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Critical Race Histories: In and Out

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Critical Race Histories: In and Out

Keywords

Critical Race Theory (“CRT”), Critical Race Theorists, Civil Rights, racial inequality, multiracial

FOREWORD

CRITICAL RACE HISTORIES: IN AND OUT

DARREN LENARD HUTCHINSON*

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I. INTRODUCTION

This Symposium contributes to a wealth of scholarship in the area of Critical Race Theory (CRT). The Symposium arises out of a CRT Workshop held in April 2003 at the American University Washington College of Law. The organizers of the workshop¹ hoped to spark new directions in the scholarly analysis of racial injustice and to reflect upon critiques of CRT from both “insiders” (internal critics) and “outsiders” (external critics). While earlier workshops provided the necessary intellectual space for “founding” scholars in the field,² the last formal CRT Workshop (prior to 2003) was held in June 1997 at Tulane Law School.³ While these workshops do not represent the exclusive venue for thinking and writing about progressive racial theory, the organizers of the Washington College of Law CRT Workshop believed that reviving of the annual CRT Workshop would engender renewed interest in critical race analysis, initiate new theoretical directions for CRT research, and provide a forum for reflecting upon and responding to internal and external critiques of progressive race scholarship. The works published in this Symposium effectuate this purpose.

Any body of legal research endures—as it should—intellectual critique and engagement.⁴ As such, a wide body of literature, both progressive and conservative, has emerged in recent years that disputes Critical Race Theorists on many issues.⁵ The earliest external critiques of CRT challenged the embrace of race consciousness among Critical Race Theorists and critiqued the usage of storytelling in their writings.⁶ Later, external critics dusted off the attacks on storytelling but added a new dimension: the second-stage conservative critics assailed CRT for being nihilistic and unduly cynical.⁷ While many able scholars have rebutted the central claims of this literature, the argument concerning CRT’s supposed nihilism should receive more scholarly attention, particularly in light of

1. Pamela Bridgewater, Devon Carbado, Darren Hutchinson, and Leti Volpp organized the CRT Workshop.

2. See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 9, 18-22 (Francisco Valdes et al. eds., 2002) (discussing the importance of CRT Workshops).

3. See Stephanie L. Phillips, *The Convergence of the Critical Race Theory Workshop with LatCrit Theory: A History*, 53 U. MIAMI L. REV. 1247, 1248 (1999) (offering a chronology of CRT Workshops).

4. See bell hooks, *Censorship from Left to Right*, in OUTLAW CULTURE: RESISTING REPRESENTATIONS 63-72 (1994) (discussing the importance of dissent and critique within progressive social movements).

5. See generally *infra* Part III (discussing internal and external critiques of critical race analysis).

6. See discussion *infra* Part III.B.1.

7. See discussion *infra* Part III.B.2.

efforts by many Critical Race Theorists to develop programmatic or policy agendas for a contemporary racial justice movement.⁸

During the “formative” years of CRT, most of the internal critics focused attention on questions concerning the complexity and multiplicity of identity and subordination.⁹ Many scholars urged Critical Race Theorists to move beyond a “single-axis” analysis of racial subordination and identity and to develop intersectional or multidimensional frameworks of analysis.¹⁰ Other internal scholars challenged the “black/white paradigm” of CRT and urged theorists to conduct multiracial analyses of racial inequality.¹¹ Today, multiracial and multidimensional analyses have become leading methodologies within CRT and have even influenced judicial decision-making.¹²

Recent internal critiques push Critical Race Theorists into different directions. Several internal critics, for example, have argued that CRT should abandon its embrace of race consciousness, which occupies a central space within CRT and other progressive racial discourses, because race is “socially constructed,” rather than “real,” and because race has been the source of brutality, repression, and inequality.¹³ Other internal critics contend that multiplicity theories and other identity discourses detract from what should be the broader goal of critical race analysis: a critique of the material or economic harms caused by racial injustice.¹⁴ While several scholars have offered constructive critiques of the internal critics’ “progressive race blindness” thesis,¹⁵ the claim that identity theories divert needed energies away from a discussion of economic deprivation lacks significant critical engagement.¹⁶

This Article contributes to the completion of some “unfinished business” within CRT by engaging insufficiently examined external and internal critiques of critical race scholarship. The external critique of critical race nihilism and the new insider critique that dichotomizes identity theories and material harm warrant extended reflection because there are critical deficiencies that problematize these arguments.¹⁷ The nihilism critique, for example, falsely associates CRT with more radical forms of postmodernism and overlooks leading works in CRT which demonstrate that Critical Race Theorists inhabit an admittedly contradictory space.

8. See discussion *infra* Part III.C.2.

9. See discussion *infra* Part III.A.

10. See discussion *infra* Parts III.A.1-2.

11. See discussion *infra* Part III.A.3.

12. See *infra* note 87 and accompanying text.

13. See *infra* notes 113-18 and accompanying text.

14. See *infra* notes 116-17 and accompanying text.

15. See *infra* notes 119-20 and accompanying text.

16. But see *infra* notes 116-17 and accompanying text.

17. See discussion *infra* Part III.C.

Critical Race Theorists radically deconstruct the racial hierarchies that law constitutes and reinforces, and simultaneously, they utilize both law and reason to advocate for racial justice.¹⁸ Whether or not Critical Race Theorists can sufficiently balance these conflicting positions exists apart from the false charge that CRT is ultimately fatalistic.¹⁹ Furthermore, CRT's cynicism exists, in part, because the problem of racial injustice seems intractable; yet, the law, rather than offering solicitude to disadvantaged groups, largely reflects majoritarian interests.²⁰ While Critical Race Theorists have persuasively unveiled the "whiteness" of United States legal institutions, they could fortify their claims by using empirical research in political science scholarship which demonstrates how legal institutions—particularly the Supreme Court—cater to majoritarian, rather than minority, interests.²¹ If this research is accurate, then the conservative critics' animosity toward CRT's cynicism is misplaced; the Critical Race Theorists have reason to express alarm.

Insider critiques of CRT also require critical assessment. Recent internal critics complain that racial identity discourse, including multidimensionality theory, marginalizes more important attention to material, class, or economic issues.²² If their claim holds true, the material harm critics serve a vital purpose: because racial injustice causes and interacts with economic deprivation, any progressive racial justice movement should interrogate class and economic inequality concerns.²³ Nevertheless, the analysis of the material harm critics suffers because it dichotomizes class and multidimensionality.²⁴ Although these critics bifurcate multiplicity and class analysis, multiplicity theories relate to class analysis in two important respects.²⁵ First, poverty has multidimensional sources. Gender, sexuality, race, and other factors contribute to economic disadvantage.²⁶ Accordingly, an accurate account of economic inequality must consider the multidimensionality of structures of subordination. Second, poverty (alongside race, gender, class, and sexuality) is a source of identity construction and social group experiences; as such, any comprehensive analysis of identity should take class into account.²⁷

18. See *infra* Part III.C.2.

19. See Jeffrey Rosen, *The Bloods and the Crits*, THE NEW REPUBLIC, Dec. 9, 1996, at 27 (criticizing as fatalistic CRT's rejection of law to achieve social change, along with its contention that facially neutral laws "fuel white domination").

20. See *infra* notes 177-82 and accompanying text.

21. *Id.*

22. See discussion *infra* Part III.C.1.

23. See *infra* notes 162-68 and accompanying text.

24. See *infra* notes 169-74 and accompanying text.

25. See *infra* notes 171-73 and accompanying text.

26. *Id.*

27. See *infra* note 174 and accompanying text.

This Article explicates my thesis in three parts. Part II sets forth an “intellectual history” of CRT, isolating the central historical and social forces that gave rise to its development as a body of jurisprudential research.²⁸ Part III discusses both historical and recent insider and external critiques of CRT and relates these critiques to the development of critical race methodologies.²⁹ Part III offers new perspectives on outsider critiques that describe CRT as nihilistic and on insider critiques that bifurcate multiplicity theories and class.³⁰ Part IV “introduces” the works of this Symposium and connects them to ongoing theoretical projects within CRT.³¹

II. CRT: AN INTELLECTUAL HISTORY

Many scholars have devoted attention to analyzing the evolution and thematic content of CRT.³² As such, this Part offers only a brief historical examination of CRT, highlighting important factors that shaped the early interventions and later transformations of CRT.

The introduction to *Critical Race Theory: The Key Writings That Formed the Movement*³³ provides the most succinct and poignant description of CRT. CRT, the book’s authors observe, represents a progressive insurgency within traditional civil rights discourse and a racial insurgency within existing progressive legal discourse, such as Critical Legal Studies (CLS).³⁴ As the remainder of this Part reveals, CRT has agreed with, but departed from, CLS and traditional civil rights discourse in many important respects.

A. A Racial Intervention in CLS

CRT developed in the late-1980s at a time when conservative Supreme Court doctrine was eroding many of the gains made by the 1960s civil rights movement.³⁵ Doctrines such as standing,³⁶ colorblindness,³⁷ and the

28. See *infra* Part II.

29. See *infra* Part III.

30. *Id.*

31. See *infra* Part IV.

32. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii-xxxii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter THE KEY WRITINGS]; MARI J. MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE GENDER AND THE LAW 47-59 (1996).

33. THE KEY WRITINGS, *supra* note 32, at xiii.

34. See *id.* at xix (observing that CRT represents a “left intervention into race discourse and a race intervention into left discourse”).

35. *Id.* at xvi-xvii.

36. See generally Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1422, 1496 (1995) (critiquing racial disparities in the application of standing doctrine that deprive people of color of civil rights remedies and concluding that a showing of Supreme Court racial discrimination is inconsequential because it has long served a

discriminatory intent rule³⁸ limited access to the Court by subordinate groups,³⁹ curtailed the availability of judicial remedies to plaintiffs properly before the Court,⁴⁰ and made it extraordinarily difficult for states and Congress to address questions of racial inequality.⁴¹ Early Critical Race Theorists critically assessed Court doctrine. Echoing themes in other progressive legal discourses, primarily CLS, Critical Race Theorists argued that the law reinforces racial hierarchy, reflects the viewpoints of privileged classes, serves as a weak vehicle for social change, is indeterminate and unable to provide fixed, predictable outcomes for civil rights litigants, and is inherently non-neutral (and biased towards the protection of societal privilege).⁴²

While Critical Race Theorists appreciated CLS's poststructuralist questioning of the law and legal reasoning, Critical Race Theorists and CLS scholars diverged in one important respect: while many CLS scholars sought to discard using the law as an instrument of progressive social change, Critical Race Theorists, recognizing the historical role that law has played in the advancement of the material and social status of persons of color, exhibited a commitment (in varying degrees) to the institution and structure of law.⁴³ In a symposium published by the *Harvard Civil Rights-Civil Liberties Law Review*, Critical Race Theorists asserted that the "whiteness" of CLS scholars prevented those writers from appreciating the value of law and rights discourse to persons of color.⁴⁴ Although law is imperfect, it remains a vehicle for persons of color to demand justice and to represent the varied harms of racial subordination.⁴⁵ As a result, the

majoritarian purpose).

37. See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 36-37 (1991) (criticizing colorblind constitutional doctrine as perpetuating racial hierarchy).

38. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 388 (1987) (assessing the discriminatory intent rule as limiting racial equality and contending that judicial evaluation of governmental action with racially discriminatory impact may uncover unconscious racism).

39. See Spann, *supra* note 36, at 1424, 1455 (demonstrating how standing doctrine limits access to the courts by persons of color).

40. See Lawrence, *supra* note 38, at 353-54, 376-78 (discussing how the discriminatory intent rule sharply curtails the availability of judicial relief in equal protection cases).

41. See Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 646, 654 (discussing the impact of colorblindness upon remedial usages of race).

42. Angela P. Harris, *Foreword: A Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 745-50 (1994).

43. See *id.* at 750-51 (discussing the rift between CRT and CLS over efficacy of rights).

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

45. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-07 (1987) (arguing that persons of color, unlike CLS scholars, value rights due to their vulnerable status in racial

experiences of subordinate persons reflect a “dual consciousness”⁴⁶—a simultaneous respect and disdain for law and legal institutions. Patricia Williams, for example, argues that:

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them—not just the notion of them. We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from 400-year-old ashes; the parthenogenesis of unfertilized hope.⁴⁷

The desire to integrate postmodern skepticism toward the law within a modern framework of law and reason thus became a central theme in critical race scholarship.⁴⁸ And as Angela Harris has persuasively argued, rather than resisting this inherent contradiction and attempting to decide “which” strand (postmodern or modern, deconstructionist or reconstructionist) should dominate critical race analysis, Critical Race Theorists should “inhabit that very tension.”⁴⁹

Critical Race Theorists have largely followed Harris’ thoughtful advice. While Critical Race Theorists continue to unveil the malleability of law, the intractability of racism, and the socially constructed nature of race, they also offer doctrinal and policy reforms in a host of legal contexts.⁵⁰

B. *A Progressive Intervention in Civil Rights Discourse*

Although Critical Race Theorists appreciate the value of law in the betterment of the lives of persons of color, they also understand that law is a problematic instrument for progressive social movements.⁵¹ Some

hierarchy).

46. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 341 (1987) (“The minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy.”).

47. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987) (internal citation omitted).

48. See Harris, *supra* note 42, at 745-55 (discussing the tension in CRT that results from its simultaneous embrace of CLS and traditional liberal discourse).

49. *Id.* at 760 (internal citation omitted).

50. See, e.g., Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1480-82 (1991) (proposing an equal protection remedy for the criminalization of prenatal drug use among black women by linking governmental obligations to the rights of privacy and racial equality); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1383 (1991) (arguing that antidiscrimination law should recognize claims of “accent discrimination”).

51. See Harris, *supra* note 42, at 749-50 (discussing disenchantment with the law among Critical Race Theorists).

Critical Race Theorists even question whether the United States can ever transcend its racism.⁵² While Critical Race Theorists understand that the establishment of formal equality has improved the status and material conditions of persons of color, formal equality has a limited impact.⁵³ A regime of formal equality cannot complete the project of racial equality because it: (1) does not address the material harms caused by racism; (2) does not disturb subtle or unconscious racism; (3) does not treat as impermissible laws that negatively impact subordinate groups (regardless of the intent of lawmakers); and (4) treats as suspicious, explicit or remedial usages of race.⁵⁴

The Court's equal protection jurisprudence illuminates the severe limitations of a regime of formal equality and its adverse effects upon racial justice. In a series of decisions, the Court has construed the Equal Protection Clause as prohibiting race-based state action.⁵⁵ In order to justify race consciousness, the governmental actor must provide a compelling justification for its use of race and demonstrate that the classification is narrowly connected to the policy end.⁵⁶ The Court's colorblindness doctrine certainly helped persons of color when laws overtly and intentionally sought to subordinate them. In other words, colorblindness was a sensible doctrine during an historical era where racism was openly encoded in law and policy.

Today, however, most state actors do not explicitly legislate or promulgate policies on the basis of race.⁵⁷ The Civil Rights Movement created a change in social structure; American society now disfavors race-conscious state action.⁵⁸ Consequently, the only laws or policies that openly utilize race are typically remedial in nature. Contemporary race-conscious laws seek to benefit—rather than harm—socially marginalized

52. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

53. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378 (1988) (“[T]he attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people.”).

54. See Hutchinson, *supra* note 41, at 637-81 (demonstrating how equal protection doctrine legitimates “neutral” laws that harm socially disadvantaged groups but invalidates “facially discriminatory” laws that seek to eradicate subordination).

55. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”).

56. *Id.*

57. See Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) (“Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly.”) (citation omitted).

58. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (observing that United States culture embraces equal opportunity).

groups.⁵⁹ White state actors who implement affirmative action plans do not consider race to subjugate whites, but to remedy the harms caused by racial subordination and to diversify important social institutions. Nevertheless, the Court's colorblindness doctrine demands symmetry: governmental race consciousness requires strict scrutiny regardless of whether it seeks to harm or to benefit persons of color.⁶⁰ This lack of context in the Court's race jurisprudence has made it extremely difficult for the states and Congress to remedy the effects of racial discrimination.⁶¹ The Court has utilized the strict scrutiny doctrine primarily to strike down or to limit remedies rather than to affirm them.⁶²

Concurrent with its application of colorblindness, the Court also treats as presumptively constitutional laws or policies that are facially neutral but which disparately affect disadvantaged classes.⁶³ Although Court doctrine permits the introduction of statistical impact evidence to prove discriminatory intent, the Court has invariably discounted impact studies in equal protection (and statutory) antidiscrimination cases and has made it clear that impact alone, disconnected from a finding of intent, does not substantiate a claim of discrimination under the Equal Protection Clause.⁶⁴

The discriminatory intent rule has placed high barriers before civil rights litigants.⁶⁵ This rule essentially requires that a plaintiff present a court with "smoking gun" evidence at a time when overt manifestations of racial bias are highly suspicious and well-policed. As a consequence, the Court has rejected claims of discrimination where discriminatory patterns mirror historical legacies of extreme racial subjugation,⁶⁶ where parties present highly sophisticated statistical studies documenting the influence of race in

59. See Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 5 (1995) (describing affirmative action as "the race-conscious allocation of resources motivated by an intent to benefit racial minorities").

60. See *Adarand*, 515 U.S. at 224 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

61. See Spann, *supra* note 59, at 65 (arguing that the Supreme Court's failure to recognize motive in the context of affirmative action disregards "the only distinction that exists between affirmative action and discrimination").

62. See *id.* at 65-66 (discussing the Court's hostility toward affirmative action).

63. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976) (acknowledging the reluctance of the Court to declare laws unconstitutional based on the presence of a racially disproportionate impact, without assessing the presence of a racially discriminatory purpose).

64. See *id.* (holding that despite discriminatory impact, equal protection plaintiffs must prove intentional discrimination).

65. See, e.g., Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1113 (1989) (noting that under the specific intent standard, evidence of disparate effect is of little use to plaintiffs).

66. See, e.g., *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (dismissing probative value of racial impact in a housing discrimination case).

state action,⁶⁷ and where the discriminatory patterns themselves are clearly foreseeable.⁶⁸ Finding no intentional discrimination, the Court has applied low-level rational basis review and largely upheld challenged policies in equal protection impact cases.⁶⁹

Together, the colorblindness and impact rules demonstrate the pitfalls of an exclusive reliance on formal equality as a vehicle for racial justice. The Court, wedded to the notion of colorblindness, applies strict scrutiny to governmental policies aimed to alleviate the harms caused by racism, but it remains deferential in the face of laws that, while facially neutral, disparately affect historically protected groups. These doctrines leave subordinate classes vulnerable to facially neutral—though harmful—state action, and they prevent state actors from remedying the discrimination these groups continue to face.⁷⁰

In an effort to interject progressive values into the terrain of civil rights jurisprudence, many Critical Race Theorists have criticized formal equality regimes.⁷¹ Their research has pushed legal theorists to consider solutions to the problem of racial inequality that do more than simply establish formal rules that prohibit discriminatory acts by state actors.

III. CRT: INTERNAL AND EXTERNAL CRITIQUES

Cultural critic bell hooks has observed that progressive social movements mature in response to critical inquiry from within their ranks. Hooks notes that “any progressive political movement grows and matures only to the degree that it passionately welcomes and encourages, in both theory and practice, diversity of opinion, new ideas, critical exchange, and dissent.”⁷² This assertion certainly holds true in the context of CRT, as its evolution has depended largely upon very vigorous internal criticism. Although Critical Race Theorists have not always passionately welcomed

67. See Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1073 (1998) (critiquing the Court’s dismissal of “sophisticated and comprehensive statistical evidence” in equal protection litigation).

68. See *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (upholding state preference for veterans in employment settings despite the foreseeable, gross disparate effect of the policy upon women).

69. See, e.g., *Washington v. Davis*, 426 U.S. 229, 250-52 (1976) (applying rational basis review and upholding municipal hiring policy with a disparate racial effect).

70. See Hutchinson, *supra* note 41, at 637-73 (providing an extensive critique of this particular aspect of equal protection doctrine).

71. See, e.g., Crenshaw, *supra* note 53, at 1384 (discussing the symbolism behind removing formal barriers, and the unlikelihood that this action would change hierarchical relationships between whites and blacks “until the way in which race consciousness perpetuates norms that legitimate Black subordination is revealed”).

72. See hooks, *supra* note 4, at 65-66 (noting how the early feminist movement did not welcome discussion on race and racism).

such critiques,⁷³ the relative openness of CRT has allowed for substantial innovation of its intellectual agenda.

Internal critics have also challenged Critical Race Theorists, and their arguments have shaped the direction of critical race analysis as well—if only by generating rebuttals to these very critiques. This Part discusses the influence of internal and external critiques upon critical race analysis and then responds directly to some important critiques with which Critical Race Theorists have not yet exhaustively engaged.

A. *Innovation in CRT: Reckoning with Internal Critiques*

Much of the evolution and development of CRT has resulted from internal critiques of the theory. The predominant internal critiques of CRT focus on questions of multiplicity, essentialism, and exclusion. Specifically, these critiques have argued that Critical Race Theorists essentialize persons of color by omitting gender, sexuality, and class from analysis, thereby excluding women of color⁷⁴ and gays, lesbians, and bisexuals of color.⁷⁵ Other internal critics have contested the “black/white paradigm” of racial discourse, arguing that CRT focuses primarily on black/white racial issues, to the exclusion of Native American, Asian American and Latino concerns.⁷⁶

1. *Intersectionality: the race/gender critiques*

The feminist critiques of CRT have contributed heavily to the concept of subordination among Critical Race Theorists. Leading Critical Race Feminists include Kimberlé Crenshaw,⁷⁷ Angela Harris,⁷⁸ Dorothy

73. Phillips, *supra* note 3, at 1250-51.

74. See generally CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003) [hereinafter CRITICAL RACE FEMINISM] (developing areas of legal scholarship where purportedly neutral analyses excluded the experiences and realities of women of color).

75. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 7 (1999) (arguing that the work of CRT scholars who do not perform a multidimensional analysis perpetuates heterosexism and the marginalization of gay, lesbian, bisexual, and transgender people of color).

76. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1253 (1997) (noting that civil rights discourse and struggle affects everyone and should therefore include everyone); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993) (stating that the omission of Asian American perspectives from CRT forecloses a more nuanced understanding of racism in the United States).

77. See, e.g., Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-43 (1991) (asserting that intersecting patterns of racism and sexism frequently produce violence against women of color).

78. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (discussing how feminist legal theorists privilege the

Roberts,⁷⁹ Berta Hernández-Truyol,⁸⁰ Leti Volpp,⁸¹ and Adrien Wing.⁸² These scholars have contested the single-issue paradigms of antiracist and feminist discourse that focuses exclusively on race *or* gender as dimensions of subordination, to the exclusion of the intersection of race *and* gender analysis.⁸³

When Critical Race Theorists eliminate gender from their analysis, the resulting theories rest on the experiences of, and respond to the needs of, men of color.⁸⁴ Furthermore, essentialist racial discourse obfuscates the multiple harms that racism causes. Due to the “intersection” of racism and patriarchy, racism has gendered effects, and patriarchy exists in a racialized context.⁸⁵ Thus, intersectionality scholars have examined the structural elements of race, and they have also extended their rich analysis to doctrinal and policy contexts.⁸⁶ As a result of intersectional analysis, feminist concerns occupy a prominent space within contemporary CRT, and the work of these theorists has influenced legal actors.⁸⁷

“abstract and unitary voice,” and silence the voices of women of color).

79. See, e.g., Roberts, *supra* note 50, at 1424 (criticizing feminist literature on reproductive rights for adopting a white, middle class perspective, and neglecting the concerns of poor women of color).

80. See, e.g., Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 921 (1997) (recognizing that Latina inclusion requires a non-essentialist model that incorporates race, ethnicity, nationhood, gender, and culture).

81. See, e.g., Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense”*, 17 HARV. WOMEN’S L.J. 57, 93-94 (1994) (arguing that any analysis of cultural defenses must consider gendered power relationships within communities as well as cultural differences between communities).

82. See, e.g., Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM*, *supra* note 74, at 7 (arguing that Critical Race Feminism enhanced CRT by articulating that “women of color are not merely white women *plus* color or men of color *plus* gender”).

83. See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1188-89 (1991) (urging scholars to work in a coalition, to study patterns of oppression, and to recognize that “all forms of subordination are interlocking and mutually reinforcing”).

84. See Crenshaw, *supra* note 77, at 1252 (asserting that the “specific raced *and* gendered experiences [of men of color *and* white women], although intersectional, often define as well as confine the interests of the entire group”).

85. See Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1207-08 (2001) (criticizing feminist scholars in the United States for failing to address various social, political, and economic issues, including racism, that shape gender subordination).

86. See, e.g., Roberts, *supra* note 50, at 1428-36 (discussing gender and race in the context of criminal law enforcement); Crenshaw, *supra* note 77, at 1251-82 (discussing gender and race in the context of gender violence policy).

87. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (drawing on Crenshaw’s intersectionality theory to argue that attempts to “bisect a person’s identity” to prove that gender or race-based discrimination would distort the court’s analysis of the particular nature of discrimination against women of color).

2. *Multidimensionality: race, gender, sexuality, and class*

The feminist critiques of CRT have led to additional intellectual inquiries. Specifically, the intersectionality critiques have influenced scholars whose work analyzes the relationship between sexuality, race, class, and gender.⁸⁸ The “race-sexuality” critics have endeavored to advance the intersectional analysis both substantially and conceptually.

The race-sexuality theorists have advanced intersectional analysis substantively by considering the interaction of race and sexual identity, which intersectionality theorists largely ignore.⁸⁹ The race-sexuality theorists, however, have done more than simply insert another category of experience, such as sexual orientation, into pre-existing intersectionality theory. Rather, the race-sexuality theorists have tried to advance the conceptual lens of race utilized by CRT beyond the important insights that Critical Race Feminists have made. For example, while Critical Race Feminists have viewed intersectionality as a condition that affects the “multiply burdened,”⁹⁰ primarily or exclusively, multidimensionality scholars have treated multiplicity as a “universal” concept—one facing all members of subordinate groups.⁹¹ Thus, the interaction of whiteness and gayness has important implications for racial theory, as much as the interaction of blackness and womanhood.

By interrogating the convergence of privilege and subordination, rather than only “intersecting” subordination, multidimensionality theorists have uncovered the inherent contradictions in the arguments of essentialist scholars who view multiplicity theories as destructive to progressive social movements.⁹² Once we treat multiplicity as a universal concept, then no group can claim to represent a “pure” race claim or to merit a central

88. See generally Hutchinson, *supra* note 75, at 9-17 (advocating a multidimensional analysis of oppression that includes the diverse ways in which privilege and disadvantage intersect); 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, 1338-40 (1997) (urging scholars to go beyond intersectionality, and look at the complex interplay of racism, sexism and heterosexism as mutually-reinforcing oppressions).

89. I have written extensively on the distinctions between intersectionality and multidimensionality, and I have theorized the latter. See, e.g., Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 307-13 (2001) [hereinafter “Hutchinson, *Identity Crises*”] (explaining how multidimensionality goes beyond intersectionality to recognize heterosexism and universality); Hutchinson, *supra* note 75, at 9-17 (discussing substantive and conceptual similarities and differences between the two theories).

90. See, e.g., Wing, *supra* note 82, at 7-8 (noting that Critical Race Feminism concentrates on “those women of color who face multiple discrimination”).

91. See Hutchinson, *supra* note 75, at 15-16 (arguing that a multidimensional analysis must recognize the role privilege plays in the lives of subordinated groups).

92. See *id.* at 16-17 (arguing that a multidimensional approach recognizes that, for example, race and gender are integral issues to gay rights because although a gay white man may suffer from heterosexism, he is privileged by gender and race).

position in antiracist politics and theory.⁹³ Arguments to the contrary are both inaccurate and discriminatory. Today, many Critical Race Theorists have recognized multidimensionality as a natural progression of intersectionality.⁹⁴

3. *Multiracial politics*

A third area of critical race innovation involves multiracial politics. Internal critics have argued that racial discourse in the United States fixates upon black/white racial issues, thereby marginalizing Latino, Native American, and Asian American experiences.⁹⁵ Empirically, this observation is indisputable. Race theorists lack a full understanding of the breadth of racial injustice. The inclusion of the experiences of Latinos, Native Americans, and Asian Americans in racial discourse can improve CRT in several ways. First, a multiracial discourse permits a full accounting of the problem of racial inequality and allows for the construction of adequate remedies for racial subordination.⁹⁶ Although all people of color suffer racism, often in similar ways, racial hierarchies impact communities of color in diverse ways. A narrow focus on black/white subjugation severely limits the reach of antiracist remedies.

The black/white paradigm also prevents persons of color from engaging in coalition politics.⁹⁷ By treating racism as a problem that affects blacks primarily (or exclusively), racial discourse in the United States divides persons of color who could align to create formidable political forces in the battle for racial justice.

Binary racial discourse also causes persons of color to compete for the attention of whites, as marginalized racial groups treat racial justice as a

93. See *id.* (suggesting that a multidisciplinary approach avoids privileging some experiences over others); see also Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 275 (2002) (reasoning that it is unlikely that someone would be subjugated in every possible social hierarchy because of the multiple ways in which an individual can experience privilege or subordination).

94. See, e.g., Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U. L. REV. 1249, 1267 (2001) (describing multidimensionality as advancing prior theories such as intersectionality in qualitative and quantitative ways).

95. See discussion *supra* note 76 (criticizing the black/white paradigm as underinclusive and of limited utility).

96. See Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 68-69 (1997) (describing how immigration and the ensuing changes in the racial makeup of U.S. society have exposed the ways in which the black/white paradigm fails to provide an appropriate analytical framework).

97. See Perea, *supra* note 76, at 1256 (arguing that multiracial coalition politics depends upon mutual understanding among persons of color and that the black/white paradigm prevents the development of such understanding).

zero-sum game.⁹⁸ Instead of recognizing the pervasiveness and complexity of racial injuries, binary racial discourse leads to the tyranny of oppression ranking and to competing demands for centrality in a marginalized space of racial victimization.

Recently, Critical Race Theorists, responding to the multiracial critics, have attempted to contextualize binary racial discourse. Devon Carbado, for example, recognizes the existence of the so-called black/white paradigm but pushes its critics to consider that this paradigm privileges whites and subordinates blacks.⁹⁹ Because blacks and whites are situated differently with respect to the black/white paradigm, their investment in binary racial discourse likely serves diverging interests.¹⁰⁰ If whites created the paradigm, then directing multiracial critiques toward black scholars might be misguided.

Furthermore, several scholars, including those who reject binary racial politics, have documented the unique experiences of blacks in the construction of racism in the United States.¹⁰¹ “Black exceptionalism”¹⁰² might provide a historical and sociological explanation for the predominance of black/white racial discourse.

Also, resistance to multiracial discourse among blacks might exist because non-black persons of color often benefit from white supremacy. That is, non-black persons of color sometimes align themselves ideologically and culturally with whites to elevate their status in a racially hierarchical society.¹⁰³ The embrace of racial hierarchy among people of

98. See Manning Marable, *Beyond Racial Identity Politics: Toward a Liberation Theory for Multicultural Democracy*, in *BEYOND BLACK AND WHITE: TRANSFORMING AFRICAN-AMERICAN POLITICS* 185, 190-91 (1995) (describing how this approach assumes that one group can win only if another loses, which prevents groups from recognizing the parallels in their experiences).

99. See Devon W. Carbado, *Race to the Bottom*, 49 *UCLA L. REV.* 1283, 1306 (2002) (urging critics to recognize the asymmetrical racially discriminatory relationship inherent in the black/white paradigm, where whites are at the top and blacks are at the bottom).

100. Carbado argues that blacks adhere to the paradigm in order to discuss “Black exceptionalism”—the unique harms endured by blacks in a system of white supremacy—while whites promote white exceptionalism—the racist notion that blackness is diametrically opposed to whiteness. See *id.* at 1311 (discussing the different roles of whites and blacks with respect to the black/white paradigm).

101. See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 *B.C. THIRD WORLD L.J.* 225, 245 (1995) (discussing a unique continuing legacy of racism against African Americans, including chattel slavery, Jim Crow laws, and institutional racism).

102. See Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 *CAL. L. REV.* 1585, 1596 (1997) (coining the term “black exceptionalism” to denote the idea that “African Americans play a unique and central role in American social, political, cultural, and economic life, and have done so since the nation’s founding”).

103. See Carbado, *supra* note 99, at 1310 (recognizing that a racial group may attempt to distance itself from other racial groups for pragmatic political reasons, or to engage the legal system on its own terms).

color and white-supremacist privileging (even if shifting and extremely limited) of non-black communities of color impede the willingness of blacks to engage in multiracial discourse.

Furthermore, black experiences are relevant to the experiences of other persons of color for two reasons. First, anti-black racism provides an institutional and historical framework for the subordination of non-black persons of color.¹⁰⁴ Much of the racial hierarchy in the United States was concretized during slavery—though not exclusively.¹⁰⁵ The formation of a rigid racial caste structure in the black/white context legitimizes racist practices against all persons of color.¹⁰⁶ Second, persons of color do not exist in mutually exclusive groups. Latino communities, for example, have large populations of persons of African descent; thus, it is difficult to bifurcate Latino and black experiences.¹⁰⁷ Abolishing the black/white paradigm, therefore, might preclude analysis of the unique experiences facing black Latinos.

Ultimately, however, the exclusive deployment of a binary black/white paradigm artificially narrows racial discourse and harms racial justice efforts. In order to construct adequate antiracist theories and to develop effective remedies for racial injustice, Critical Race Theorists must excavate the multidimensional harms that racial injustice causes, including harms that are racial but not endured by blacks. Furthermore, progressive racial politics can only survive with broad political support. The most likely support for progressive racial change comes from persons of color. Yet, the deep divisions that result from binary racial politics hinders the formation of helpful antiracist alliances. Finally, a multiracial discourse may help blacks demonstrate the pervasiveness of racial inequality. Whites tend to view racism as a relic of prior generations, and they often respond to blacks' claims of ongoing racial injustice with suspicion.¹⁰⁸ Moreover,

104. See, e.g., Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2400-01 (1999) (arguing that the paradigm is integral to understanding how power and domination create racial hierarchies, and how non-black groups' histories intersect with the history of African Americans).

105. See *id.* at 2400 (noting that the most vivid example of white supremacy, "[t]he history of the kidnapping, enslavement, and subhuman treatment of Africans by White European Americans," is historically linked to the birth of the nation).

106. See *id.* at 2400-01 (recognizing that current racial hierarchies arise from the legacy of African American subjugation and its intersection with the histories of other groups).

107. See generally Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002) (comparing U.S. and Latin American models of race, and discussing how racial classifications exist even in the absence of any public focus on race).

108. See Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 981 (1993) (arguing that whites tend to believe that race discrimination is a thing of the past, that the situation has improved, and that race-neutrality is pervasive).

in a white-supremacist culture, binary racial discourse obscures the experiences of discrimination experienced by Latinos and Asian Americans.¹⁰⁹ As a result, whites argue that blacks should emulate “model minorities,” usually Asian Americans, who either do not suffer from racism or do not believe that racism injures them enough to oppose it on a political level.¹¹⁰ Binary racial discourse therefore allows whites to discredit blacks’ claims of racism by offering Asian Americans as proof that the United States has eradicated racial injustice, or that blacks can easily overcome what “little” racism still exists. Multiracial discourse, however, offers a powerful rebuttal to this negative and deceitful discourse. By portraying the complexity of racial inequality, Critical Race Theorists can counter a white-supremacist narrative that disparages blacks’ assertions of racial injustice by deploying model minority constructs.¹¹¹

4. *Progressive race blindness*

A more recent discussion within CRT surrounds the embrace of race consciousness among Critical Race Theorists.¹¹² Unlike conservatives who critique race consciousness to oppose remedies for racial injustice, internal critics who favor the abolition of race possess liberal and progressive credentials. The “progressive race blindness” critics argue that because race is socially constructed, Critical Race Theorists *can* discard it as an element of identity and theory.¹¹³ Furthermore, the progressive race blindness critics point to the negative uses of race and argue that Critical

109. See discussion *supra* note 76 (observing the limitations of the black/white paradigm).

110. See Wu, *supra* note 101, at 239-40 (discussing how by becoming like whites, Asians are now expected to acquiesce to white supremacy).

111. See *id.* at 244-46 (critiquing the model minority myth as ignoring historical discrimination, differential racial experiences, differences among Asian communities, and actual experiences of discrimination).

112. See, e.g., Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement*, 20 B.C. THIRD WORLD L.J. 231 (2000) (asserting that the only reason race exists is because people repeatedly and consciously think about race). Robinson argues that racism and white supremacy stem from race consciousness and related behavior. *Id.* at 233-34. See also Richard T. Ford, *Race As Culture? Why Not?*, 47 UCLA L. REV. 1803, 1806 (2000) (explaining that race consciousness proponents reject the notion that race does not exist and instead purport the existence of racial categories that delineate political and social groups); K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in K. ANTHONY APPIAH & AMY GUTMAN, *COLOR CONSCIOUSNESS: THE POLITICAL MORALITY OF RACE* 30, 31 (1996) (arguing that in order to diffuse racism people must first overcome their own racial identities); e. christi cunningham, *The “Racing” Cause of Action and the Identity Formally Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 713 (1999) (contending that race matters because race identity can be both useful in fighting racism as well as a tool for oppression). I have written extensively on these critiques in another article. See Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455 (2001).

113. Hutchinson, *supra* note 112, at 1459-60.

Race Theorists *should* abandon race-talk.¹¹⁴ Progressive race blindness theorists typically believe (though they do not speak uniformly) that because racism has served as a source of deprivation and brutality, people of color perpetuate their own marginalization when they continue to construct their identities around race.¹¹⁵ Some progressive race blindness critics have even argued that race consciousness, rather than structural racism and economic injustice, causes cycles of poverty among persons of color.¹¹⁶ When persons of color embrace race consciousness, they accept a script of racial subordination and, performing their assigned roles in racial hierarchy, “co-create” poverty.¹¹⁷ Other advocates of progressive race blindness argue that race consciousness breeds essentialism, social divisions, and alienation.¹¹⁸

Several Critical Race Theorists have responded to the progressive race blindness critiques.¹¹⁹ The primary responses acknowledge the social construction of race but also assert that race, although socially constructed, materially affects the lives of persons of color and that the deconstruction of race cannot eradicate the existence of racial hierarchy and inequality.¹²⁰

Critical Race Theorists also have argued that race blindness deprives persons of color of an organizational tool to contest racism. Without the language of race, persons of color cannot adequately describe their experiences with racism or generate political activism to contest racist institutions.¹²¹ By framing race consciousness as inherently negative—a contradictory stance to take if one seriously views race as socially constructed, malleable, and capable of discarding—progressive race

114. See *id.* at 1461 (explaining that progressive race blindness advocates believe that the concept and use of race weakens people’s identities and promotes “inferiority, victimization, and helplessness among persons of color”).

115. See *id.* (discussing the views of progressive race blindness theorists such as e. christi cunningham and Reginald Leamon Robinson).

116. See, e.g., Reginald Leamon Robinson, *The Underclass and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1432 (2001) (proposing that individuals use their own “self-empowering philosophy” to experience either poverty or wealth).

117. *Id.*

118. See Hutchinson, *supra* note 112, at 1461-62 (noting that progressive race blindness advocates believe that race consciousness alienates individuals from their “true” self and alienates communities by dividing the population).

119. See generally *id.* at 1465-75 (refuting progressive race blindness scholars’ claim that race consciousness is dangerous); Hernández-Truyol, *supra* note 80, at 921 (discussing the Latina/o experience of race, ethnicity, and culture in America and comparing that American experience to one in a Latin American country); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 747 (1994) (asserting that fighting racism requires a recognition of the various definitions of race and an understanding that the meaning of race continually shifts).

120. See Hutchinson, *supra* note 112, at 1473-75 (critiquing Robinson for failing to recognize that racism is structural; thus, even if people were able to erase race from their consciousness, the negative and persistent impact of racism would still be present).

121. See Lee, *supra* note 119, at 772 (arguing that “race” unites communities of color).

blindness scholars ignore its potentially positive uses for persons of color.¹²²

Finally, advocates of progressive race blindness ignore the multidimensionality of subordination in their efforts to rid society of race, while remaining neutral toward other socially constructed categories of identity, such as gender and sexuality.¹²³ Because identity categories are interconnected, it is impossible to abolish race without considering the identity categories that coexist with and that contextualize racial identity.¹²⁴

B. Backlash Against CRT: External Critiques

During November 1997, Yale Law School hosted a conference that commemorated the tenth anniversary of the earliest published work in CRT. The Yale conference took place in the context of very visible, public, and strident critiques of CRT.

In an essay published at that time by the *New Republic*, for example, United States Circuit Judge Richard A. Posner argues that Critical Race Theorists appear to be “whiners and wolf-criers,” “labile and intellectually limited,” “divisive,” and “weak.”¹²⁵ Posner asserts that Critical Race theorists’ scholarship is “inaccurate” and marred by “extremism . . . paranoia . . . hysteria . . . and irrationalism.”¹²⁶ At the conclusion of his essay, which is ostensibly a review of Daniel Farber and Suzanna Sherry’s *Beyond All Reason*,¹²⁷ a critique of progressive scholarship, including CRT, Posner charges that CRT “is a disgrace to legal education” and an “embarrassment to sober liberal egalitarians”¹²⁸ These impassioned reflections come from the same individual who believes that “model” scholarship must, among other things, be “unstrident [and] unpolemical”¹²⁹ Either Posner has discarded his model, or there is something inherent to CRT that renders “model” criticism ineffective and destabilized.

United States Circuit Judge Alex Kozinski offers another spirited, though less inflamed, critique of CRT in the *New York Times*.¹³⁰ Like

122. *Id.*

123. See Hutchinson, *supra* note 112, at 1469-71 (noting that progressive race blindness scholars tailor many of their arguments toward persons of color, implying that race consciousness is a problem among persons of color).

124. *Id.* at 1470.

125. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40.

126. *Id.*

127. See generally DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

128. Posner, *supra* note 125, at 40.

129. Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1578 (1997).

130. Alex Kozinski, *Bending the Law: Are Radical Multiculturalists Poisoning Young Legal Minds?*, N.Y. TIMES, Nov. 2, 1997, § 7, at 46.

Posner, Kozinski purports to review Farber and Sherry's work, but he directs most of his efforts toward criticizing CRT *de novo*. Kozinski asserts that "radical multiculturalists,"¹³¹ among whom he includes Critical Race Theorists, are "loud and militant" and "they brand those who oppose them as sexist, racist or worse."¹³²

As this cursory review indicates, the conservative critics and their critiques of CRT are well-placed. Moreover, the critiques tend to depart from a strict analytical engagement with the particulars of critical race scholarship, and degenerate into personal, often vitriolic, attacks. Yet, these facts alone do not completely explain the concern these critiques engendered. Rather, the most troubling aspect of the conservative critiques of CRT surrounds the many distortions they make concerning the *general* themes of critical race scholarship and about the analyses of *specific* works within this vast body of diverse literature. The articles tend to follow a common, almost predictable, pattern with regard to their observations about CRT proper. As the critiques go, CRT is: (1) a collection of stories, narratives, and anecdotes, usually poorly written;¹³³ (2) "nihilistic" and irreversibly cynical with respect to the possibility of racial reconciliation;¹³⁴ and (3) anti-foundational, completely disavowing claims of truth and objectivity and the possibility of legal change.¹³⁵

Typically, the conservative critiques cite the work of particular Critical Race Theorists to "prove" their claims about the general themes of CRT. These critiques invariably center upon the work of a few prominent theorists. Seemingly, no critique of CRT would be complete without a discussion of Patricia Williams and her analysis of the Tawana Brawley controversy,¹³⁶ Richard Delgado and his advocacy of narrative scholarship,¹³⁷ Regina Austin and her analysis of black criminality,¹³⁸ and

131. The term appears in Farber and Sherry's analysis of critical race theory. *See* FARBER & SHERRY, *supra* note 127, at 5 (defining "radical multiculturalists" as those scholars who are politically progressive, adhere to various theories including CRT, feminism, and "legal writing about gays and lesbians," and believe that reality is "subjective and socially constructed").

132. Kozinski, *supra* note 130, at 46.

133. *See* Posner, *supra* note 125, at 40, 42 (explaining that the use of stories and narratives in CRT in effect removes any "rational inquiry" and allows Critical Race Theorists to exaggerate the problem of discussing race in America).

134. *See generally* Andrew Sullivan, *Truth and Lies in the Language Class*, SUNDAY TIMES (London), Jan. 12, 1997, at 1.

135. *See generally* FARBER & SHERRY, *supra* note 127 (critiquing flaws in the work of "radical multiculturalists" as serious).

136. *See* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 169-78 (1991) (discussing the story of a fifteen-year-old black girl who was found after a four day disappearance with racial slurs written on her body). The controversy concerned whether the girl was actually raped or whether she made up the story. *Id.* A grand jury investigation concluded that she fabricated the entire story, which called into question the credibility of black women alleging rape by white men. *Id.*

137. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for*

Derrick Bell and his skeptical stance toward racial progress and his use of narrative.¹³⁹

The outsider critiques of CRT have generated a host of intellectual debates within and outside of CRT as scholars have countered many of the claims that conservatives have made concerning critical race analysis. This Part considers the more prominent themes in anti-CRT scholarship and discusses how Critical Race Theorists and other progressive scholars have addressed these critiques.

1. *Critique of storytelling*

Several Critical Race Theorists have utilized narratives in their research, personal or otherwise, and have urged legal theorists to incorporate narrative as a legitimate methodological tool.¹⁴⁰ Critical Race Theorists who advocate the employment of narratives argue that such stories can lead to greater understanding of the experiences of disadvantaged social groups, whose life experiences the law obfuscates.¹⁴¹

The storytelling and narrative strand of critical race scholarship, though never the most ubiquitous methodology within CRT, has been the most provocative for conservative critics. Daniel Farber and Suzanna Sherry, for example, have written extensive critiques of storytelling used by many legal theorists, including Critical Race Theorists and feminist theorists.¹⁴² The critics of storytelling argue that personal stories do not advance analysis because other scholars cannot contest them; they are not grounded in empiricism; and they are inapplicable in a legal setting where analytical reasoning pervades.¹⁴³

Critical Race Theorists and other progressive scholars have responded by arguing that the focus on storytelling among CRT's conservative critics distorts reality because CRT largely does not rely upon storytelling or

Narrative, 87 MICH. L. REV. 2411, 2414 (1988) (arguing that through narrative and stories, people of color can gain the insight and strength needed to fight the stigma of racism).

138. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1774-75 (1989) (urging today's black community to create a new identity that acknowledges notions of black lawbreaking and criminality).

139. See, e.g., Bell, *supra* note 52, at 373-74 (describing "racial realism" as the notion that for people of color, the status quo is not likely to improve, because forces will continue to maintain the white-over-black supremacy in society, and urging others to accept this reality and adopt new strategies accordingly).

140. See, e.g., Delgado, *supra* note 137, at 2411 (1988) (urging storytelling as a means to challenge the status quo and create a new reality where life is full of more possibility). Stories are effective because instead of being coercive, they enable the reader to judge the truth. *Id.* at 2415.

141. See *id.* at 2439-40 (explaining that stories of minorities to help remove race and class based walls of isolation).

142. See generally FARBER & SHERRY, *supra* note 127, at 88-94 (arguing that because storytelling is personal, no real criticism of storytelling scholarship can be given without implicating, and ultimately insulting, the storyteller).

143. *Id.* at 89-90.

narrative.¹⁴⁴ Instead, CRT engages almost exclusively in policy, doctrinal, or theoretical analysis.¹⁴⁵ Furthermore, Critical Race Theorists have demonstrated that the use of narrative as a rhetorical tool in intellectual scholarship has existed for millennia; thus, focusing the anti-storytelling critique upon CRT and feminist theorists seems disingenuous and ideological.¹⁴⁶ Also, Critical Race Theorists have argued that law, in many respects, depends upon narrative in practice. A criminal trial, for example, advances competing narratives through the usage of physical evidence, testimony, and framing of the “facts” in opening and closing statements.¹⁴⁷

2. *Critique of nihilism*

The conservative assertion that CRT is nihilistic seems immediately problematic. The emergence of CRT as a coherent body of legal theory resulted because Critical Race Theorists who worked in the CLS movement did not accept the “rights-trashing” approach of some CLS scholars.¹⁴⁸ While CLS wanted to abandon the rights approach, Critical Race Theorists recognized and wrote passionately about the value of rights in the history of persons of color and their struggles against racist deprivation.¹⁴⁹

Nevertheless, many conservative critiques of CRT argue that CRT does not embrace the “rule of law” and that it portrays the law as unable to bring about positive social change.¹⁵⁰ The responses to the nihilism critique

144. See, e.g., Richard Delgado, *On Telling Stories in School: A Reply To Farber and Sherry*, 46 VAND. L. REV. 665, 668-69 (1993) (noting that only one-quarter of CRT scholarship is written in narrative form, thereby dispelling Farber and Sherry’s harsh criticism of CRT’s emphasis on storytelling). Delgado also attacks Farber and Sherry’s notion that storytelling does not provide any analysis or reasoning, noting that most stories include “statistics, case authority, and doctrinal analysis.” *Id.* at 669-70. See also Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 845 (1994) (supporting the use of storytelling in CRT because it provides a “Voice of Color” which is necessary to articulate “the unique insights that come from the duality inherent in the existence of any person of color”).

145. Delgado, *supra* note 144, at 668-69.

146. See *id.* at 666 (“Empowered groups long ago established a host of stories, narratives, conventions, and understandings that today, through repetition, seem natural and true.”).

147. See, e.g., Michael A. Coffino, *Genre, Narrative and Judgment: Legal and Protest Song Stories in Two Criminal Cases*, 1994 WIS. L. REV. 679, 686-89 (noting that both judges and lawyers use stories to explain legal facts and effectively respond to existing legal perceptions); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (urging lawyers and legal scholars to engage in storytelling as a way to provide clarity, given the large amount of information that they must present).

148. See Hutchinson, *supra* note 112, at 1476-77 (explaining that Critical Race Theorists believe that increasing rights for minorities is vital to achieve racial justice).

149. See *supra* text accompanying notes 43-47.

150. See FARBER & SHERRY, *supra* note 127, at 35, 38 (criticizing multiculturalist legal thinkers for abandoning legal reasoning as a mechanism to bring change and instead turning to storytelling as their method of persuasion); Rosen, *supra* note 19, at 27 (criticizing Critical Race Theorists’ belief that the legal process is ineffective in bringing about change

uncover the fallacies of these claims by pointing to the divergence of Critical Race Theorists from more radical forms of poststructuralism practiced by CLS scholars who engage in rights trashing.¹⁵¹

3. *Critique of nonneutrality*

Critical Race Theorists have utilized postmodern analysis to contest the law's claim to objectivity and neutrality—a hallmark of CLS thought.¹⁵² Because analytical reasoning occurs in a social, historical, and political context, the “truth” is a contingent and elusive concept.¹⁵³

Conservative critics have capitalized on CRT's critique of objectivity, arguing that CRT does not believe in the “truth” or in reasoning.¹⁵⁴ Yet, an argument that the “truth” is socially constructed or contingent does not necessitate the abolition of reasoning.¹⁵⁵ Instead, as Critical Race Theorists have asserted, skepticism toward reasoning means that we should make tentative and more contextualized our accounts of law and racism, rather than accepting grand or totalizing theories that purport to apply to all situations, irrespective of historical, social, political, and economic context.¹⁵⁶ Intersectionality and multidimensionality, for example, criticize the sweeping reform agendas of CRT, feminist theory, and queer theory that overlook the relationships among race, gender, class, and sexuality. Yet, these scholars remain committed to engaging legal institutions as potential sites for progressive social change.¹⁵⁷

because society's perception of facts is contingent on race and their belief that neutral laws only advance white domination).

151. See Robert L. Hayman, *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 68 (1995) (explaining that although Critical Race Theorists are divided over whether racial justice is a feasible goal, they are “united by some form of antistatutory theory, and all insist upon the necessity of struggle”) (internal citation omitted).

152. See *supra* text accompanying note 42.

153. See Hayman, *supra* note 151, at 60-62 (discussing postmodern and CRT skepticism of “truth” and objectivity).

154. See FARBER & SHERRY, *supra* note 127, at 35, 95-96 (criticizing Patricia Williams's interpretation of the Tawana Brawley controversy).

155. See Harris, *supra* note 42, at 765 (noting the blending of postmodern skepticism and modern reasoning in CRT).

156. See Hayman, *supra* note 151, at 63-64 (stating that Critical Race Theorists are attempting to include discussions about “new histories, narratives, and counter-myths” in the majoritarian jurisprudence dialogue) (internal citation omitted).

157. See Crenshaw, *supra* note 53, at 1331 (supporting the civil rights movement's strategy of urging legal reform as a means to achieve greater racial equality); Roberts, *supra* note 50, at 1480 (noting feminist legal theory's position that privacy laws that punish women for their reproductive choices should be struck down); Hutchinson, *Identity Crisis*, *supra* note at 89, at 309 (discussing legal arguments made in intersectionality literature).

C. *Critical Engagement: Dealing With Unfinished Business*

Despite efforts to rebut many of the conservative critiques of CRT, the project of considering conservative and internal critiques remains unfinished. Internal critics, as the progressive race blindness movement demonstrates, continue to challenge the assumptions of CRT from a progressive perspective. One recent strand of internal criticism argues that multiplicity theories marginalize a desperately needed analysis of class within CRT. This critique remains largely unexplored. Furthermore, more established conservative critiques, such as the critique of nihilism, could receive a fresh examination. The remainder of this Part addresses these two criticisms.

1. *The dichotomy of multiplicity theories and class analysis*

Internal critics continue to contribute to the evolution of CRT. Recent internal critiques have argued that CRT has abandoned class or materialist analysis. Richard Delgado—whose work is among the most influential in CRT—has urged Critical Race Theorists to engage in class analysis by directing their attention to the material consequences of racial subordination.¹⁵⁸ In two recent articles, Delgado argues that class theory is marginalized by discussions of “unconscious racism”¹⁵⁹ and from multiplicity identity theories.¹⁶⁰ Furthermore, at the CRT Workshop held at the Washington College of Law in 2003, Daria Roithmayer presented a paper that similarly criticized CRT for failing to undertake class analysis.¹⁶¹ Roithmayer, like Delgado, argued that multiplicity theories have supplanted materiality concerns.

Delgado and Roithmayer make powerful observations regarding the need for class analysis within CRT. Race and class relate to each other in three important ways. First, racism causes economic deprivation. Virtually every statistical measure of economic well-being shows that persons of color are worse off than whites.¹⁶² An abundance of social science research

158. See, e.g., Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 151 (2003).

159. See generally Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2289, 2291 (2001).

160. See Delgado, *supra* note 158, at 122, 124, 127-28 (arguing that the attention of theorists on intersectionality and essentialism issues, along with race and sexual orientation studies, impedes class analysis).

161. At the time of publication, a formal draft was not available for citation.

162. See, e.g., ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992) (citing statistics that show that earnings in white households are higher than earnings in black households and that even among similarly educated whites and blacks, the income of whites is much higher); ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 25 (1997) (discussing income statistics based on race, including that in 1995, the median income of all

links these disparities to racial injustice.¹⁶³ Second, the combination of race and poverty exacerbates the inequality of poor people of color.¹⁶⁴ Sociological research reveals that poor persons of color, unlike poor whites, tend to live in areas of concentrated poverty, where they lack access to important social resources, such as adequate education, housing, and employment opportunities.¹⁶⁵ The lack of stabilizing social resources in these communities, as well as the inattention of U.S. power structures, leads to ongoing generational poverty.¹⁶⁶ Finally, imperial capitalism has figured prominently in the subordination of persons of color. The decimation of Native Americans, the enslavement of Africans, the exploitation of Asian “immigrant” labor, and the conquest of Latinos through westward expansion all demonstrate the linkage of race and class domination.¹⁶⁷

Due to this relationship between class and race, Critical Race Theorists should heed the advice of Delgado, Roithmayer, and other scholars whose work engages race and class. Critical Race Theorists should undertake the task of engaging class inequality and advocate for legal doctrines and policies that promote substantive, rather than formal equality. While many Critical Race Theorists have engaged in class research,¹⁶⁸ Delgado and Roithmayer correctly note the deficiency of sustained inquiry in this area within CRT.

African American families was 60.8% of the median income of European American families—only a 1.6% improvement from the 1967 ratio).

163. See generally WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 111-12 (linking class and racial inequality).

164. See, e.g., WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 136-37 (1987) (explaining that a person’s race and class group determines whether the person will have access to “organizational channels of privilege and influence”); WILSON, *supra* note 163, at 196 (claiming that minorities do not have the resources to compete in the open job market because of the crushing effects of the challenges that they face due to their race and poverty).

165. DOUGLASS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

166. See WILSON, *supra* note 163, at 49 (explaining that the Reagan and Bush administrations decreased spending on direct aid to cities, including programs such as “general revenue sharing, urban mass-transit, public service jobs and job training, compensatory education, social service, block grants, local public works, economic development assistance, and urban development action grants”).

167. See Tayyab Mahmud, *Colonialism and Modern Constructions of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999) (linking racial construction to colonial exploitation).

168. See, e.g., Regina Austin, “*Step on a Crack, Break Your Mother’s Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273 (2002) (discussing how poor minority women living in public housing are disadvantaged by the government’s no-fault eviction policy); Jerome Culp, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 177-82 (1994) (explaining that the policy of colorblindness is ineffective in changing the racial status quo that exists); Dorothy Roberts, *Irrationality and Sacrifice in Welfare Reform Consensus*, 81 VA. L. REV. 2607 (1995) (showing how conservative “welfare reform policies” hurt black children).

While this Article generally agrees with Delgado and Roithmayer's plea for class analysis, it takes a different approach to the role of multiplicity theories in marginalizing class analysis. This divergence may seem minor, but it is ultimately vital for theorizing on the relationship between race and class. In Delgado and Roithmayer's critique of multiplicity theories, both theorists conflate multiplicity with a focus on identity—rather than a focus on structures of subordination.¹⁶⁹ Although Delgado and Roithmayer correctly note that many multiplicity theorists focus attention on “identity construction,” writings in multidimensionality and intersectionality have not exclusively focused on questions of status. Instead, these bodies of literature have sought not only to complicate questions of identity but also to demonstrate that structures of subordination themselves are multidimensional. The multidimensionality literature also asserts that Critical Race Theorists cannot fully understand racism *and all of its material harms* without engaging structures of patriarchy, heterosexism, and economic domination.¹⁷⁰ Furthermore, class, along with race, seems like a probable place for identity construction as well.¹⁷¹ In addition, multiplicity theories can explain why *poor persons of color* tend to remain poor, while poor whites have greater opportunities for economic advancement,¹⁷² or why *women of color* are the poorest segment of United States society.¹⁷³ The explanation for these social realities rests on an appreciation of the multidimensionality of race and class. So, identity theorists can, and should, take class into account when describing the processes of social construction that create racial identities. Furthermore, Critical Race Theorists need not engage in an either/or proposition of forsaking identity or multiplicity for class analysis. It is possible to engage in both types of analyses.¹⁷⁴ Accordingly, multiplicity theories can serve an important role in a critical race analysis that emphasizes class.

169. Delgado, *supra* note 158, at 122, 124, 127.

170. See Hutchinson, *supra* note 75, at 10 (arguing that multidimensionality treats oppression as “complex and multilayered”).

171. See, e.g., Martha Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 803-04 (2003) (explaining that classes obtain their identity from their economic position, their shared understanding and their shared action); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 8, 19 (1991) (arguing that because the identities of whiteness and the working class arose simultaneously, there is a presumption of whiteness with the term worker).

172. See *supra* notes 162-65 and accompanying text.

173. See Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 886 (1997) (explaining that women of color earn less than white women, and that only lower paid work is generally available for women of color).

174. Even Delgado has written on the problem of essentialism and the black/white paradigm. See, e.g., Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (arguing that binary racial discourse perpetuates racial subordination); Richard Delgado,

2. *Critique of nihilism revisited*

While many Critical Race Theorists have responded to the conservative characterization of CRT as being nihilistic, this Article supplements these responses with empirical research that justifies CRT's suspicion of law as a site of social change. Although CRT criticizes legal structures, Critical Race Theorists rely on law and legal reasoning as instruments for antiracist agendas.¹⁷⁵ Rebuttals to the antinihilism argument have centered on this dual consciousness of CRT.¹⁷⁶

While these responses to conservative critiques of CRT's cynicism are effective, Critical Race Theorists could bolster their arguments by pointing to political science data that demonstrate the majoritarian nature of the Court's decision making. Rather than protecting disadvantaged classes through the judicial review process, the Court responds primarily to majoritarian concerns,¹⁷⁷ thus hindering the attainment of social justice.¹⁷⁸ Although some Critical Race Theorists have demonstrated the majoritarian nature of the Court through doctrinal analysis,¹⁷⁹ several political scientists have conducted substantial empirical research, which fortifies the doctrinal

Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform, 68 N.Y.U. L. REV. 639 (1993) (discussing the complexity of identity politics).

175. See *supra* text accompanying notes 43-45.

176. See *supra* text accompanying notes 46-49.

177. See, e.g., THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 192-93 (1989) ("Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution. Where clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls."); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 239 (2002) (explaining that the Supreme Court's rulings represent public opinion because the justices are chosen by the President, who is elected by the people); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) (arguing that despite its reputation as a countermajoritarian institution, the post-New Deal Court has been largely majoritarian or, if not, has rendered decisions consistent with emerging trends in public opinion); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) (explaining that by ruling according to the policy opinions of the majority, the Supreme Court reinforces and legitimizes majoritarian opinions and concerns); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994) (noting that out of 130 Supreme Court decisions for which public opinion of the issue was known, 63% of the Court's decisions correlated to the majoritarian opinion).

178. See GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 27, 31 (1993) (arguing that because many challenges to majoritarian laws and policies are equal protection claims that receive the deferential rational basis scrutiny, the Supreme Court can easily abide by majoritarian preferences in its legal reasoning, to the detriment of minorities); Hutchinson, *supra* note 75, at 618 (critiquing equal protection doctrine as protecting dominant, rather than minority, interests); Darren Lenard Hutchinson, *The Majoritarian Difficulty, Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1 (forthcoming 2004) (demonstrating how equal protection doctrine harms social justice efforts and sides with dominant interests).

179. See, e.g., Spann, *supra* note 36, at 1426-36 (discussing the Supreme Court's standing decisions to illustrate that the Court rules in favor of majority interests).

research of Critical Race Theorists.¹⁸⁰ For example, when public opinion polls are available, they show that the Court makes decisions that largely reflect majoritarian public viewpoints.¹⁸¹ This relationship between the Court and public opinion exists even in the civil rights context, where minority interests should matter more under traditional conceptions of judicial review.¹⁸² Thus, as several Critical Race Theorists have demonstrated through extensive doctrinal analysis, the Court does not exercise judicial review to protect politically vulnerable classes from majoritarian abuse. Instead, the Court's doctrine facilitates majoritarian interests. This aspect of judicial review lends support to critical race skepticism of law as a viable instrument of progressive social change.

IV. CONTINUING THE EVOLUTIONARY PROJECT: AN INTRODUCTION TO THE ESSAYS IN THIS SYMPOSIUM

The works in this Symposium advance the evolutionary project of CRT. Regina Austin makes an extremely timely and compelling contribution to this Symposium, given ongoing debates within CRT concerning the need for class analysis. Austin's work on the exploitation of poor persons of color in capital markets demonstrates the ongoing commitment of critical race scholars to class analysis.

Brant Lee's "network economic analysis" unveils the structural dimensions of whiteness, thus furthering CRT's understanding of racism as a product of institutional, ideological, and cultural sources, rather than atomistic acts by "bad" individuals. Lee's article demonstrates the pervasiveness, fluidity, and subtlety of whiteness as a societal norm and the need for concerted efforts to dismantle racial inequality that transcends the enactment of mere formal equality regimes.

Reginald Oh's deconstructionist reading of the Court's affirmative action jurisprudence unveils how equal protection doctrine obscures the geographic spheres of white racial domination. Oh's rich analysis unveils how the Court's myopic equal protection doctrine falsely portrays blacks, concentrated in urban areas, as "politically powerful" for purposes of a process theory/heightened scrutiny analysis.

180. See Barnum, *supra* note 177, at 656-61 (tracking public opinion over time and its correlation to Supreme Court decisions); Mishler & Sheehan, *supra* note 177, at 90 (discussing the statistical methodology of examining the relationship between public opinion and Supreme Court rulings).

181. MARSHALL, *supra* note 177, at 192-93; SEGAL, *supra* note 177, at 239; Barnum, *supra* note 177, at 662.

182. See, e.g., Thomas R. Marshall & Joseph Ignagni, *Supreme Court and Public Support for Rights Claims*, 78 JUDICATURE 146, 151 (1994) (urging reconsideration of the argument that judicial review protects the civil rights and civil liberties of unpopular minorities).

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Reginald Leamon Robinson's contribution renews the author's status as an unrepentant, internal critic of the deployment of race consciousness among Critical Race Theorists. Robinson's provocative work urges Critical Race Theorists to abandon race consciousness, and it advances the belief that race-talk will inevitably fail to eradicate the inequality among whites and persons of color.

The organizers of the Washington College of Law CRT Workshop wanted to invigorate CRT and to create a forum for discussing race in a creative fashion. Collectively, these texts advance these goals. The articles push critical race analysis into new directions, while adhering to the foundational themes that have defined CRT. The articles focus outwardly by challenging white-supremacist domination, but they also focus inwardly by questioning cherished tenets of CRT. Recently, other law reviews have dedicated issues to CRT.¹⁸³ Hopefully, these publications will spark new theories and innovations among Critical Race Theorists and assist in the development of strategies to combat the intractable problem of racial injustice and inequality.

183. E.g., Symposium, *Theorizing the Connections Among Systems of Subordination Responses & Commentary*, 71 UMKC L. REV. 227 (2002).