at 1250 (sources cited therein).

154. In addition to sources cited *supra* at note 142, *see, e.g.*, JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 203-33 (2000); Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the Black-White Paradigm*, 54 *RUTGERS L. REV.* 959-87 (Summer 2002).

Jim Crow... [T]his gives blacks a connection to slavery and Jim Crow—both familial and psychological—that no other racial minority has. There is a collective memory here that only blacks have.... [U]nlike Asians and Latinos, blacks did not volunteer for this tour of duty. Blacks were kidnapped from their homeland and brought to this country by brutal force, the likes of which we have not seen before or since in American history. In short, although blacks, Asians, Latinos, Native Americans, Indians, and other people of color are victims of what Joe Feagin calls ‘systemic racism’ (or the “white-created” paradigm of racial subordination), they do not experience and hence do not react to racial subordination in exactly the same way.... White-on-black oppression is just different from other white-oppression syndromes, whether racial or gender. Patricia Rodriguez has observed, ‘White means mostly privilege and black means overcoming obstacles, a history of civil rights. As a Latina, I can’t try to claim one of these.’¹⁵⁵ Black Americans carry the weight of the atrocities—slavery and Jim Crow....¹⁵⁶

2. *Comparing Historical Experiences of African Americans and Native Americans*

One could plausibly argue that Native Americans were more subordinated than African Americans in the past. The government’s protracted Indian wars, which sought to “exterminate, assimilate or otherwise eliminate Native Americans from the American hemisphere,” brought the pre-Columbian Native American population from an estimated 1.2 to 5 million in what is now the United States to an estimated 600,000 by 1800.¹⁵⁷ Yet, this atrocity came more as the result of war and whites’ desire for territory than through racism. Native Americans were held in higher esteem by our government. Comparing blacks to Native Americans, the Supreme Court remarked:

The situation of this [black] population was altogether unlike that of the Indian race. The latter, . . . although they were uncivilized, . . . were yet a free and independent people, associated together in territories to which the white race claimed the ultimate right of dominion. But the claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied . . . These Indian Governments were regarded and treated as foreign Governments. . . .¹⁵⁸

155. Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick ‘Other’*, N.Y. TIMES, Nov. 9, 2003 at A1.

156. BROOKS, *supra* note 147, at 160-61.

157. See Lawrence Armand French, *Native American Reparations: Five Hundred Years and Counting*, in WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 241 (Roy L. Brooks ed., 1999).

158. *Dred Scott v. Sandford*, 60 U.S. 393, 403-404 (1857).

Though the American government has routinely broken its treaties with various tribes and Native Americans have continued to experience discrimination on a variety of fronts,¹⁵⁹ we should not be focused on how much suffering Native Americans have faced relative to African Americans. Ultimately, the question we should be asking is whether each group has had a unique experience that warrants separate consideration and may require a different legal response. An examination of the history and political posture of each group shows the answer to be yes. Native Americans' organization in sovereign tribes with government-granted land gives them a uniqueness which is better served by a binary approach.

A prime example can be seen in the child welfare arena. Although both African Americans and Native Americans have had high percentages of children removed from their families of origin on allegations of abuse and neglect, the needs and responses of each group to this problem have been very different. Native Americans have seen as much as twenty-five to thirty-five percent of Indian children removed from families and placed in predominantly non-Indian foster homes.¹⁶⁰ Arguing that such practices constituted a threat to their culture and sovereignty, Native Americans sought and won protection through the passage of the Indian Child Welfare Act (ICWA).¹⁶¹ This Act strengthened tribal governments' role in child welfare cases by requiring that Indian children be placed in foster or adoptive homes that reflect Indian culture.¹⁶²

Facing a similar problem of overrepresentation of their children in foster care, African Americans, however, sought a very different legal solution based upon their unique needs. African-American families were discouraged from becoming foster and adoptive parents while at the same time agencies were actively trying to match children with adoptive families of the same race. This dual discrimination caused African-American children to linger in foster care longer than other children. The Congressional solution to this, the Multiethnic Placement Act of 1994 (MEPA), forbid discrimination against adoptive and foster families on the basis of race, forbid the delay or denial of adoption for a child based on race, and required agencies to increase efforts to recruit diverse placement resources.¹⁶³

159. Although the treaties were routinely broken by our government, the reservations created as a result of these treaties form the basis for what Native Americans today call the "new buffalo economy"—dominated by casinos that collectively earn more than the Las Vegas casinos. Some of this wealth is being shared with poor reservations under state gaming laws. For a more detailed discussion, see BROOKS, *supra* note 119, at 261-62.

160. See, e.g., THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1 (Steven Unger ed. 1977).

161. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069.

162. *Id.*

163. The Multiethnic Placement Act was passed as part of the Improving America's Schools Act of 1994, Pub. L. No. 103-553, 108 Stat 3518 § 552.

Clearly, MEPA and ICWA take nearly opposite approaches. The latter is race-conscious, requiring consideration of ethnic and culture background for placement, while the former is race-neutral, requiring that race not be a factor preventing placement. These different approaches would not be possible without a binary approach that respected the uniqueness of each group.

3. Lynching

An example of the great differences between the racialized experiences of African Americans and other racial minorities can be seen in the area of lynchings. Professor Perea asks, “How many of my present readers are aware that Mexican Americans, like Blacks, were lynched frequently?”¹⁶⁴ In raising this question, Professor Perea is either suggesting that African Americans were not the principal targets of lynching (in which case he is wrong) or he conflates lynchings and hangings (the effect of which is to increase the number of Mexican American lynchings). In either case, he unwittingly trivializes African-American history. Both arguments are related, and therefore can be addressed simultaneously.

There was a rather large qualitative difference between lynchings and hangings. The latter were ad hoc occurrences most closely associated with “the old west,” where there was a tradition of frontier justice and where Mexican Americans lived in large numbers.¹⁶⁵ Though there were some shared racial motivations for lynchings and hangings—“acting ‘uppity,’ taking away jobs, making advances toward a white woman, cheating at cards, practicing ‘witchcraft,’ and refusing to leave land that Anglos coveted,”¹⁶⁶—the motivations for the lynching of African Americans went much further. Lynching was part of an on-going, systemic campaign of racialized and ritualized violence and intimidation designed to perpetuate a prior system of racial subordination under which only African Americans lived. Thus, lynchings were a post-slavery phenomenon. As Thomas Sowell notes, “[e]conomic considerations alone would prevent a slaveowner from lynching his own slave or tolerating anyone else’s doing so. It was only after the Civil War that the emancipated blacks became the principal targets of lynching.”¹⁶⁷ Lynchings served the particular social end of reducing African Americans to a state of slavery—mentally, if not physically.

164. Perea, *supra* note 6, at 1250. Richard Delgado explored the same question in a recent article. Richard Delgado, *The Law of the Noose: a History of Latino Lynching*, 44 HARV. C.R.-C.L. L. REV. 297 (2009).

165. See F. ARTURO ROSALES, *POBRE RAZA!: VIOLENCE, JUSTICE, AND MOBILIZATION AMONG MÉXICO LINDO IMMIGRANTS, 1900-1936* (1999); see also Andrea McDowell, *Criminal Law Beyond the State: Popular Trials on the Frontier*, 2007 B.Y.U.L. Rev. 327.

166. Delgado, *supra* note 160, at 299. Delgado notes that in addition to these motivations, Latinos were sometimes targeted for “acting too Mexican.” *Id.*

167. SOWELL, *supra* note 14 at 13.

Yet another difference between lynchings and hangings is what happened before and after the killing. When African Americans were lynched, they were not just choked to death by a rope hanging from a tree. Unlike Mexican-American hanging victims, African Americans were typically tortured, dismembered, castrated, or burned by white mobs prior to or following the actual hanging.¹⁶⁸ Thus, lynchings, unlike hangings, manifested a level of racial hatred towards African Americans that few, if any, other racial group witnessed in such a systemic fashion. With few exceptions, Mexican Americans and whites in the “cowboy” West were hanged; African Americans—particularly in the South—were lynched.¹⁶⁹

In total, more than 5,000 African Americans were lynched between 1882 and 1930.¹⁷⁰ The African-American activist Ida B. Wells brought attention to the fact that while many of these lynchings were rationalized as vigilante justice for crimes committed by African Americans against whites, particularly rapes, few African Americans actually committed such crimes.¹⁷¹ Lynchings were as much acts of psychological and social domination as they were acts of physical domination. They were intended to keep recently freed and enfranchised African Americans in a slave-like condition.¹⁷² As such, lynchings reaffirmed the old racial order. They were intended to send a strong message to both blacks and whites that the antebellum racial order was still in effect regardless of what the Constitution said. Thus, lynchings often took place in a festive atmosphere, staged as public celebrations attended by the entire family. Photographs of victims swinging from a tree were often taken

168. See JONATHAN MARKOVITZ, LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY 24 (2004) (citing a pamphlet titled MOB MURDER IN AMERICA: A CHALLENGE TO EVERY AMERICAN CITIZEN 3 (1920)); RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM 217-18 (1975) (indicating that lynching was a process that lasted for hours, during which time the victim suffered intense pain from torture, mutilation, castration, burning or all of the above; and that the process ended with spectators scavenging the victim's remains for souvenirs—carving off a toe, a finger, or flesh from the victim's burnt husk).

169. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States – Mexico Border*, 37 U. MIAMI INTER-AM L. REV. 517, 523-24 (2006) (arguing that lynchings were motivated by race, not criminal liability). Sowell uses the term “lynching” in noting that “most lynching victims in the antebellum South were white.” SOWELL, *supra* note 163, at 13. On reflection, we believe he would substitute the word “hanging” for the word “lynching” in that statement, which is otherwise correct.

170. See MARKOVITZ, *supra* note 166 at 20 (citing Petition, from “Anti-lynching Measures” subject file, from NAACP Anti-lynching Publicity and Investigative Papers).

171. See *id.* at 8-10.

172. See *id.* at 3; see also *id.* at 13-14 (citing NAACP Anti-lynching Publicity and Investigative Papers and letter by James Weldon Johnson to *The Forum*, Feb. 1927); Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 230-34 (2008); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 823-24 (2005).

and sent to family and friends.¹⁷³

Lynchings were so rampant and targeted that the white poet and songwriter Abel Meeropol (a.k.a. Lewis Allan) wrote a musical protest titled "Strange Fruit." Made famous by Billie Holiday, the famous African-American blues singer, the song's lyrical description of black bodies left hanging from the trees goes in part as follows:

Southern trees bear a strange fruit;
Blood on the leaves and blood on the root;
Black body swinging in the Southern breeze;
Strange fruit hanging from the poplar trees.¹⁷⁴

No other group in America, racial or otherwise, has experienced lynchings to the same degree as African Americans.

In addition to qualitative differences between lynchings and hangings, obvious demographic differences between Mexican Americans and African Americans prevented hangings from affecting the Mexican-American community in the same way lynchings affected the African-American community. Mexican Americans could more easily escape threats of violence, including hangings, by returning across the border to their homeland. African Americans had no similar means of escape. In addition, Mexican Americans, for the most part, willingly entered the United States for the economic opportunities the country offered, aware of the accompanying risks. This felicity calculus was unavailable to African Americans. Finally, the Mexican-American community, unlike the African-American community, experienced growth and renewal through additional immigration.¹⁷⁵

In short, while African Americans are not the only group to have experienced racially-motivated hangings, the African-American lynching experience was singular. It was unique in its purpose, duration, level of violence, social acceptance, and in its effect on the African-American population nationally. The recent formal congressional apology issued to African Americans for the repeated failure of Congress to pass an anti-lynching law during the lynching era gives testimony to the view that the term "lynching" has taken on a special meaning in our culture—that it can appropriately be considered a black-white matter.¹⁷⁶

This point is further illustrated by the recent resurgence in the use of the

173. See JACQUELINE GOLDSBY, *A SPECTACULAR SECRET: LYNCHING IN AMERICAN LIFE AND LITERATURE* (2006); Roberts, *supra* note 170.

174. Roy L. Brooks, *Redress for Racism?*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 153, at 396.

175. See CARLOS G. VÉLEZ-IBÁÑEZ, *BORDER VISIONS: MEXICAN CULTURES OF THE SOUTHWEST UNITED STATES* (1996).

176. Between 1890 and 1952, Congress rejected more than 200 anti-lynching bills, despite enormous pressure from activists and petitions from seven Presidents. See S. Res. 39, 109th Cong. (2005).

noose as a symbol of white bigotry against blacks.¹⁷⁷ In August 2006, three white students in Jena, Louisiana hung nooses from a schoolyard tree, which had traditionally been used for shelter only by white students, after black students sat under it.¹⁷⁸ Since then, nooses have been left in an increasing number of locations around the country, including in the bag of a black Coast Guard cadet, in the locker room of a Long Island police station, on a Maryland college campus, and in the office of a black professor at Columbia University.¹⁷⁹ As William Jelani Cobb, a professor of black American history at Spelman College explained, “[The noose] is a symbol that can be deployed with no ambiguity. People understand exactly what it means.”¹⁸⁰

Although the current use of the noose is largely symbolic of past violence, disproportionate violence against blacks is not just historical. In 2003, more than half of all hate crimes (51%) were racially motivated, and in more than half of these incidences (52%) the victim was black. In comparison, only 9% of the victims of racially motivated hate crimes were Hispanic, and other racial minorities have even lower rates of victimization (5% for Asian and Pacific Islanders and 2% for American Indians).¹⁸¹ The facts about hate crimes tend to show that African Americans are deeper in the well than other racial minorities even though all are near the bottom.

4. *The Lost American Dream*

It is still true, as James Baldwin once noted, that the African American “is ‘that shadow which lies athwart our national life,’ not as a threat or a curse but as a constant reminder of the injustice and inequality that belie the American Dream and the promise of the nation’s foundational ideals.”¹⁸² That shadow belongs to no other racial group in America. It is coextensive with the African American ethos.

Professor Toni Morrison’s famous critique of Elia Kazan’s film “America, America,” illustrates Baldwin’s point. Less known than Kazan’s other films, such as “On the Waterfront” and “A Streetcar Named Desire,” “America, America” tells the story of his Greek family’s immigration to America from Turkey at the beginning of the twentieth century. In the film’s last scene, a member of the family is given a job shining shoes (commonly called a “boot

177. Errin Haines, *Noose incidents on the rise in U.S. since 'Jena 6' unrest*, SAN DIEGO UNION-TRIBUNE, Oct. 11, 2007.

178. Richard Jones, *In Louisiana, a Tree, a Fight and a Question of Justice*, N.Y. TIMES, Sept. 19, 2007.

179. Haines, *supra* note 175.

180. *Id.*

181. See Federal Bureau of Investigation, *Hate Crime Statistics, 2003*, available at <http://www.fbi.gov/ucr/03hc.pdf>.

182. Watson Branch, *Reparations for Slavery: A Dream Deferred*, 3 SAN DIEGO INT’L L.J. 177, 182 (2002) (quoting James Baldwin, *Many Thousands Gone*, in NOTES OF A NATIVE SON 24 (1984)).

black”) at Grand Central Station. Although this is a job that most Americans, no matter how poor, would reject as demeaning, it provides the immigrant with a better life than the life he had known in his homeland. When he notices an African American nearby who, like he, is soliciting customers, the boot black immigrant, taking advantage of his racial power or sense of white entitlement, runs the African American off, yelling, “Get out of here! We’re doing business here!” Reflecting on the meaning of this scene in an article appropriately titled, “On the Backs of Blacks,” Professor Morrison reviews the scene not from the “dewy-eyed perspective” of an immigrant, but through the eyes of an African American. From that perspective, Professor Morrison sees the “explicit insertion into everyday life of racial signs and symbols that have no meaning other than pressing African Americans to the lowest level of the racial hierarchy.”¹⁸³ The immigrant “is now set to become a true American—an immigrant, but also an entitled white who understands that, regardless of his immigrant status, he stands above the long suffering Black American citizen.”¹⁸⁴

No matter the ethnicity, race or legal status of the immigrant, this new arrival to America knows *a priori* that his adopted country has a racial order, and he knows his place in that order—above the African American. A dramatic illustration of this racial awareness came at the highest level of government in Mexico. Addressing American business executives at a conference in Puerto Vallarta, Mexico in 2005, Mexican President Vicente Fox remarked that unauthorized Mexican immigrants “do work that not even blacks want to do.”¹⁸⁵ Although African Americans regarded his statement as racist (he could have said that Mexicans “do work that Americans do not want to do”), President Fox may have intended only to make a factual statement in support of unauthorized immigration. But, on a deeper level, President Fox’s remark reaffirmed the racialized message that Professor Morrison sees in “America, America”—that in America, African Americans are at “the lowest level of the racial hierarchy.”¹⁸⁶ Hence, not unlike the Greek immigrant in Kazan’s film, the Latino/a immigrant is quite willing to take a bottom-of-the-barrel job knowing that her chances of success in America are greater than in her homeland. The immigrant has correctly calculated that she will not be at the bottom of the well in America. Thus, the scene is the same, only the nationality of the immigrant has changed from Greek to Mexican.

There is no dearth of evidence of a racial pecking order that in the main

183. Toni Morrison, *On the Backs of Blacks*, TIME, Dec. 2, 1993, at 57. For an in-depth analysis of how blacks compare unfavorably to other racial groups in terms of financial, human and social capital, see BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA, *supra*, note 81, at 125-182.

184. VACA, *supra* note 123, at 13.

185. Navarrette, *supra* note 118.

186. Morrison, *supra* note 183.

places Latinos/as over African Americans. Although both groups are virtually even in areas of poverty, earnings, and education (except for high school dropout rates, discussed in more detail below),¹⁸⁷ African Americans are doing considerably worse than Latinos/as in several other key areas. For example, African Americans are only 13% of the United States population, but represent 39% of the local jail population; whereas Latinos/as are a little more than 13% of the population and 15% of the local jail population. Thus, the African American local jail rate is almost three times that of the Latino/a population.¹⁸⁸ Similarly, the total incarceration rate (which includes local jails plus state and federal prisons) for African Americans between the ages of 25 and 29 is a shocking 12.6% compared to 3.6% for Latinos/as, a difference of more than threefold.¹⁸⁹

The high school dropout rate is the one area of American life in which both Latinos and Latinas, especially the former, are doing worse than their African-American counterparts. High school dropout rates have decreased slightly for all races since 1993.¹⁹⁰ However, the “black, not Hispanic” dropout rate (about 15%) is significantly higher than the “white, not Hispanic” rate (about 8%), while the “Hispanic” dropout rate is easily the highest of all the races (between 30-35%).¹⁹¹ According to a 1998 Senate study, the Hispanic dropout rate is relatively high because discussions of the dropout problem have too often been “submerged in discussions of dropouts in general, the education of ethnic minorities in general, or politicized debates about immigration, language, and bilingualism.”¹⁹² Asians & Pacific Islanders have the lowest dropout rate of all the races (less than 5%),¹⁹³ which may partially explain why their average income is the highest of all the races, including whites.¹⁹⁴

187. See, e.g., U.S. Census Bureau, *Historical Poverty Tables—People*, table 2, at <http://www.census.gov/hhes/www/poverty/histpov/perindex.html> (last visited Feb. 1, 2010) (poverty rate of individuals); U.S. Census Bureau, *Historical Income Tables—Families*, table F-05, at <http://www.census.gov/hhes/www/income/histinc/incfamdet.html> (last visited Feb. 1, 2010) (earnings); U.S. Census Bureau, *Mean Earnings of Workers 18 Years and Over, by Educational Attainment, Race, Hispanic Origin, and Sex: 1975 to 2007*, table A-3, available at <http://www.census.gov/population/www/socdemo/educ-attn.html> (advanced college degree).

188. See U.S. Dep’t. of Justice, *Prison and Jail Inmates at Midyear 2004*, at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim04.pdf> (last visited Feb. 1, 2010)

189. See *id.*

190. See U.S. Census Bureau, *The Population 14 to 24 Years Old by High School Graduate Status, College Enrollment, Attainment, Sex, Race, and Hispanic Origin, October 1967 to 2002*, table A-5, available at <http://www.census.gov/population/socdemo/school/tabA-5.pdf>. The decline in dropout rates for “black not Hispanics” and “Hispanics” may be due to the strong performance of female students.

191. See *id.*

192. *No More Excuses: The Final Report of the Hispanic Dropout Project*, at http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/19/c3/07.pdf at 62 (last visited Jan. 18, 2010).

193. See U.S. Census Bureau, *Population 14 to 24 Years Old supra* note 189. Census data for Asians & Pacific Islanders before 1999 is not available.

194. See, e.g., U.S. Census Bureau, *Historical Income Tables—Families*, tbl. F-05, available

With the exception of high school dropout rates, overall demographic data tend to demonstrate that African Americans are often at the very bottom of the well. If immigrant flow were factored out of the Latino/a statistics, the African-American picture would look even worse than it does now, because much of the unauthorized immigration coming across our southern border is poor, thereby diminishing the socioeconomic status of Latinos as a group.¹⁹⁵ Even more telling than the statistics is the undisputable fact that African Americans have suffered 240 years of human bondage, 100 years of Jim Crow, and several generations living with the lingering effects of such pain and devastation. Although these facts do not mean that the African-American experience should define all civil rights scholarship and law, they certainly indicate that the African-American ethos is unique and worthy of individualized attention.

IV. CONCLUSION

We conclude with two arguments. First, although critical theorists claim to reject the black/white binary and all other binaries,¹⁹⁶ in reality they are simply creating a new binary. They are substituting one binary—the insider/outsider binary—for another binary—the black/white binary. All analysis in critical theory operates through the insider/outsider binary. Moving outside this binary creates illegitimate or undertheorized discourse in the realm of critical theory.¹⁹⁷ Although criticalists acknowledge individual groups' unique experiences, the insider/outsider binary is so all-consuming in existing scholarship that the notion that each outsider group suffers its own form of subordination is rendered meaningless by the fact that each group must submit to the same binary analysis.¹⁹⁸ Critical theorists wish to jettison all binaries

at <http://www.census.gov/hhes/www/income/histinc/incfamdet.html>.

195. Immigrant flow, which influences the growth of the Hispanic population, refers to the inflow of foreign-born or first-generation persons, including both legal and unauthorized immigrants. The Census Bureau's Current Population Survey does not differentiate between legal and unauthorized immigrants, but it does attempt to include both when surveying the population. Nevertheless, private researchers have attempted to estimate the size of the unauthorized population in the United States by comparing data from the Current Population Survey with data from the Immigration and Naturalization Service (INS) and other sources. The Pew Research Center, a non-profit and non-partisan institute, estimates that there were 10.3 million unauthorized immigrants in the United States in 2004 (referred to by Pew as "unauthorized migrants"). Pew estimates that of these 10.3 million, approximately 1 million are not accounted for in the March 2004 Current Population Survey, a 10 percent under-counting of the unauthorized population. See Pew Research Center, *Unauthorized Migrants: Numbers and Characteristics*, Jun. 14, 2005, <http://pewhispanic.org/files/reports/46.pdf> (last visited Feb. 1, 2010).

196. See *supra* notes 6 and 99-101.

197. See, e.g., Delgado, *supra* note 6 at 1270 (referring to the black/white binary as "a simplistic approach"); see generally ROY L. BROOKS, *STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY* 187-255 (2d ed. 2005).

198. "The truth is that all the groups are exceptional; each has been racialized in different ways; none is the paradigm or template for the others." Delgado, *supra* note 6, at 15.

with the exception of one—their preferred binary, their own formalism: the insider/outsider binary.

Thus, we must demur to Professor Perea's thoughtful contention that he is not "merely substituting another, nearly equally oppressive paradigm for the Black/White binary paradigm" because he is not "advocating a Black/White/Latino/a paradigm which would give Latinos/as more visibility but would render even more invisible... other racialized groups."¹⁹⁹ Although Perea is right, he is arguing the wrong point. The issue is not whether he and other critical theorists are joining together specific racial groups to form a new binary. The issue, instead, is whether he and other critics are forming a new binary period. And the answer to that question is an emphatic *yes*. The criticalists are creating a new binary that unintentionally trivializes the black ethos and subordinates African Americans.²⁰⁰

This statement does not mean that critical theorists have bad intentions. Critical theorists are motivated by the desire to create a diverse America in which everyone and every group gives up a little autonomy to create a harmonious whole. In this vision of a diverse society, all groups are honored for their uniqueness and none are subordinated. That, at least, appears to be the goal. But in the absence of a deeper reckoning with fundamental and socio-historical conflicts of interests among racial groups, the rejection of the black/white binary is dangerously premature. Given this country's longstanding racial hierarchy—whites on the top, blacks on the bottom—it makes sense for African-American and other civil rights scholars to focus on black/white racial relations.

Merging all racial groups hurts not only African Americans but other racial groups as well. According to a study by the U.S. Senate, one reason for the relatively high Latino/a dropout rate is that the discussions of the dropout problem have too often been "submerged in discussions of dropouts in general, the education of ethnic minorities in general, or politicized debates about immigration, language, and bilingualism."²⁰¹ This does not mean that blacks, browns, and other racial groups cannot or should not form coalitions. But it does mean that racial problems facing particular groups must be analyzed separately to arrive at an accurate, undiluted understanding of the problems *before* we attempt to form coalitions.

The second argument with which we wish to conclude is that criticisms of the black/white binary are, essentially, claims to racial priority. Critical theorists are challenging the idea that African-American civil rights interests

199. Perea, *supra* note 6, at 1255.

200. Imani Perry argues that neither the insider/outsider binary nor the black/white binary can sufficiently explain the racialization of non-black racial groups. I agree, which is why we need multiple binaries. See Perry, *supra* note 35.

201. *No More Excuses: The Final Report of the Hispanic Dropout Project*, *supra* note 192.

should be given priority over the claims of other outsider groups, especially non-black racial groups. While former President Bill Clinton, James Q. Wilson, and others suggest that the descendants of slaves have earned the right to claim priority because they have suffered the longest and still remain at the very bottom of the well,²⁰² we would not go that far. In our view, the ranking given to conflicting civil rights claims should be based on the relative severity and duration of the groups' deprivation on the specific issue under consideration. Hence, African-American civil rights interests should only take priority in those instances where African Americans are statistically worst off than other racial groups. For example, the Latino civil rights interest in quality education would possibly trump the competing African-American interest in formulating a solution to the high-school dropout problem because Latino/a students have the highest high school dropout rates of all racial groups—double the rate for blacks.²⁰³ If one solution fits all, then, of course, the priority question is moot.

Identifying the worst-off in society is only one of many factors to consider in determining the prioritization of racial claims.²⁰⁴ We also need to consider the question of how one decides who is the worst-off. For example, Thomas Sowell argues that statistical disparity and racial disparity are not coterminous.²⁰⁵ There can be any number of factors other than race that may explain varying demographics. Non-racial factors may even help to explain the extraordinarily high Latino/a high school dropout rate.²⁰⁶ Also, questions of language, culture, and immigration are inextricably intertwined with questions of race relative to Latinos.²⁰⁷ These are some of the issues that will have to be resolved in the construction of a racial priority theory. Rather than attempt to resolve these issues, we merely endeavor to present enough food for thought to stimulate wider reflection.

In a word, it is a misconception to view the black/white binary as an analytical device that relegates non-black racial groups to second-class treatment in civil rights. The black/white binary is merely a framework that permits scholars of all colors to focus intensely on white-on-black racial problems. That framework provides the underlying structure for a long tradition of civil rights scholarship. The hallmarks of this tradition are rigorous

202. See *supra* text accompanying notes 37-39.

203. Since at least 1993, about 33% of Latinos have dropped out of high school each year, compared to about 15% of blacks. See U.S. Census Bureau, *The Population 14 to 24 Year Old*, *supra* note 193; see also *supra* text accompanying note 192.

204. For an interesting discussion of the issue, see Carbado, *supra* note 35, at 1286-96.

205. See, e.g., THOMAS SOWELL, RACE, CULTURE, AND EQUALITY 11 (1998) ("cultural, social, economic, and other factors" interact to cause and explain racial disparity).

206. See *id.*; see also *supra* text accompanying notes 192-193; Wood, *ESL and Bilingual Education*, *supra* note 121, at 614 (explaining how Latino students can feel like cultural outsiders, leading to low self-esteem, poor academic performance, and dropping out of school).

207. See Espinoza & Harris, *supra* note 100, at 1612-20.

empirical and analytical thinking and writing on white-on-black racial problems.²⁰⁸ This tradition allows room for other binaries that focus similar attention on other groups' unique experiences. Despite these merits, critical theorists would presume to advise African-American scholars to jettison this venerable and useful tradition. The criticalists are not, however, the first group to criticize this scholarly tradition. White scholars have also had their turn.²⁰⁹ African-American scholars who choose to write in this scholarly tradition should respond to critical theorists with the same degree of determination shown in response to white critics. Politely, respectfully, but firmly, black scholars should insist that African Americans must not allow others to "take on the task of defining the theoretical perimeters in which [blacks] ought to operate."²¹⁰

208. See, e.g., *supra* notes 13-20; see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Leonard M. Baynes, *Racial Justice in the New Millennium: From Brown to Grutter: Methods to Achieve Non-Discrimination and Comparable Racial Equality*, 80 NOTRE DAME L. REV. 243 (2004). The empirical analysis has not always held up to close scrutiny, however. See BROOKS, *supra* note 119, at 18-21 (criticizing the social science research that underpins *Brown I*).

209. See Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157 (1990); see also Jerome McCristal Culp Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992) (responding to Posner).

210. Brooks, *supra* note 22, at 35 (quoting a letter from Professor Baker to the author). Professor Baker was the first black to be appointed to the Yale Law School faculty. He taught contracts there in the early 1970s.