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## Re-balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States

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# Re-balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States

## **Keywords**

Federalism, federal legislative authority, federal preemption, political subsidiarity, social subsidiarity

# HUMAN AGENCY, NEGATED SUBJECTIVITY, AND WHITE STRUCTURAL OPPRESSION: AN ANALYSIS OF CRITICAL RACE PRACTICE/PRAxis\*

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#### INTRODUCTION

*A slave in chains is as free as the master.*<sup>1</sup>

— Jean-Paul Sartre, Existentialist

*Instead of denying the existence of objective reality, [we should acknowledge] that subjective and objective reality sort of create each other.*<sup>2</sup>

— John Wheeler, Quantum Physicist

*You can never change things by fighting the existing reality. To change something, build a new model that makes the old model obsolete.*<sup>3</sup>

— Buckminster Fuller, Thinker and Architect

During slavery, when whites ruled blacks by law, vigilance, and violence, blacks fought and died, all in the name of their natural, normal claim to freedom. In addition to fighting and dying, they ran away so often that southern planters called it a “disease.”<sup>4</sup> Using guile and wit, slaves escaped, hiding within earshot of their masters. Having escaped, Harriet Jacobs lived for seven years in an attic space over her master’s head.<sup>5</sup>

1. Sonia Kruks, *Beauvoir, Gender, and Subjectivity*, 18 SIGNS 96, 96-97 (1992).

2. MICHAEL TALBOT, *MYSTICISM AND THE NEW PHYSICS* 25 (1993) (quoting Princeton physicist John A. Wheeler).

3. R. BUCKMINSTER FULLER, *CRITICAL PATH* 251 (St. Martin’s Griffin ed., 1982).

4. See Samuel A. Cartwright, *Diseases and Peculiarities of the Negro Race*, 11 DE BOW’S REV. S. & W. STS. 331, 331-33 (1851) (listing a disease called “Drapetomania” which causes slaves to run away).

5. See HARRIET JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 99 (Oxford Univ. Press 1988) (1861) (telling the story of her enslavement and escape). Harriet Jacobs was born in 1813 as a slave but she procured her freedom after years of hiding. *Id.* at 199-200,

Working slowly, slaves frustrated the master's desired yield. Using sabotage, slaves destroyed tools, making their exploitation inefficient. Feigning sickness, they resisted. Denmark Vesey, future revolt leader, pretended to suffer from epilepsy.<sup>6</sup> When not running, slaves used sheer intelligence, patience, and planning. In 1848, Ellen Craft, a white mulatto, dressed like a man, hid her visage behind bandages of a false injury, and refused to talk.<sup>7</sup> By her side, ever attentive and properly cowered, the faithful slave was her husband. Believing in their right to be free, Craft and her husband walked and rode their way to freedom.<sup>8</sup>

Choosing to fight and die, slaves showed us their power to act purposefully. The power to act is human agency, and these actions can support or transform society. Through social and cultural influences, society can constrain or empower ordinary people<sup>9</sup> to act by giving them relatively equal access to the rules, resources, and language. By supporting or transforming a society, we express a latent, inexorable power that rejects the thought that white structural oppression negates ordinary people's subjectivity, thus making them subtextual victims.<sup>10</sup> Within a broad structuralist framework, white structural oppression refers to practices like racism that constitute an objective, external power that robs people of their natural right to be free human beings. Subtextual victims refer to ordinary people like blacks who believe that America will always treat them badly, preventing them from attaining social and economic success. For these ordinary people, experiences like subtextual victimization and practices like white structural oppression belie human agency (e.g., right action).<sup>11</sup>

223. Jacobs originally published her story in 1861 under the pen name of Linda Brent. *Id.* at xiii.

6. THOMAS WENTWORTH HIGGINSON, *BLACK REBELLION, FIVE SLAVE REVOLTS* 101 (1998).

7. See DEBRA J. DICKERSON, *THE END OF BLACKNESS* 33 (Pantheon Books 2004) (1959) (describing how Ellen Craft's deception was a form of active resistance).

8. See SHIRLEY J. YEE, *BLACK WOMEN ABOLITIONISTS: A STUDY IN ACTIVISM 1828-1860* 24-25 (1992) (explaining that after Ellen and her husband escaped slavery they became involved in the abolitionist movement).

9. By ordinary people, I mean non-elite Asians, blacks, American Indians, Latinos, whites, and women, including immigrants.

10. Cf. Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 76 (1993) (arguing that colorblindness or treating all people equally, regardless of race, makes it "impossible to remedy pre-existing discrimination"). Nunn further argues:

The word "tyranny" begins to describe the second kind of symbolic harm suffered by Black defendants. . . . The trial of a Black person before an all-white jury gives the appearance of a privileged elite passing judgment over the fate of an inferior. At the symbolic level, the jury is no longer a neutral institution but one controlled, dominated and possessed by whites.

*Id.* at 110-11.

11. See SHUNRYU SUZUKI, *ZEN MIND, BEGINNER'S MIND* 23-49 (Trudy Dixon ed., 1970) [hereinafter *ZEN MIND*] (discussing Right Practice in Zen meditation, and how, as humans, to express our true nature, we must learn to understand our true selves, without any

Although ordinary people like blacks exercised human agency within the crucible of slavery, Critical Race Theory ("CRT") builds its methodology on the idea that law, race, and power oppress ordinary people, denying them the right to live free and to act purposefully.<sup>12</sup> Race Critics have developed deconstructive approaches to unearth how law and race form powerful, objective relations of whites over blacks, men over women, natives over foreigners. Relying on this methodology and these approaches, Race Critics, especially in early writings, analyzed unconscious white racism.<sup>13</sup> Given CRT's early development, these writings were perforce theoretical. Recently, some Race Critics have sought practical, serviceable tools to assist lawyers and activists.<sup>14</sup> Practical writings cope better with struggles against white racism. Practical writings talk to community activists.<sup>15</sup> They enable political lawyers to examine and transform legal conflicts into practical solutions or legal remedies. These writings encourage left scholars to leave the ivory tower, so that they can work with the ordinary people for whom Race Critics purport to write and on whom their scholarly existence depends.<sup>16</sup> Under this view, Race Critics can redress white structural oppression and engage in antisubordination struggles, so that ordinary people can use their human agency.

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distractions).

12. See Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTION, AND NEW CRITICAL RACE THEORY 1, 1-3 (Francisco Valdes et al. eds., 2002) (discussing the history of CRT and such concepts as anti-essentialism and race as a social construct).

13. See Charles R. Lawrence, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (arguing that racism affects everyone and that whites are often totally unconscious of their racially biased thoughts and actions).

14. See Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in CROSSROADS, DIRECTION, AND NEW CRITICAL RACE THEORY 379, 389-90 (Francisco Valdes et al. eds., 2002) (positing that Race Critics need to get into the field and do work beyond the academic setting).

15. See *id.* (focusing particularly on coalition building between different racial communities as well as between intellectuals and grass roots activists).

16. See, e.g., Keith Aoki & Margaret Chon, *Introduction: Critical Race Praxis and Legal Scholarship*, 5 MICH. J. RACE & L. 35, 36-38 (1999) (noting that justice is experienced through practice, not simply a theoretical ideal); Paulette M. Caldwell, *The Content of our Characterizations*, 5 MICH. J. RACE & L. 53, 68-69 (1999) (asserting that racism in our society is related in part to the separation of civil and political rights from economic and social rights); Robert S. Chang, *Facing History, Facing Ourselves: Eric Yamamoto and the Quest for Justice*, 5 MICH. J. RACE & L. 111, 114-18, 131 (1999) (discussing the theories and ideas of Eric Yamamoto and their application to current problems in racial relations); Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 215-19 (1999) (looking to critical race praxis and social lawyering theories as a means of change); Eric K. Yamamoto, *Practically Reframing Rights: Culture, Performance, and Judging*, 33 U.C. DAVIS L. REV. 875, 887-90 (2000) (exploring the ways to change the attitudes and the experiences of jurists and lawyers, and discussing the role culture plays in the legal process).

In this regard, Robert A. Williams advocates for Critical Race Practice (Practice).<sup>17</sup> Eric K. Yamamoto sues for Critical Race Praxis (Praxis).<sup>18</sup> For Williams, traditional legal scholarship, especially ethereal writings, cannot alter ordinary people's lives.<sup>19</sup> Exploiting people of color's personal and social circumstances for institutional gains like tenure,<sup>20</sup> Williams asserts that these Race Crits become little more than vampires,<sup>21</sup> feeding on a people's misery, caring selfishly for themselves, and giving nothing back.<sup>22</sup> By not using their writings to redress day-to-day issues, these Race Crits ignore ordinary people's oppression.<sup>23</sup> To overcome this gap, Practice requires left scholars to teach law students, especially through clinical legal education, how to empower Native people and their perspectives.<sup>24</sup>

17. See Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 753-55 (1997) (recounting his life and experiences, Williams posits that scholars must go beyond theory and actually "practice"). Williams advances that it is important to serve the legal needs of underprivileged groups and that simply publishing theory or deconstructing racial groups is insufficient for social change. *Id.*

18. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829 (1997) ("Critical race praxis combines critical, pragmatic, socio-legal analysis with political lawyering and community organizing to practice justice by and for racialized communities. Its central idea is that racial justice requires antistatist practice. In addition to ideas and ideals, justice is something experienced through practice.").

19. See Williams, Jr., *supra* note 17, at 748-50 (asserting that legal scholarship is only accessible and useful to a small group of legal scholars interested in the same area of the law and that such theory is essentially useless to the marginalized or oppressed groups they are discussing); see also Robert A. Williams, *Checks and Balances and Balances: Understanding the Legacy of White Patriarchy in an American American Indian Cultural Context*, 24 GA. L. REV. 1019, 1023-24 (1990) [hereinafter Williams, *Checks and Balances*] (describing some of the problems of legal analysis in the inter-cultural context by stating, "The problem for those who would practice outsider jurisprudence is to understand an American Indian cultural context according to its own terms—terms that possess meaning for American Indian people—instead of terms derived from a much different cultural perspective grounded in the legacy of white patriarchy.").

20. See Williams, Jr., *supra* note 17, at 744 (referring to experiences with law professors by stating, "They cared about one thing and one thing only: themselves. You see, as I soon came to learn, I had been hired to make them and their law school look good.").

21. See *id.* at 743-55 (using the term "vampire" to describe law professors who are entirely separate from the real world). Williams argues that the tenure process at many law schools transforms young excited intelligent minority professors into "vampires," meaning that they stop interacting with the outside world and lose their ability to make meaningful social change. *Id.* at 753-55.

22. See *id.* at 743 (separating himself from this attitude and describing how his upbringing enforced in him the sense that he was obligated to provide service to his community).

23. See *id.* at 759 (using his own story as an example, Williams described how he spent so much time working on legal theory that he ignored the requests for help from local American Indian groups). Regarding his position, he stated, "What these Arizona American Indians really wanted me to do was to get off my critical race theory ass and do some serious Critical Race Practice. They didn't give a damn about the relationship between hegemony and false consciousness. They wanted help for their problems, and I was a resource." *Id.*

24. See *id.* at 762 (summarizing his career and finding that he truly began Critical Race

Under Praxis, Yamamoto argues that left scholars must serve ordinary people's practical needs.<sup>25</sup> Right now, these scholars do not relate to political lawyers and community activists. By existing in separate worlds, neither group has helped to co-create<sup>26</sup> "racial justice." As such, theoretical writings and traditional civil rights strategies move institutions not toward racial justice, but toward liberal solutions.<sup>27</sup> So long as this gap continues, law will retreat from racial justice. In surmounting this gap, Yamamoto requires scholars, lawyers, and activists to work together (e.g., consortium).

Under Practice or Praxis, Williams and Yamamoto intend to pursue a justice concept, in which antistatization becomes the singular end.<sup>28</sup> This end promises to give to ordinary people, especially those engaged in interracial conflict, the human agency (or empowerment) that they lack. For example, Yamamoto advocates for a "racial group agency," one oddly standing on racial identity and personal responsibility.<sup>29</sup>

Unfortunately, Practice and Praxis cannot achieve this end. Relying on classical CRT methodology, Williams and Yamamoto assume that ordinary people like blacks lack human agency and personal responsibility. They presume that white structural oppression buries ordinary people alive under the weight of liberal legalisms like Equal Protection, rendering them subtextual victims.<sup>30</sup> I disagree.

Pure consciousness is always prior, and all sentient beings have agency. Despite the sheer weight of the legal violence, slaves never forgot their innate right to be free; they retained a pure consciousness that never itself

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Practice when he started a Tribal Law Clinic at a law school).

25. See Yamamoto, *supra* note 18, at 876 (emphasizing the need to look at specific real world problems, such as a grievance over racial discrimination, and the need to incorporate the lessons of CRT to find an appropriate solution).

26. See Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 287 n.2 (2000) (defining co-creation by stating, "each of us has been socially conditioned, principally in our primary environments, to accept that race, race consciousness (e.g., thinking of ourselves in racial terms), racism, and white supremacy are naturally occurring (e.g., human nature) and socially inevitable."); see also Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 37 (1987) (providing an overview and a critical look of the works of Stanley Fish). To understand its code you must decode it, and the very act of decoding constitutes an encoding, or the creation of new text. *Id.*

27. See Yamamoto, *supra* note 18, at 830-35 (citing to other scholars who believe that the focus of critical race theorists on incremental change led to stagnation rather than social change).

28. See *id.* at 854-55 (discussing the need for all groups to recognize the ways in which they shape the structures of oppression, and stating that only when the focus is on eliminating any type of inter-minority hierarchy will there be justice for all groups).

29. See *id.*

30. See *id.* at 842 ("In terms of constraints on self-definition, law has played a powerful role in imposing identities on racialized minorities as a way of excluding them from full participation in American life.").



was enslaved.<sup>31</sup> Moreover, slaves acted purposefully when they picked cotton and when they fought to be free. Slaves planned revolts, killed masters, overseers, and each other, ran away, picked cotton, and betrayed other co-conspirators; all examples of human agency. Today, despite danger and violence, ordinary people co-create lives of joy, peace, and happiness. Antebellum slaves co-created spaces in which they knew joy, peace, and happiness. In the modern era, ordinary people like blacks have pure consciousness and human agency too.

Despite daily examples of human agency, Williams and Yamamoto posit that ordinary people lack real, practical control over their lives.<sup>32</sup> By taking this position, they reproduce a major premise in CRT: slavery, Jim Crow, racism, and racial discrimination have subordinated the lives of ordinary people.<sup>33</sup> Put succinctly, white structural oppression (e.g., supremacy) impacts the micropractices of ordinary people. By implication, it negates their racial identity, social values, and personal responsibility. If so, then criminal courts mock ordinary people like blacks when the state punishes them for committing crimes.<sup>34</sup> If so, the New York Times unfairly punished Jayson Blair, and he was correct to fault it for encouraging plagiarism and for rewarding his unprofessional behavior.<sup>35</sup> Failing to address these implications, Williams and Yamamoto direct us to white structural oppression and divert us from the real, practical control that ordinary people exercise when they go to work or commit a crime. In this

31. See JANE ROBERTS, SETH SPEAKS: THE ETERNAL VALIDITY OF THE SOUL 40 (1994) (asserting the inviolability of the soul and that each soul selects from a range of consciousnesses by which it focuses its energy).

32. See Michael Olivas, *The Chronicle, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicles as Racial History*, 34 ST. LOUIS U. L.J. 425, 429-30 (1990) (discussing stories of resilience in the history of three oppressed groups—the Cherokee, the Chinese and the Mexican). Compare Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981, 996-97 (1994) (discussing the history of the Iroquois and their vision of law and peace), with Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 101-10 (1998) (analyzing the historic struggle of Polynesians throughout the process of colonization in Hawaii).

33. See Robert S. Chang, *Critiquing "Race" and its Uses: Critical Race Theory's Uncompleted Argument*, in CROSSROADS, DIRECTION, AND NEW CRITICAL RACE THEORY 87, 87 (Francisco Valdes et al. eds., 2002) (focusing on the CRT mantra that race is a social construct devised through a history of oppression); Catharine A. Mackinnon, *Keeping it Real: On Anti-Essentialism*, in CROSSROADS, DIRECTION, AND NEW CRITICAL RACE THEORY 71, 71 (Francisco Valdes et al. eds., 2002) (addressing the effect of CRT on critical feminism and the movement for gender equality).

34. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (arguing that, with the extent of bias in the United States criminal justice system, race may be a legitimate factor for a juror to consider).

35. See Clay Calvert, *Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 2-4 (2004) (covering Jayson Blair and the repercussions of his acts of plagiarism while working for the New York Times).

way, Williams and Yamamoto can only empower ordinary people if they eradicate white racism, for only then will ordinary people have human agency.

Practice and Praxis fail because they ignore how ordinary people use *mind constructs*. A mind construct means any artificial, causal, or interdependent arrangement of facts, factors, elements, or ideas that flows from our inner awareness.<sup>36</sup> Representing core beliefs,<sup>37</sup> a mind construct allows us to make sense of our personal experiences and social reality. A mind construct is not reality, but ordinary people believe that it is.<sup>38</sup>

Practice and Praxis also fail because they refuse to deconstruct mind constructs of ordinary people. Intending to adhere to CRT's methodology, Williams and Yamamoto believe that these mind constructs cannot co-create experiences, and thus white structural oppression must be an external, objective reality. By refusing to interrogate these mind constructs, they tell us that the proper locus of white structural oppression must be white mindsets. By and large, while white mindsets co-create racial oppression, other mind constructs cannot. Whites have power; others do not. Whites victimize blacks; ordinary people cannot co-create their own oppression experience.<sup>39</sup> Working within CRT methodology, Williams and Yamamoto cannot re-imagine ordinary people as bearers of human agency, the power to act purposefully that includes how we use our mind constructs to co-create and to understand experiences and realities. By failing to see ordinary people as powerful agents, Williams and Yamamoto have tied personal liberty not only to liberal legalism and white appreciation, but also to CRT's liberal agenda.<sup>40</sup>

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36. See ROBERT E. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 2 (2d ed. 1986) (positing that humans are limited by what they believe and that the true boundaries of our abilities are hidden by what we believe is real).

37. See JANE ROBERTS, *THE NATURE OF PERSONAL REALITY: A SETH BOOK* 46 (1974) ("It is the core belief which is strong enough to so focus your perception that you perceive from the physical world only those events that correlate with it.").

38. See ORNSTEIN, *supra* note 36, at 21-23 (finding that most people never challenge the reality they perceive and fail to understand the many other factors that exist outside of human consciousness).

39. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 126 (1999) [hereinafter *INTERRACIAL JUSTICE*] (discussing the ability of a mob or group to attack or oppress another group without individual responsibility and arguing that the individual person cannot act as a great perpetrator within society).

40. See generally JOHN MCWHORTER, *AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY* (2003) (discussing that problems arise because blacks continue to define themselves in racialized ideals); JOHN MCWHORTER, *LOSING THE RACE: SELF SABOTAGE IN BLACK AMERICA* (2000) [hereinafter *MCWHORTER, LOSING THE RACE*] (critiquing the civil rights movement and suggesting ways in which black and white Americans can change their behavior to reach social justice); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION FOR RACE IN AMERICA* (1995) (arguing that blacks are more oppressed by their own beliefs than the presence of racism).

Ordinary people have always had human agency. But Race Crits cannot imagine this power. They must alter our core beliefs to sustain their theories. A core belief flows from feelings and imaginations, and ordinary people reinforce this belief through words and deeds. From this core belief, ordinary people co-create their experiences and realities. Core beliefs, experiences, and realities are concentric circles, overlapping and indistinguishable. For example, race consciousness (a core belief) denies ordinary people full experiences, and at the same, it co-creates what they seek to avoid. Yet, race consciousness is simply a mind construct. In this Article, race consciousness constitutes a belief (or a mind construct) that encourages ordinary people to point accusatory fingers at white racism, an emotional balm for that which naturally flows from their feelings, imaginations, and actions.

Part I lays out the framework of Practice and Praxis, illustrating how these frameworks link themselves to a central feature of CRT—*structural determinism*. Part II critiques CRT's mindset doctrine and "naming our own reality,"<sup>41</sup> arguing that they are corollaries of structural determinism. Part III presents an incomplete model for a pure consciousness theory of human agency, an approach that conjoins pure consciousness, conscious mind (inner and outer ego), and co-creative principles as powerful elements in the co-creation of a range of personal experiences and social realities. These elements suggest a new model for agency, bypassing the liberal notion of a negated subject and, by implication, the victim's theory of ordinary people who suffer apparent external, objective structural forces. In this tentative model, nothing exists outside of the individual self or collective selves. CRT embraces a liberal idea of human subjectivity, and so Race Crits cannot liberate anyone from so-called oppressive experiences. Nevertheless, I should point out that ordinary people, relying on a pure consciousness theory of agency, can choose what personal experiences and social realities they would like to co-create, thus reminding them that they are human gods who simply play the role of victims.

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41. See Richard Delgado, *When A Story Is Just A Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 111 n.1 (1990) (establishing that "naming our own reality" is a basic theme of Critical Race scholarship as feminists and scholars of color draw attention to the role of voice in legal scholarship).

I. CRITICAL RACE PRACTICE/PRAXIS: AN ANTISUBORDINATION  
FRAMEWORK FOR SUBTEXTUAL VICTIMS OF WHITE STRUCTURAL  
OPPRESSION

A. *Introduction*

Practice and Praxis proffer antisubordination practices for subtextual victims of white structural oppression (e.g., white racism). Under these practices, Williams and Yamamoto confer great power on structural forces.<sup>42</sup> Yamamoto posits that structural shifts explain how and why minorities need political lawyers.<sup>43</sup> Structural shifts displace and disempower ordinary people, and through powerful agents like political lawyers, Williams and Yamamoto state that ordinary people can learn to engage in antisubordination practices.<sup>44</sup>

Whether stable or shifting, structures and ordinary people work together dualistically. Broadly speaking, structural shifts evidence changing human activities and values. Changes can be welcomed or otherwise, positive or negative. Regardless, structure has no life without human activities. Structural shifts are not objective, external forces that work against ordinary people. For example, the Civil War qualifies as a structural shift. Supported by historical ambivalence, ordinary people simply confronted their activities and values. For better or worse, ordinary people simply encountered themselves. Although politicians expressed it in social and political terms, a history of human ambivalence about American slavery gave rise to this War. Like the Civil War, changing racial attitudes, social values, and political interest also qualify as structural shifts, and these attitudes flow from us.<sup>45</sup>

Structure matters. What matters more, literally more, is the conscious mind. The conscious mind (e.g., race consciousness) has a social life, and it is through our day-to-day practices that ordinary people experience the result of the conscious mind as an apparently tangible, external, and objective reality. Yet, it is a virtual one, shifting when a critical mass of

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42. See generally Williams, Jr., *supra* note 17 (discussing the ways in which the structure of law school education excludes and trivializes minority contributions); Yamamoto, *supra* note 18 (highlighting the ways in which the structure of the legal system fails to serve minority communities).

43. See Yamamoto, *supra* note 18, at 830-39 (discussing the disconnectedness of progressive race theory and political lawyering practice).

44. See Williams, Jr., *supra* note 17, at 765 (encouraging law students and professors to bring CRT into their practice of law); Yamamoto, *supra* note 18, at 827 (discussing the general state of disconnect between race theory and practical lawyering).

45. ROBERTS, *supra* note 37, at 68. See generally ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 76-82 (1993) (exploring the issues and barriers facing educated blacks because of individual beliefs and attitudes and despite legal and policy change).

ordinary people changes their core beliefs.<sup>46</sup> How we use language, and how we allow it to use us,<sup>47</sup> reinforces beliefs and other engines of reality creation. For example, the *Ho* conflict came into sharp relief when each side expressed their views.<sup>48</sup> Language reveals beliefs and these beliefs drove the *Ho* litigation. Rather than analyze this language, Yamamoto prefers to see the interracial conflict as structurally determined.<sup>49</sup> For ordinary people, structural properties are social realities. If this conflict serves as a blank structural canvas,<sup>50</sup> Asians and blacks have painted their ideas of who ought to benefit from these remedies. Structure can be the hard edges of the canvas, but human hands built it. In this way, structure works intimately with the conscious mind and human activities (e.g., race consciousness). It cannot be otherwise.

Williams and Yamamoto confer too much power on structural forces, thus relegating ordinary people to mere witnesses to history.<sup>51</sup> In effect, they negate ordinary people's subjectivity. Yet, through their antistatutory practices, they purport to cope with these forces by giving us a classic, yet banal tale of "structure" versus "agency." With a blend of modernist hope and postmodernist surgery, they tell us that negated subjects can reclaim themselves.

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46. See Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 131 (1984) (positing that consciousness is a collective, rather than an autonomous, concept that can change over time).

47. See *id.* at 134-35 (explaining that language is merely a collection of usages that accompany social change).

48. See *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1316 (N.D. Cal. 1997) (challenging the validity of a judicial consent decree desegregating San Francisco's public schools). The decree stated that no fewer than four ethnic or racial groups had to be represented in the schools' student body, "with no racial/ethnic group permitted to constitute more than 45% of any school's total enrollment." *Id.* The plaintiffs applied for admission and were rejected because the particular schools had already reached a maximum enrollment for their ethnicity. *Id.* They sued, claiming that the policy unfairly discriminated against them. *Id.* See also *INTERRACIAL JUSTICE*, *supra* note 39, at 29-30 (stating that the Chinese-American plaintiffs in *Ho* wanted to be excluded from the consent decree's forty percent cap on minority enrollment in a school, claiming that it unfairly promoted Hispanic and African-American students with lower test scores than the Chinese-American children).

49. See Yamamoto, *supra* note 18, at 821-27 (discussing the interracial dynamics of *Ho* and yet failing to analyze critically the individual and collective core beliefs that brought these groups into legal conflict).

50. See ROBERTS, *supra* note 31, at 39 ("When you arrive, or emerge, into physical life, not only is your mind not a blank slate, waiting for the scrolls that experience will write upon it, but you are already equipped with a memory bank far surpassing that of any computer.").

51. See KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 19 (Terrell Carver trans.), reprinted in MARX'S 'EIGHTEENTH BRUMAIRE': (POST)MODERN INTERPRETATIONS 19 (Mark Cowling & James Martin eds., 2002) (stating that "men make their own history, but they do not make it just as they please in circumstances they choose for themselves").

*B. What is Critical Race Practice?*

For Williams, Practice serves clients. It teaches students to serve clients too. He writes: "Teaching is a vital part of translating CRT into practice. It's the students, stupid."<sup>52</sup> He continues: "They're future practitioners who won't have a whole lot of time to read law review articles on critical race theory when they get out into the real world. Better give it to them now, in meaningful doses."<sup>53</sup> Practice focuses on ordinary people and their communities, on helping and empowering them.<sup>54</sup>

In preparing to earn law degrees, students should learn applied ways to empower ordinary people and redress conflicts. Without applied ways, left scholars expect this level of engagement, even though they have given students no practice at listening and doing. With applied tools gained while students actually have the interest and time, Race Critics can achieve at least three goals: reorient themselves to practice, develop a client-centered analysis of racism, and bridge the gap between ivory tower thinkers and trench-oriented lawyers.

In the clinical program, CRT's important themes organize the student projects. That is, a bottom-up perspective drives the projects, in which left scholars teach students to listen seriously to concerns, priorities, and experiences of indigenous people, whether they live on a Navajo Reservation or in Nicaragua.<sup>55</sup> The projects reify indigenous rights by decolonizing American and international law, and left scholars encourage students to learn how current legal doctrine causes colonialism and racism. In the clinic, they strategize to weaken this doctrine and to develop and test new legal theories.<sup>56</sup>

For Williams' Tribal Law Clinic, Practice immerses students in "important aspects of critical race theory."<sup>57</sup> Teachers "globalize and historicize" social and legal problems.<sup>58</sup> They teach "the nature and meaning of the historic struggle of indigenous peoples."<sup>59</sup> They orient students as to how tribal courts express an applied tribal vision. They

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52. Williams, Jr., *supra* note 17, at 761.

53. *Id.*

54. *Id.* at 761-63 (discussing how being involved in community activities enriches the experience of being a law professor).

55. *Id.* at 762-63; see also Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (stating that, by understanding the perspectives of those who have experienced discrimination, scholars can better understand law and justice).

56. Williams, Jr., *supra* note 17, at 763; see INTERRACIAL JUSTICE, *supra* note 39, at 128 (discussing Robert Williams, Jr.'s call for a critical race practice because he felt that law professors working on progressive theory had become too distanced from actual law-based practice).

57. Williams, Jr., *supra* note 17, at 763.

58. *Id.*

59. *Id.* at 763-64.

sensitize students to the duty they owe to the community, as “invited participant[s] in an important human rights struggle to reverse the history of ethnocide and genocide.”<sup>60</sup> After these instructions, teachers train law students to listen, to become sensitive to the client’s subject position,<sup>61</sup> to see the world through the client’s eyes, and to appreciate how a client’s narratives reveal her values.<sup>62</sup>

Listening promotes value-learning. “[W]e train students next to listen seriously to the stories that American American Indian people tell about this issue [of tearing generations of children from American American Indian homes and culture],” Williams writes.<sup>63</sup> By listening, students get cultural sensitivity training led by tribal elders and social workers who talk about traditional values, culture, beliefs, and practices.<sup>64</sup> Teachers and students, for example, discuss child rearing and how the tribe applies the best interest of the child test.<sup>65</sup> To buttress this value learning, students learn from tribal legends and stories that teach values through storytelling.<sup>66</sup>

By appreciating values through cultural sensitivity training, students learn from the bottom up. Thereafter, they investigate cases on the reservation by first collecting the parties’ relevant stories: “the child’s story, the parents’, social workers’, probation officers’, relatives’, neighbors’, victims’, whatever.”<sup>67</sup> By making them “story hearing fools,”<sup>68</sup> students learn and then later share what they have learned with others. Now they can work toward a fair result. Williams’ point appears clear: through clinical legal education, students learn that solutions exist within American American Indian narratives if they listen to those at the bottom.<sup>69</sup>

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60. *Id.* at 764.

61. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1281 (1992) (arguing that empathic fallacy illustrates that “our ability to escape the confines of our own preconceptions is quite limited . . . . The notion of ideas competing with each other, with truth and goodness emerging victorious from the competition, has proven seriously deficient when applied to evils, like racism, that are deeply inscribed in the culture.”).

62. See ART BERMAN, FROM THE NEW CRITICISM TO DECONSTRUCTION: THE RECEPTION OF STRUCTURALISM AND POST-STRUCTURALISM 124-28 (1988) (arguing that narratives suffer the fate of structuralism).

63. Williams, Jr., *supra* note 17, at 764.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. See *id.* (stating that this process teaches students to examine clients’ stories and to see how they matter in the context of a multicultural world and legal system).

### C. *What is Critical Race Praxis?*

For Eric Yamamoto, Praxis means “racial justice as antistubordination practice.”<sup>70</sup> It requires left scholars to engage in actual community struggles against white structural oppression. Antistubordination practice is a “jurisprudence of reconstruction,”<sup>71</sup> and in blending modernism and postmodernism, Yamamoto puts critical inquiry and pragmatism into antiracism practice. That is, he suggests using actual experiences to rework theory.<sup>72</sup> His approach leads to two duties. First, by translating theory into actual experience, left scholars can engage in direct action against racism.<sup>73</sup> Second, once presented with these practical tools, political lawyers and community activists must attend to how critical thinkers define race, how society understands civil rights, and why law serves elite interests.<sup>74</sup> By meeting these duties, the consortium can critically reframe and legally engage “racialized practices,”<sup>75</sup> in areas such as corporate and immigration law.<sup>76</sup>

#### 1. *Critical race praxis’ definition*

Praxis blends critical, practical, sociological, and legal analysis with political lawyers and community activists who seek realized justice for communities of ordinary people.<sup>77</sup> By critical, Yamamoto means theory. By practical, he suggests useful.<sup>78</sup> By sociological, he hints at how we have organized society. By legal analysis, he looks to problem-solving legal rules.<sup>79</sup> Specifically, Praxis means “racial justice as antistubordination practice.”<sup>80</sup> For this central idea, Yamamoto draws on Paulo Freire’s “antistubordination action with reflection.”<sup>81</sup>

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70. INTERRACIAL JUSTICE, *supra* note 39, at 129.

71. See Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 744 (1994) (referring to CRT as a jurisprudence of reconstruction and positing that CRT is successful because it recognizes the tension between modernist and postmodernist narratives).

72. Yamamoto, *supra* note 18, at 874.

73. *Id.* See also YAMAMOTO, *supra* note 39, at 129.

74. Yamamoto, *supra* note 18, at 874.

75. *Id.* at 874-75.

76. See, e.g., Kevin Johnson, *The End of “Civil Rights” As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1481, 1491 (2002) (discussing critical scholarship and its implications for civil rights in immigration law and contending that civil rights laws must change to accommodate increasing rates of marriage); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 389 (2002) (exploring racism in corporate law settings and suggesting ways to assist corporate managers in conforming to laws prohibiting racial discrimination).

77. Yamamoto, *supra* note 18, at 875.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 875 n.249.



Given Freire's influence, Praxis structures the practice of justice. This structure has four principle components. First, Praxis embraces justice as a process (e.g., method) and as a custom (e.g., norm). As a process, Yamamoto invokes Freire's schema: "experience-rethinking-translation-engagement."<sup>82</sup> As a custom, Praxis tackles antisubordination and rectifies injustice. Accordingly, Praxis' first component directs the consortium to cope with a client's grievance (e.g., a conflict between a Korean merchant and black customer<sup>83</sup>) by also probing for structural forces behind the grievance.<sup>84</sup>

Second, Praxis requires the consortium to use theoretical frameworks to accomplish several goals: cross-examine the grievance's subtext; learn how the grievance flows from culturally disabling representations; appreciate how this subtext and representation fuel grievances; and assess critically how institutional justice works in a particular social setting. Institutional justice may impose limits on the first principle, or it may hold promise for tackling subordination and for rectifying injustice.<sup>85</sup>

Third, Praxis encourages the consortium to apply their experiences to real problems by sharing practical solutions in accessible language with ordinary people who wish to end the grievance. Fourth and finally, Praxis requires the consortium to critique what justice means in the setting out of which the grievance arose, so that it can "heal disabling intergroup wounds" and build "intergroup alliances."<sup>86</sup>

## 2. *Critical race praxis' framework*

Praxis is a provisional framework. At the beginning, the consortium starts with four points: the conceptual, the performative, the material, and the reflexive.<sup>87</sup> These inquiries do not operate like "a universal theory of justice, nor do they prescribe what racial justice is, or should be, in any particular situation."<sup>88</sup> Rather, they assist others to forge "right relationships," thus serving as "guideposts toward collective, reflective antisubordination practice."<sup>89</sup>

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82. *Id.*

83. *See, e.g.,* Reginald Leamon Robinson, "The Other Against Itself": *Understanding the Violence Discourse Between Korean-African Americans*, 67 S. CAL. L. REV. 15, 36-40 (1993) (exploring the racial and legal roots that led to violence in the case of *People v. Soon Ja Du*, 5 Cal. Rptr. 2d 177, 181 (Cal. Ct. App. 1992), in which a Korean grocer shot a black teenager over an alleged incident of shoplifting).

84. *See* Yamamoto, *supra* note 18, at 876 (exploring the need to look deeply at the cultural forces that may impact the issues of the case).

85. *Id.*

86. *Id.*

87. *Id.* at 877-78.

88. *Id.* at 878; *see also* Harris, *supra* note 71, at 745 (discussing the impossibility of developing a complete CRT).

89. Yamamoto, *supra* note 18, at 878.

a. *The conceptual inquiry*

This inquiry translates and analyzes high theory. The consortium does so in response to an interracial grievance or a legal dispute.<sup>90</sup> In *Interracial Justice*, the street fight between the Nguyens and Narcisse escalates into broad structural claims made by blacks against a Vietnamese grocer.<sup>91</sup> In this conflict, the consortium examines why the parties have racialized a street fight, and how this grievance links itself to “heterosexism, patriarchy, and class.”<sup>92</sup> By identifying these structural forces, the consortium also critiques the political economy.<sup>93</sup> This critique conceptualizes the conflict—its particulars (e.g., the fight) and its context (e.g., white racism).<sup>94</sup>

With this conceptualization, the consortium examines the claims that emerge from a controversy. Are the claims a “traditional source[] of authority”?<sup>95</sup> Are the claims supported by evidence?<sup>96</sup> What remedies the claim?<sup>97</sup> By answering these questions, the consortium engages in an “ordinary investigation of a legal claim.”<sup>98</sup> Relying on a socio-legal analysis, they must take two additional steps. First, they must review the judicial setting of the conflict.<sup>99</sup> Second, they must recognize large legal issues that may motivate specific claims.<sup>100</sup>

After these steps, the consortium assesses the claim. Can the consortium remedy the claim despite the way the conflicting groups have constructed it? The consortium also identifies larger, structural forces that drive the grievance.<sup>101</sup> With these forces noted, the consortium dislodges embedded

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90. *Id.*; see, e.g., *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316, 1327 (N.D. Cal. 1997) (holding that Chinese American students had not been unconstitutionally discriminated against despite their being denied enrollment in a public school because of their race).

91. See *INTERRACIAL JUSTICE*, *supra* note 39, at 1-6 (discussing the interracial group conflict between the Nguyens, a Vietnamese family, and Ulysses Narcisse, a black man, that led to a boycott of the Nguyen’s store by blacks).

92. Yamamoto, *supra* note 18, at 878.

93. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474 (1897) (recommending that if lawyers wish to understand (e.g., predict) the complex content out of which judges make legal decisions about social ends, then they should study philosophy and political economy).

94. See Yamamoto, *supra* note 18, at 878 (providing other examples of context, including heterosexism and class).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 878-79.

100. *Id.*

101. See *INTERRACIAL JUSTICE*, *supra* note 39, at 1-6 (discussing the tense relations between African American and Vietnamese residents in a New Orleans community, including the failed attempts at mediation after African American residents boycotted a Vietnamese grocery store and attempted to drive the owners out of the neighborhood); see also *People v. Soon Ja Du*, 5 Cal. Rptr. 2d 177, 181 (Cal. Ct. App. 1992) (highlighting that a

and externally derived structural perceptions.<sup>102</sup> In the Nguyen conflict, the Neighborhood Committee for Justice organized a boycott, and after the media criticized blacks for the economic stranglehold, one person said: "It is clear that some groups just arriving in America see us as the bottom of the pecking order and intend to use us as stepping stones to their own prosperity."<sup>103</sup> This ordinary person has core beliefs that regard blacks as an underclass and believe immigrants exploit this underclass.<sup>104</sup> Yamamoto's two-step process purportedly unearths deeper, darker beliefs (e.g., false consciousness) that drive interracial conflicts, and the consortium can develop an "operational language" so that, through agency, ordinary people can redress problems and form alliances.<sup>105</sup>

*b. The performative inquiry*

Performative inquiry is at least a two-part action. First, advocates must ask "what." Second, they must ask "who." Under the "what" inquiry, the consortium must identify the "practical" steps that not only respond to specific claims but also redress a claim's subtext. This subtext possesses structural features: "disparaging cultural images" and "exercises of group power." More than likely, these structural features amp up "historical group grievances."

With respect to the Nguyen conflict, according to Yamamoto, the violent fight between Nguyen's son and Narcisse had a very specific context, one that stood above historical tensions between different racial groups.<sup>106</sup> Each group would hold culturally-derived images of the other.<sup>107</sup> Seizing upon this fight, the Neighborhood Committee for Justice declared that the community it represented lacked real power.<sup>108</sup> To garner this power, the Neighborhood Committee for Justice sought to oust the Nguyen family.<sup>109</sup>

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Korean woman who shot an African American girl failed to demonstrate her remorse because of cultural barriers).

102. See Harris, *supra* note 71, at 743 (stating that "[racism] is deeply embedded in language, perceptions, and perhaps even 'reason' itself").

103. See *INTERRACIAL JUSTICE*, *supra* note 39, at 3-4 (citing Muhammad Yungal, *Blacks Still Seek Empowerment*, NEW ORLEANS TIMES-PICAYUNE, June 30, 1996, at B6).

104. *INTERRACIAL JUSTICE*, *supra* note 39, at 3.

105. Yamamoto, *supra* note 18, at 879.

106. See *INTERRACIAL JUSTICE*, *supra* note 39, at 5 (explaining that interracial tensions derived from slavery, Jim Crow laws, white racism, poverty, and violence in both the African American and Vietnamese communities).

107. See *id.* at 3 (reporting that African Americans viewed Asian foreigners as exploiters and that the Vietnamese saw African Americans as stifling their opportunity for equal economic treatment).

108. See *id.* at 2 (reporting the comments of a Committee for Justice spokesperson: "It's time to reclaim the community from a stream of foreigners who invade a neighborhood and bleed it of money."). See generally McWHORTER, *LOSING THE RACE*, *supra* note 40, at 2-6 (discussing exaggerated stories that blacks tell so that they can reinforce victimhood).

109. See *INTERRACIAL JUSTICE*, *supra* note 39, at 1 (describing that the Neighborhood Committee for Justice distributed fliers accusing the Nguyens of discrimination and verbal

Refusing mediation with the Human Relations Commission out of distrust, it declared: “[o]ur plan is to drive this mean spirited grocer out of our community, if necessary penniless.”<sup>110</sup> And so in addressing the “what,” the consortium must use what it has learned to engage in a socio-legal analysis, and in so doing, the consortium can dismantle “subordinating social structures and . . . rectify injustice.”<sup>111</sup>

Under the “who” inquiry, the consortium must decide “who” should act. Presumptively, in interracial group conflict, progressive lawyers and activists should play vital roles. Left scholars can play a role, but if and only if they translate their abstract analyses into workable tools, so that they have a practical effect in “frontline antisubordination practice.”<sup>112</sup> Once engaged, left scholars can appreciate first-hand that antisubordination practice harbors difficult, complex, and unstable realities.

In the Nguyen conflict, left scholars can help contending groups realize that they vie with each other because the dominant society has not only constructed but also poured damaging stereotypes, images, and narratives into their heads and their communities. As a result, left scholars can redress the latent distrust between blacks and Vietnamese. Until left scholars place their work in the service of antisubordination practice, political lawyers and community activists cannot develop real, practical analyses of interracial conflicts. By staying in the Ivory tower and by publishing inaccessible critiques of white racism, community stakeholders cannot begin to develop different ways of coping with structural forces, and without these options, racial groups may not produce material changes within interracial communities.<sup>113</sup>

*c. The material inquiry*

The material and performative inquiries work together. Materiality refers to stakeholders’ desire to attain redress in interracial group conflict. Toward this end, this consortium must look into the material conditions that racial oppression has changed. Change can happen at social, structural, and representational levels. At the socio-structural level, we should ask: Can we change how these conflicting racial groups get access to housing, education, and labor markets? Can we alter how society redistributes goods and services to these conflicting racial groups? Can we restructure how these conflicting racial groups work with democratically

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abuse).

110. *Id.* at 2-3.

111. *Id.*

112. Yamamoto, *supra* note 18, at 880. *See generally* MAO TSE-TUNG, ON PRACTICE (1946) (arguing that intellectuals must become involved with the ordinary people so that they can learn how peasants actually live and work).

113. Yamamoto, *supra* note 18, at 880.

organized public institutions? At the representational level, we must ask: What are these conflicting racial groups' cultural practices (e.g., racial identities)? By examining how structural forces have positioned communities for interracial conflict, we can reassess why these groups maintained specific cultural practices. In this way, the consortium must show these groups how structural forces have aided them in developing racial identities and in constructing identity practices that fuel interracial conflicts.<sup>114</sup>

In the Nguyen conflict, a material inquiry interrogates underlying structural forces.<sup>115</sup> The consortium would investigate the extent to which conflicting racial groups actually have access to resources, and how they perceive that access.<sup>116</sup> It would explore why the Neighborhood Committee for Justice worked so hard to derail mediation talks by using incendiary language against Mr. Jackson and the Nguyens. It would examine why blacks felt victimized by the Vietnamese who had only recently joined the community. It would look into how different cultural practices informed the way they experienced each other.<sup>117</sup> It would also study how racial identities (e.g., race consciousness) led to ways of experiencing white racism. In the end, the interracial group conflict that followed the street fight may be a proxy for perceptions about access, cultural practices, and racial identities. If so, the consortium must ask local stakeholders to take personal responsibility for the way structural forces have organized their consciousness, molded their identities, and assembled their experiences. In this way, the consortium has to focus heavily on structural properties, viewing them as primary causes of interracial conflicts. For Yamamoto, a material inquiry exposes deeper, structural issues—narrative discourse.

*d. The reflexive inquiry*

Reflective inquiries tie real experiences and practical theories together. The consortium constructs, deconstructs, and reconstitutes theories, especially because it has engaged antiracist struggles in which prior theories and understandings were perhaps ineffective. By keeping its theories in flux, the consortium can alter the conceptual, performative, and

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114. *Id.*

115. See *INTERRACIAL JUSTICE*, *supra* note 39, at 4 (criticizing the legal proceedings for failing to understand why African Americans and Vietnamese maintain certain racial beliefs about each group).

116. See generally IVAN LIGHT & EDNA BONACICH, *IMMIGRANT ENTREPRENEURS: KOREANS IN LOS ANGELES 1965-1982* 178 (1988) (describing how Koreans in Los Angeles used class and ethnic resources to become successful entrepreneurs).

117. See *INTERRACIAL JUSTICE*, *supra* note 39, at 5 (providing the class structure history of New Orleans as an example of this type of inquiry).

material inquiries of Praxis. In the Nguyen conflict, the consortium would use this inquiry to better understand what they did well and not so well. It would deconstruct and reconstitute a practical theory to help other racial groups who contend with each other.

## II. CRITICAL RACE THEORY'S METHODOLOGICAL FRAMEWORK: MINDSET DOCTRINE, "NAMING OUR REALITY," STRUCTURAL DETERMINISM, AND THEIR IMPACT ON CRITICAL RACE PRACTICE/PRAXIS

### A. CRT's Methodological Framework

Since the late 1980s, Race Critics have increasingly practiced<sup>118</sup> a standard methodology, through which they pursue justice and liberation.<sup>119</sup> With textbooks,<sup>120</sup> Race Critics have attempted to settle down what Angela P. Harris once described as an "eclectic, iconoclastic nature."<sup>121</sup> Nevertheless, Race Critics still experiment, perhaps encouraging Williams and Yamamoto to develop their antisubordination practices. In their writings, Race Critics have adopted modernism (or structuralism), allowing them to place faith in liberal ideas like rights, justice, and liberty, even though they deconstruct these legalisms so that they can unearth the truth.<sup>122</sup> Writing within this tension of modernism and postmodernism, these antisubordination practices suffer from the conceptual limits of this structuralist methodology,<sup>123</sup> one standing on the following themes:

- (1) an insistence on "naming our own reality"; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine;

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118. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1841 (1988) (explaining that legal scholarship is not about "objective information" or tools to discover this information, but rather, about practice through which scholars socially construct ways to engage each other).

119. See Harris, *supra* note 71, at 743 (commenting that "CRT seems confident that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free").

120. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (providing articles on CRT scholarship to highlight the themes and directions scholars have embraced); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2000) (incorporating articles by young authors who discuss new ways to confront the issues involving race).

121. See Harris, *supra* note 71, at 744 (explaining that the birth of the CRT movement witnessed few common methods or beliefs).

122. *Id.* at 743.

123. *Id.* at 744 ("The seeming choice between modernism and postmodernism is an impossible one. The task is to live in the tension itself: to continually rebuild modernism in light of postmodernist critique.").

(7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform.<sup>124</sup>

Under CRT's modernist and postmodernist methodology, these themes divide two categories: (1) macro structuralism and (2) macro individual agency and social practices. Under macro structuralism, we find "an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform."<sup>125</sup> This feature forms a major set, within which we find its elements: "a readiness to question basic premises of moderate/incremental civil rights law;" "a more contextualized treatment of doctrine;" and "criticism of liberal legalisms."<sup>126</sup> Under macro individual agency and practices, we find an insistence on "naming our own reality," within which we find its elements: "the belief that knowledge and ideas are powerful;" "the borrowing of insights from social science on race and racism;" and "critical examination of the myths and stories powerful groups use to justify racial subordination."<sup>127</sup> Macro structuralism refers to structural forces. Macro individual agency purports to deconstruct these forces, suggesting that Race Critics can free themselves from white racism. Yet, the categories lack efficacy; they never recognize ordinary people as powerful reality creators, earthly gods who name and thus co-create their realities.

Believing in rights and questioning how society recognizes these rights, Race Critics never ask if ordinary people currently name a reality that reinforces racism, the very experiences and realities against which they struggle. Rather, Race Critics simply take pity on these people,<sup>128</sup> viewing them as victims of white racism. Out of this view, they work to end white racism so that ordinary people like blacks can live as "free" blacks. If liberal society raced them, this mission belies real freedom. Escaping this tension requires Race Critics to reject a victimization theory, and they must ask: "what is reality?" Right now, these themes methodologically bracket

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124. Delgado, *supra* note 41, at 95 n.1; see Anthony Paul Farley, *Thirteen Stories*, 15 *TOURO L. REV.* 543, 586-88 (1999) (citing to these themes while explaining that he objects to CRT because it is too interested in a dialogue with racists); Greta McMorris, *Critical Race Theory, Cognitive Psychology, and the Social Meaning of Race: Why Individualism Will Not Solve Racism*, 67 *UMKC L. REV.* 695, 698-700 (1999) (identifying several themes of critical race scholarship, culminating into three distinct arguments).

125. Delgado, *supra* note 41, at 95 n.1.

126. *Id.*

127. *Id.*

128. See Alan Wolfe, *Hidden Injuries: Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche, 1880-1996*, *THE NEW REPUBLIC*, July 7, 1997, at 31, 32 (book review) (arguing that liberal theories of racial damage have been used to foster pity rather than unity among races and stating that, "And pity, even when it is well-intentioned, is never far from contempt.").

Race Crits; they stunt them epistemologically.<sup>129</sup> By relying on these methodological themes, Race Crits can only imagine ordinary people as negated subjects victimized and dominated by white society.

Can these ordinary people name their own reality? This question confesses another methodological contradiction. Race Crits like Williams and Yamamoto argue that structural forces rob ordinary people of their right to live as relatively unmediated citizens. These forces emit spirit-murdering stories that infect ordinary people. Whites consume these stories too, which convince them that worthy citizens benefit in a liberal society. If society mesmerizes ordinary people with these stories, are the authors immune? Using postmodernist tools, how do we remember our unmediated selves so that we can effectively violate these stories? Under structuralism, ordinary people cannot truly remember this Self, so on what source can ordinary people rely to name their own reality that helps recall that they have always been earthly gods? None. Ordinary people live as ever-questioning victims who are heartlessly mocked by liberal legalisms like Justice. By declaring that society mocks them and denies them Justice, ordinary people have effectively boiled their stories down to an oft-told sad tale of “structure” versus “agency,” in a term: structural determinism.

### B. *Structural Determinism*

As an antisubordination practice, Williams’ Practice and Yamamoto’s Praxis grow out of structural determinism. For didactic purposes, I divide this sociological concept into two parts: structuralism and determinism. Structuralism<sup>130</sup> directly links “words” and “reality.”<sup>131</sup> It relates things to things. Speaker A talks of things, and even if ordinary people, the listeners, cannot actually “observe” these things, they become accustomed to experiencing the things as real, external forces.<sup>132</sup> Speaker A reveals how society’s underlying structure shapes an individual’s experience or group’s life.<sup>133</sup> For Race Crits, an unseen thing like white racism limits and constrains how people believe, think, feel, and act.<sup>134</sup>

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129. I discuss these limitations in my working paper entitled “The Death of the Race Crit: Deconstructing Critical Race Theory and the End of Race Consciousness” (forthcoming 2004). I delivered this paper at the Law and Society Conference, in British Columbia, Vancouver, Canada on June 2-5, 2002. I chaired a panel that focused on race consciousness and that included Professors Tanya Kateri Hernandez (Rutgers-Newark) and R. Richard Banks (Stanford).

130. See BERMAN, *supra* note 62, at 114-17 (discussing the features of structuralism as a theory, a method of language, and an interpretation).

131. See ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY* 315 (2d ed. 2000) (describing structuralism as a view of language that recognizes a relationship between words and what words represent).

132. BERMAN, *supra* note 62, at 114-17.

133. *Id.*

134. *Id.*



Determinism states that a clear, narrow set of factors cause social events in a relatively predictable way.<sup>135</sup> Broadly speaking, determinism is any theory, like CRT, that explains the world (e.g., white racism) by definable factors.<sup>136</sup> This approach negates a host of other factors, including human agency.<sup>137</sup> As such, Race Critics can argue against the relative autonomy of ordinary people like blacks so that they can pursue other political ends. By so doing, Race Critics can say that things (or a set of things) cause ordinary people to be subtextual victims, thus explaining the moment-to-moment existence of, say, the black community. If these things victimize ordinary people, it follows that ordinary people lack meaningful human agency. In this way, determinism becomes a reductionist model, emphasizing a limited range of causal social factors that explains why ordinary people like Mexicans suffer racism and racial discrimination.<sup>138</sup>

And so within the concept of structural determinism, Race Critics state that they “focus on ways in which the entire structure of legal thought, or at least of major doctrines like the First Amendment, influences its content, always tending toward maintaining the status quo.”<sup>139</sup> Delgado and Stefancic go on to say that “once we understand how our categories, tools, and doctrines influence us, we may escape their sway and work more effectively for liberation.”<sup>140</sup> That is, structural determinism represents a “[c]oncept that a mode of thought or widely shared practice determines significant social outcomes, usually without our conscious knowledge.”<sup>141</sup> Yet, despite these determining factors, Delgado, like Williams and Yamamoto, suggests that the buried, negated subject will rise to act.

Structural determinism informs not only CRT but also Practice and Praxis, in which the negated subject has only the power to identify structural forces that explain American Indian oppression and interracial conflicts. For example, Yamamoto declares that blacks can be victims *and* victimizers.<sup>142</sup> If they victimize, can they have agency? More broadly, does such victimizing of victims presuppose that blacks have always had agency, a kind of purposeful human action that sits astride core beliefs? Did Yamamoto mean that at the “borderland[s]”<sup>143</sup> blacks operate on false consciousness, a racist implant that destroys the respect and self-restraint they would otherwise express toward other blacks? Acting as duress, this

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135. *Id.* at 84.

136. *Id.* at 84-85.

137. *Id.*

138. *See id.*

139. CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 120, at 205.

140. *Id.*

141. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 155-56 (2001).

142. INTERRACIAL JUSTICE, *supra* note 39, at 100-01.

143. *Id.* at 101.

implant prevents him from forming the criminal mind and volitional will to act criminally against other blacks. Should they be free from state prosecution? The mindset doctrine works seamlessly with structural determinism, thus suggesting that ordinary people cannot likewise name their own reality without reifying dominant values. Accordingly, Yamamoto insists that in the material inquiry, the consortium must reassess group cultural traits and re-articulate racial identities and relationships.<sup>144</sup> This reassessment and re-articulation vet structural forces like misogyny that turn black men against their lovers.<sup>145</sup>

### 1. *Macro structuralism*

In light of my critique, macro structuralism and macro individual agency and practices share common functions. Each major set reveals the degree to which *white* structural oppression works against ordinary people. Race Critics appear to use these themes to unearth invisible, deeply encrusted forms of structural injustice.<sup>146</sup> These hidden forms permit whites to control ordinary people and men to dominate women.

By deconstructing elite white narratives, Race Critics must believe that a payoff exists. The payoff must be white guilt, consciousness raising, or the end of white oppression.<sup>147</sup> This exposé should make visible the invisible privilege that whites unjustifiably enjoy,<sup>148</sup> and with real, sober analysis,<sup>149</sup> elite whites will suffer regime changing remorse. Feeling badly, they will condemn themselves as evil, greedy people. With heavy hearts and grieving minds, they will become better people. If CRT's political game is white guilt and black innocence, Race Critics cannot now surgically destroy the mindsets of ordinary people, implying that it is a locus for co-creating their personal experiences of white racism. From CRT's structural

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144. Yamamoto, *supra* note 18, at 880.

145. *Id.*

146. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 41-42 (1990) ("The systemic character of oppression implies that an oppressed group need not have a correlate oppressing group. While structural oppression involves relations among groups, these relations do not always fit the paradigm of conscious and intentional oppression of one group by another."). By implication, Young argues that people have agency, unbeknownst to them, and the power to reproduce oppression in their lives as well as in others. *Id.* These people could be black, Latinos, American Indians, Asians, poor, gay, lesbian, or women. *Id.* at 42.

147. See Roy Brooks, *Critical Race Theory: A Proposal Structure and Application of Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 91 (1994), reprinted in DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 2, 7 (2003) ("CRT also seeks to raise the consciousness of people of color and whites alike.").

148. See generally Barbara J. Flagg, "Was Blind But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961 (1993) (arguing that the idea race consciousness should address "whites consciousness of whiteness" instead of the principle of colorblindness).

149. See Brooks, *supra* note 147, at 95 (stating that CRT attempts to raise consciousness "by grounding its analysis on the real, everyday experiences of people of color").

determinism perspective, ordinary people are simple, empty-headed sheep. Like other liberal subjects, ordinary people, having consumed ideas about limited autonomy, not only serve themselves up as meat for their keepers, but also fall easy prey to systemic predators. To this extent, Race Critics are academic priests who hope to redeem, not ordinary people who cannot control the next moments in their lives, but white elites who have structure-shaping agency. CRT's religious movement discounts ordinary people, seeking not to empower them, but to destroy white narratives, so that ordinary people like blacks can become the unabashedly raced people their parents train them to be!<sup>150</sup>

Specifically, macro structuralism focuses on white structural oppression and how dominant narratives impact ordinary people. Let's consider public education. Blacks have struggled to educate their children and to break down artificial barriers to formal education.<sup>151</sup> Yet, during slavery and Jim Crow, blacks were educated, and they excelled academically. Do slavery and Jim Crow politics explain how ordinary people like blacks perform academically? If so, Race Critics must identify the specific historic markers that prevent ordinary people from academic excellence. If not, Race Critics must identify multiple factors, including parental role models, that perforce impact school-age children.<sup>152</sup> As such, structural forces alone cannot explain why blacks do not excel academically. By examining other factors, Race Critics would have to consider cultural practices, core beliefs, and emotions, including the power of thought.<sup>153</sup> This approach subjects ordinary people to attack, perhaps condemnation. Yet, if Race Critics give ordinary people like blacks a pass, thus suggesting that their core beliefs cannot govern academic performance, then they must blame structural forces. They must look to "out there" forces—the power elite and white oppressors.

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150. See ROBERTS, *supra* note 45, at 57 (stating that the reality in which children believe is that which their parents understand).

151. See *generally* Roberts v. City of Boston, 59 Mass. (1 Cush.) 198, 198-201 (1850) (describing how a black child, who was denied entrance into a public school for white children, sued to recover damages against the city).

152. See JAMES A. BEANE & RICHARD P. LIPKA, SELF-CONCEPT, SELF-ESTEEM, AND THE CURRICULUM 18 (1984) ("Educators who work with young children are well aware that when children first come to school they already have feelings and beliefs about themselves in terms of adequacy and competency. . . . In other words, from the very first experiences in life, young children begin to develop a sense of themselves.").

153. Blacks share core beliefs that may prove detrimental to the progressive success of their communities. See Julian Bond, 'Blackness' Is a Phony Issue, WASH. POST, Sept. 1, 2002, at B7 (discussing the "black enough" belief and stating, "The degree of their 'blackness' isn't measurable—or relevant. There are no DNA tests for that.").

In this way, structural determinism is a proxy for mindsets.<sup>154</sup> It shapes and contours everything, displacing agency so that ordinary people serve ends beyond their known intentions. To bracket this liberal project, Race Critics convince themselves that they can discern the way language, culture, and practices operate against ordinary people and the public interest. Invariably, Race Critics start with slavery and Jim Crow politics. Proceeding linearly to the present, they question whether extant laws can cope with a history of racial discrimination. Logic thus mandates that slavery and Jim Crow must explain why ordinary people like blacks simply cannot keep up. Within the present effects of past discrimination, ordinary people and how they co-create are cast aside so that Race Critics can simply and gratuitously blame structural forces.

In addition to his indictment of structural forces, Charles Lawrence posited correctly that racism affects all of us,<sup>155</sup> and in the context of his argument about unconscious racism and cultural meaning, he asked us and the courts to focus not on intent but on effects.<sup>156</sup> In a complex way, Lawrence found a compelling argument so that we could broadly understand how racism worked in Freudian and cognitive ways.<sup>157</sup> Whether whites liked it or wished to acknowledge their racial prejudice,<sup>158</sup> society experienced their repressed or unconscious racial ruinings as effects that, if all else failed, we could explain through a cultural meanings test.<sup>159</sup> Should Lawrence's insights apply to ordinary people like blacks? Like whites, ordinary people have consumed self-annihilating discourse, and at deep, unacknowledged levels, this discourse like any effective mindset produced effects in black life. Even in the absence of whites, blacks would fulfill latent prophecies. Are blacks different from whites? Human beings can hold powerful narratives that undermine their efficacy at junctures where they may feel especially vulnerable. By lifting Lawrence's insight beyond a straight-forward structuralist critique of white racism, Race Critics can examine ordinary people as well as structural forces.

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154. See Heller, *supra* note 46, at 142 (stating that "structuralism in general consistently involves the reduction of apparently multiple and independent practices —the analogues of words—to elements within an ordered system").

155. See Lawrence, *supra* note 13, at 322 (suggesting that our cultural belief system makes us all racists and that we do not recognize when that system manifests itself in our actions).

156. *Id.* at 323.

157. See *id.* at 322-23 (explaining that Freudian theory provides that the human mind suppresses those ideas that conflict with what the individual has learned is right to protect itself from feeling guilty and defining the theory of cognitive psychology as one in which certain beliefs "are so much a part of the culture" that "they seem to be part of the individual's rational ordering of her perceptions of the world").

158. See *id.* at 323 (asserting that, based on Freudian theory, people often suppress racism from their consciousness when confronted with racist ideas that conflict with societal beliefs condemning those racist ideas).

159. *Id.*

In this way, CRT's macro structuralism rejects any meaningful link between white structural oppression and ordinary peoples' core beliefs. Only through positing that liberal consciousness and white racism construct interracial conflicts can macro structuralism account for the Neighborhood Committee for Justice's crusade against the Nguyens,<sup>160</sup> and the *Ho* litigation which tried to grant Asian students greater access to the San Francisco Unified School District.<sup>161</sup> Race Critics can eradicate these conflicts by getting ordinary people to appreciate the power of American Indian value-based narratives and to reassess and rearticulate an identity that allows ordinary people to peel the fog-inducing substances from their liberal brains. By implication, Race Critics, like Williams and Yamamoto, tell us that mindsets negate a subject who can name a reality that embraces values and that ends interracial conflicts. By identifying structural forces, by destroying mindsets, and by permitting ordinary people to name their reality, they can project the legitimacy of their core beliefs out into the world. These core beliefs are values on which ordinary people would otherwise have relied, in the absence of white racism. Expose white racism for what it does to ordinary people. Thereafter, they can restore value-teaching narratives of American Indians to their rightful place, and they will have an antidote to interracial conflicts.

## 2. *Macro individual agency and social practices*

Like macro structuralism, macro individual agency and social practices suffer the same conceptual limitations. Delgado argued that the "entire structure of legal thought . . . influences [the law's] content."<sup>162</sup> In this vein, Peter Irons writes that "[w]ith Congress, the White House, and the Supreme Court under the firm corporate control, groups like blacks, workers, and women had little voice in government."<sup>163</sup> In 1895, a New York banker toasted powerful white agents, who used their institutional positions to dictate the content of law: "I give you, gentlemen, the Supreme Court of the United States—guardian of the dollar, defender of private property, enemy of spoliation, sheet anchor of the Republic."<sup>164</sup>

160. INTERRACIAL JUSTICE, *supra* note 39, at 1-6.

161. Yamamoto, *supra* note 18, at 821-27.

162. CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 120, at 213; see Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2008 (1990) (observing that the design of the Supreme Court impedes minority efforts to promote social change).

163. PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 221 (1999).

164. *Id.* at 221-22.

Yet, what about *Buchanan v. Warley*,<sup>165</sup> *Shelley v. Kramer*,<sup>166</sup> and *Barrows v. Jackson*?<sup>167</sup> Were they just evidence of Bell's interest convergence thesis?<sup>168</sup> In these cases, the state protected white interest, and incidentally conferred a benefit on ordinary people.<sup>169</sup> Therefore, apart from these rulings, ordinary people like blacks simply remain victims and lack any real power to alter white structural oppression. As such, these rulings fail to create structural spaces in which ordinary people can begin to assert their agency. Rather, these rulings promote new social practices, altering only slightly the ways structural forces actually work.

### C. Mindset Doctrine

In CRT, Race Critics rely heavily on the mindset doctrine to analyze and deconstruct how liberal legalism, like Equal Protection, and structural determinants, like rights, affect ordinary people. Mindset is a "bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."<sup>170</sup> For Race Critics, these stories, parables, narratives, and practices form a shared reality to make white elite rule natural and normal.<sup>171</sup> A mindset prevents ordinary people from subverting elite realities, and so it becomes natural and normal for the lazy, undeserving poor to live at the bottom. With a shared reality, mindsets "build consensus, a common culture of shared understandings, and a deeper, more vital ethics."<sup>172</sup> In short, elite whites exist naturally on top, ordinary people at the bottom.<sup>173</sup>

165. 245 U.S. 60 (1917) (finding unconstitutional a city ordinance that forbade colored persons from purchasing houses in blocks where the greater number of the houses were occupied by white persons).

166. 334 U.S. 1 (1948) (holding that private agreements to exclude persons of designated race or color from the ownership or occupancy of residential property did not violate the Fourteenth Amendment when enforced privately while agreements involving state action did violate the Fourteenth Amendment).

167. 346 U.S. 249 (1953) (deciding that a state court's action of sanctioning a racially restrictive covenant is a state action that violates the Fourteenth Amendment).

168. See Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 519 (1980) (advancing that the interests of blacks and whites converged when *Brown v. Board of Education* was decided, and thus, allowed the decision for desegregation).

169. See *Buchanan*, 245 U.S. at 81 (denouncing a city ordinance that annulled the right of a white man to dispose of his property to a person of color and incidentally protecting the right of a person of color to purchase or sell property to a white person).

170. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, in CRITICAL RACE THEORY: THE CUTTING EDGE 64, 61 (Richard Delgado & Jean Stefancic eds., 2000).

171. See *id.* at 60 (discussing how both the dominant group and the outgroups (ordinary people) create stories). The outgroup writes stories whose goal is to challenge the white elite status, while the dominant group writes stories that justify its superiority. *Id.*

172. See *id.* at 61 (noting that stories can also reveal that certain beliefs are "ridiculous, self-serving, or cruel").

173. *Id.*

Within CRT, mindsets operate nearly invisibly, becoming sunglasses that ordinary people habitually wear.<sup>174</sup> Day or night, they allow these shades to soften the practices on which they focus. They simply forget that mindsets are there, each using the other. Everyone consumes this deadly, mind-numbing experience.<sup>175</sup> With this very staid, structuralist view, Race Critics know that mindsets like white structural oppression can influence how and why ordinary people, like Latinos and Asian Americans, have experienced America as they have.<sup>176</sup>

Now, I will proffer an unorthodox view. Ordinary people use mindsets to “scan” and “interpret” their realities. Race Critics like Delgado, Williams, and Yamamoto do not critique what “scan” and “interpret” mean. “Scan” and “interpret” are active, co-creative tasks that construct experiences and realities. As such, ordinary people like blacks are not simple, empty-headed pawns, or playthings for a structuralist agenda. If so, Race Critics quietly confess that ordinary people, like Latinos, construct reality just as whites do.<sup>177</sup> Elite whites and ordinary people construct experiences and realities, suggesting that by scanning and interpreting, we co-create the structural forces called racism. By avoiding a critique of how ordinary people co-create their toxic experiences and realities, Race Critics have encouraged them to look only at white “habitus.”<sup>178</sup> This traditional approach indicates that the innocent do not participate in extant racism, and suggests that they need not examine the way their scanning and interpreting co-create conceptual limits that already pre-existed within their core beliefs.

Despite its conceptual limits, Williams and Yamamoto subscribe to the mindset doctrine. They know that narrative discourse matters. Williams

174. *See id.* at 62 (providing that habitual patterns of perception allow people to believe that the way things are is unavoidable and that there will never be a perfect world).

175. *See id.* at 61 (maintaining that ideology, which is rarely examined, allows people to believe that the current social climate is reasonable and natural, therefore allowing the elite to believe that they are not oppressing anyone).

176. *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 *ASIAN L.J.* 1, 1 (1994) (emphasizing the need for Asian American legal scholarship to address the unique form of racism and oppression that Asian Americans face); Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in *CROSSROADS, DIRECTION, AND NEW CRITICAL RACE THEORY* 187, 187-98 (Francisco Valdes et al. eds., 2002) (describing how immigration law and policy in the United States is a source of racial subordination); FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002) (evaluating the alienation that Asian Americans face in America and discussing problems of racial diversity from an Asian American perspective).

177. *See* Delgado, *supra* note 170, at 61-62 (maintaining that most of social reality is constructed and therefore, people decide what “is, and, almost simultaneously, what ought to be”).

178. *See* RICHARD JENKINS, PIERRE BOURDIEU (1992) (defining “habitus” as the manner and style in which people carry themselves and also as the idea that the thoughtlessness of habit, rather than learned rules, produces certain “socially competent performances”).

knows that law students must learn to hear American Indian stories, precisely because United States history, Washington legislators, and Bureau of American Indian Affairs agents have devalued their stories. In order to justify decimating American Indians, destroying their cultural practices, and confiscating their hunting grounds, white elites produced and disseminated dominant narrative.<sup>179</sup> Through orchestrated efforts, ordinary people largely consumed this savage image, thus making it easy for most of them to discount the power of American Indians' traditional narratives.

Yamamoto knows that we cannot redress interracial conflicts if we do not assess, reassess, and rearticulate who we are, what we want, and why we want it. This process requires contending groups to hear each other's stories or counterstories.<sup>180</sup> By telling stories and counterstories, ordinary people can begin to take personal responsibility for how they perceive themselves and others. They can reassess who they would like to be.<sup>181</sup>

Despite this aspiration, ordinary people (e.g., the liberal subject) lack the autonomy and agency to assess, reassess, and rearticulate as Yamamoto requires. Further, they are unable to learn new values through American Indian storytelling that Williams seeks. For the unreconstructed structuralist, ordinary people cannot have human agency, and to the extent that they engage in assessing, reassessing, and rearticulating, they simply manipulate language and symbols through the lens of false consciousness that led them to believe that liberty and freedom are ever possible. It is also the false consciousness that underwrote the *Ho* litigation and the interracial conflict between the blacks and the Nguyen family. Within structuralist terms, white racism steers ordinary people into a zone where conflict may arise, especially if they view the world through their false consciousness. If so, Yamamoto requires the consortium to examine structural factors. He writes:

Social scientists observe that interminority relations in the United States have 'undergone a dramatic shift since the mid-1980s. They have

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179. See *Johnson v. McIntosh*, 21 U.S. 543, 562 (1823) (describing American Indians as a savage, war-making people in holding that American Indians were not able to convey land to another because they did not own property in the traditional sense of the word); see also *Tee-Hit-Ton v. Washington*, 348 U.S. 272, 322-23 (1955) (finding that the United States government did not owe an American Indian tribe just compensation under the Fifth Amendment for the taking of land in which the tribe had original American Indian title because Congress never intended to grant the tribe any permanent rights to the land).

180. See, e.g., Yamamoto, *supra* note 18, at 880 (remarking that to change the material conditions of racial oppression, change needs to be representational and those involved need to examine their own cultural traits, identities, and relationships).

181. See THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* 64 (Univ. of Chicago 1972) (1962) ("Initially, only the anticipated and usual are experienced . . . . Further acquaintance, however, does result in awareness of something wrong . . . . That awareness of anomaly opens a period in which conceptual categories are adjusted until the initial anomalous has become the anticipated.").



become more tense, more provoking, and more confusing.’ That shift, they observe, is tied to shrinking economic pie, continuing Asian and Latina/o immigration, worsening inner-city living conditions, differential minority group power, neoconservative political backlash, and expanded media attention. Small face-to-face conflicts become full-blown intergroup controversies—‘more provoking, and more confusing.’ The intensifying interracial conflicts . . . along with expanding coalitional efforts, mark the late 1990’s racial landscape.<sup>182</sup>

Within these antisubordination practices, structural forces dominate, prevailing over ordinary people.<sup>183</sup> By Williams and Yamamoto applying the mindset doctrine uncritically, they suggest that ordinary people cannot engage in this assessment and reassessment.<sup>184</sup> As the founders had conceived, they use the mindset doctrine to rebuke elite whites’ use of white structural oppression. Yet even if they do not think alike, ordinary people have a “common culture of shared understandings” within their various communities. In the mid to late 1800s in California, Asians had human agency. In the early 1900s, elite whites attempted to subvert this agency through laws like the Alien Land Act. After the California legislature enacted this clearly racist law, Asians found creative ways to hold real property. Although living in hostile climates, Asians forged ahead to the dismay of many whites.<sup>185</sup> During slavery, blacks used money to buy their freedom. They worked within the slavery system, reinforcing it indirectly, so that they could be “free.” The irony notwithstanding, blacks had human agency. An antisubordination practice that negates the subject and her agency cannot help ordinary people. Williams and Yamamoto keep ordinary people in the blame game, encouraging them to become self-reflective only so that they can identify the structural forces that affect their lives. Unintentionally, ordinary people become not personally responsible but more efficient at proclaiming their innocence and their victim status, and in so doing, they only marginally inspect their mindsets (or core beliefs). By proclaiming their innocence, ordinary people never know that they, too, co-create racism.

182. INTERRACIAL JUSTICE, *supra* note 39, at 83.

183. Berta Esperanza Hernandez-Truyol, *Las Olvidadas—Gendered in Justice/Gendered Injustice: Latinas, Fronteras and the Law*, 1 J. GENDER RACE & JUST. 353, 361 (1998) (contending that structural forces also operate to create inequality between men and women, allowing men to act as decision-makers in matters that affect women).

184. As of November 4, 2002, when I conducted a Westlaw search using Boolean terms like “mindset” and “dominant narratives,” I found more than 300 articles, essays, comments, or notes that cited to the mindset doctrine as it is related to dominant narratives.

185. See generally RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 203-08 (1989) (illustrating how Japanese farmers were able to overcome oppressive laws by owning and leasing land under the names of their American-born children and by operating farms as corporations).

In relying on the mindset doctrine, Race Critics like Williams and Yamamoto have little interest in core beliefs, except if they belong to white elites and a system called white structural oppression. Further, while it is clear that Race Critics like Richard Delgado have influenced a new generation of left scholars, none of them has unpacked the disturbing implications for ordinary people. Even under a so-called radical theory like CRT, ordinary people can vitiate personal responsibility, proclaim their innocence, and blame the structural forces that lie solely in white elite hands. In effect, CRT keeps ordinary people like blacks in a victim's conscience. I apply this point with equal vigor in the following section.

*D. "Naming Our Own Reality"*

The mindset doctrine works closely, if not intimately, with other related themes like "naming our own reality." As with mindsets, these themes violently engage traditional legal scholarship (or legal narratives).<sup>186</sup>

What then does "naming our own reality" mean if ordinary people like Asians, American Indians, and blacks do not know that they have adopted common social practices that operate to support the status quo? Notwithstanding extant social practices, Homer Adolphus Plessy and Rosa Parks had human agency. They also helped to shape history. Along with the railroad company, Plessy willingly created a test case for Louisiana Courts and for the United States Supreme Court.<sup>187</sup> Rosa Parks refused the bus driver's order to surrender her seat. Parks stated: "I was quite tired after spending a full day working. I handle and work on clothing that white people wear. . . . It just happened that the driver made a demand and I just didn't feel like obeying his demand. He called the policeman and I was arrested and placed in jail. . . ."<sup>188</sup> Parks' arrest sparked the Montgomery Bus Boycott, all of which brought the Reverend Martin Luther King, Jr., to national prominence.<sup>189</sup> As such, ordinary people like blacks can name their own reality by saying simply: "I refuse." Does this simple, powerful phrase supplant white structural oppression? If so, does it suggest that an ordinary person's self can never be truly negated? If not, how do Race Critics explain Parks' refusal? From whence did it emanate?

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186. See Daniel Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 827 (1993) (concluding that CRT storytelling has benefits for those at the bottom and that it is a legal scholarship which should be explored further). But see Reginald Leamon Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 102-25 (1996) (criticizing the legal analysis of Farber and Sherry).

187. IRONS, *supra* note 163, at 222.

188. See *id.* at 222-23 (describing how Parks' arrest led to the eventual desegregation of buses in Montgomery, Alabama).

189. *Id.* at 223.

“I refuse” complicates the idea that structural forces can completely negate a subject, a way of naming their own reality. Thus, “I refuse” becomes Sartre’s ever-present consciousness. Giving negation a positive place, Pierre Schlag writes that “negation for Sartre is like a worm, a corroding, corrupting, destructive, continuous presence.”<sup>190</sup> Yet, naming our own reality appears to conflict with the mindset doctrine, in which dominant narratives support exploitative social arrangements, making them normal, natural, and inevitable.<sup>191</sup> Nevertheless, Race Crits believe that despite these powerful narratives, ordinary people can subvert white racism and liberal consciousness.<sup>192</sup> This naming allows ordinary people to reclaim an agency little different from Rosa Parks when she said, “I refuse.” For Sartre, this destructive naming would be a consciousness that structural forces could never negate. For Race Crits, what is this source?

Delgado vacillates between blacks, the poor, and women as victims and as powerful reality creators. He argues that “we decide what [reality] is, and, almost simultaneously, what ought to be.”<sup>193</sup> And then, within the same breath, Delgado marks blacks as victims of *white* structural oppression. “Narrative habits, patterns of seeing, shape what we see and that to which we aspire. These patterns of perception become habitual, tempting us to believe that the way things are is inevitable, or the best that can be in an imperfect world. Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible.”<sup>194</sup> And so, society declares war on the black mind. “They contend for, tug at, our minds.”<sup>195</sup> Does society tug at our minds because it recognizes, as I have already argued, that inner narratives have “reality-creating potential”?<sup>196</sup>

By vilifying the Nguyen family, by engaging in economic terror, and by disrupting the mediation process, blacks were reality creators, and they allowed the Neighborhood Committee for Justice to push a family out of its hard-earned business. And in so doing, blacks asserted an agency, using racial identity as a sword and race consciousness as a bludgeon. Rather than find common ground with a Vietnamese community relatively new to

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190. Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1219 (1989).

191. See Delgado, *supra* note 120, at 60 (noting that the dominant group’s narratives affirm its superior status, putting the blame for inequality not on itself but on cultural lag or lack of adequate enforcement of laws that would help the minority groups).

192. See *id.* at 61 (illustrating that through storytelling or counterstories, ordinary people can overcome the dominant group’s narratives because storytelling provides community building functions, allowing ordinary people to find a way out of the realm of exclusion and to reallocate power).

193. *Id.* at 61-62.

194. *Id.* at 62.

195. *Id.*

196. See *id.* (expressing that stories have the potential to show reality when they do not entail a full assault on one group).

New Orleans, blacks acquired justice at the expense of a family, little different from them, that was seeking a place in a community. Where is the borderland that justifies blacks foisting their already possessed power onto those with less power? Of course, we can complicate this equation by talking comfortably about oppressive intersectionality. Yet, in truth, blacks like other people must choose to be victims, just as they chose to victimize the Nguyen family. Blacks must choose to act irresponsibly, to act without appreciating cause, effect, and consequences.<sup>197</sup> By filing a lawsuit, the Nguyens sought a voice, one that would bring all interested parties to the table, a dialogue in which blacks could perhaps see the Nguyen family as just like them. Unfortunately, Race Critics like Delgado, Williams, and Yamamoto refuse to see all people as empowered agents who have learned first at home to grow weary of successive failure—the only road to dream catching. Given the history of the civil rights movement and the sorry case of the Nguyen conflict, blacks have been powerful reality creators who, for countless reasons, many of them historically situated, have learned to group think by internalizing a racial identity and by imposing a race consciousness on their experiences.<sup>198</sup> And through this internalization, blacks have purposefully consumed a structured way of seeing themselves, a disempowering way of co-creating their personal experiences.

Can I conclude that Race Critics have abandoned subject positionality, counterstories, and “naming our own reality” as CRT’s central features?<sup>199</sup> If so, can I conclude that only white agents like justices, corporate leaders, and purveyors of cultural hegemony can manufacture and manipulate social reality? That is, whites possess the power of cause and effect.<sup>200</sup> For blacks, women, and the poor, social reality remains an out-there, objective, and external experience over which they have no personal power.<sup>201</sup> What

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197. See DAVID R. HAWKINS, *POWER VS. FORCE: THE HIDDEN DETERMINANTS OF HUMAN BEHAVIOR* 55-56 (1995). According to Hawkins,

As perception itself evolves with one’s level of consciousness, it becomes apparent that what the world calls the domain of causes is in fact the domain of effects. By taking responsibility for the consequences of his own perceptions, the observer can transcend the role of victim to an understanding that ‘nothing out there has power over you.’

*Id.*

198. See generally ROBERT H. BRISBANE, *BLACK ACTIVISM: RACIAL REVOLUTION IN THE UNITED STATES 1954-1970* (1974) (discussing the rise of black activism following the *Brown* decision by analyzing groups such as the NAACP, the Urban League, the SNCC, and the Black Panthers).

199. See Delgado & Stefancic, *supra* note 61, at 1287 (explaining that minority narratives are given very little credibility because minorities are associated with such stereotypes as lazy, watermelon eaters, below average, and intellectually inadequate).

200. See ROBERT H. HOPCKE, *THERE ARE NO ACCIDENTS: SYNCHRONICITY AND THE STORIES OF OUR LIVES* 27 (1997) (suggesting that cause and effect thinking results in an illusion of power and control over reality).

201. See Reginald Leamon Robinson, *Race Consciousness: Can Thick, Legal Contextual Analysis Assist Poor, Low-Status Workers Overcome Discriminatory Hurdles in*

then becomes of “naming our own reality”? Given my model, this “naming” power must be a vital element of macro individual agency and social practices. By embracing structural determinism and by asserting that blacks cannot subvert *white* structural oppression, Race Critics have effectively reinscribed blacks as victims. That is, *white* structural oppression victimizes blacks, browns, yellows, and reds, and in response, they can do nothing—no words, no telling, no pointing, no hollering! Nothing! Delgado and Stefancic write:

Racism is not a mistake, not a matter of episodic, irrational behavior carried out by vicious-willed individuals, not a throwback to a long-gone era. It is ritual assertion of supremacy, like animals sneering and posturing to maintain their places in the hierarchy of the colony. It is performed largely unconsciously, just as the animals’ behavior is. Racism seems right, customary, and inoffensive to those engaged in it, while bringing psychic and pecuniary advantages. The notion that more speech, more talking, more preaching, and more lecturing can counter this system of oppression is appealing, lofty, romantic—and wrong.<sup>202</sup>

Why then should law students listen to wisdom-based stories when they prepare to assist American Indians? Why should legal scholars ever care if they translate their critical socio-legal analysis into useful tools against subordination practices? Why should progressive race theorists, political lawyers, and community activists reassess and rebuild their antiracism tools in preparation for the next context out of which interracial group conflict might arise? Why spend any time reassessing cultural traits and rearticulating racial identities if voices, however shrill, mean nothing?

Yet, thoughts *do* matter. In fact, thoughts *cause* matter.<sup>203</sup> If hegemonic stories have so fixed the mind of whites, then they have equally poisoned black minds.<sup>204</sup> If so, then whites and blacks have become powerful reality creators in the social dynamics that we call *racism*.

As such, Williams and Yamamoto must critique not only the structural features of racism, but also mind constructs that whites, blacks, browns, yellows, and reds use to co-create racism. In this sense, blacks and whites have been “naming [their] own reality” since they first encountered each

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*the Fast Food Industry? A Reply to Regina Austin*, 34 J. MARSHALL L. REV. 245, 274-75 (2000) (discussing how the use of fast-food worker ethnographies only reinforces cause and effect thinking and does not adequately challenge the central assumptions of CRT).

202. Delgado & Stefancic, *supra* note 61, at 1288.

203. See FRITJOF CAPRA, *THE TAO OF PHYSICS: AN EXPLORATION OF THE PARALLELS BETWEEN MODERN PHYSICS AND EASTERN MYSTICISM* 141 (3d ed., expanded 1991) (speculating that atomic physicists do not merely observe the world, but rather participate in creating the world “to the extent that [they] influence the properties of the observed objects”).

204. See Lawrence, *supra* note 13, at 326 (asserting that all people “unconsciously harbor” racist attitudes because of racism’s unavoidable influence upon society).

other and they have done so differently across various contexts and shifting time-space. If true, whites cannot victimize blacks. Certainly, whites have committed atrocities against blacks. But to be *victimized*, blacks must give their power away; they must volunteer, or acquiesce, in serving it up. Blacks can allow whites to steal their minds and, in so doing, adopt a racial identity, seeing the world through a race consciousness and blaming *white* structural racism for oppressing them. In this sense, words, stories, and naming do matter because *they cause matter*. Yet, by positing that the first cause of racial oppression must be *white* structural racism, Race Critics like Delgado, Stefancic, Williams, and Yamamoto dare not look at how blacks use race, racial identity, and race consciousness to co-create and participate in structural issues. By bracketing race, racial identity, and race consciousness (e.g., consciousness), critical race practice cannot liberate blacks because Race Critics like Williams and Yamamoto ignore the role that blacks play in co-creating *white* structural oppression.

### III. BEYOND THE NEGATED SUBJECTIVITY OF CRITICAL RACE PRACTICE/PRAxis: A PRIOR CONSCIOUSNESS CONCEPTION OF HUMAN AGENCY

#### A. Overview

I have attempted to demonstrate in my prior works<sup>205</sup> that Race Critics cannot use CRT to end racism and promote liberation. As a methodological framework, CRT fails as antiracism practice because Race Critics presume that white racism and white structural oppression happen to ordinary people. To this extent, white racism victimizes ordinary people and white structural oppression robs them of basic liberties and freedoms. Accordingly, for this practice to succeed, Race Critics must not only show ordinary people how the system works against them but also must convince elites to do better by ordinary people. In the end, white racism and white structural oppression must be external, objective social realities over which ordinary people have no real control.

By embracing a structuralist approach to antiracism practice, Race Critics posit that the social reality of white racism happens to ordinary people, negating their subjectivity, and constructing them so that they

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205. See generally Reginald Leamon Robinson, "Expert" Knowledge: *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145, 145 (2000) (arguing that racial oppression may come equally from blacks in their "expert" knowledge, as from whites and white racial oppression); Reginald Leamon Robinson, *Race Consciousness: A Mere Means of Preventing Escapes from the Control of Her White Master? An Allegoric Essay*, 15 TOURO L. REV. 401, 406, 436-37 (1999) (debating the utility of race consciousness as an antiracism practice); Robinson, *supra* note 26, at 231 (denouncing race consciousness as the continued center of racism and white supremacy).

cannot be heard and so that they engage in interracial conflicts. Under this approach, American Indians cannot benefit from the power of their narratives until whites hear and abide by them. Asians and blacks engage in interracial conflict because they have consumed stereotypical narratives about each other and believing these narratives they are pushed into conflict by society. Do these ordinary people have subjectivity? For Race Critics, ordinary people have no subjectivity. Thus, they have no agency. Structural racism oppresses and victimizes them, but they are innocent. As such, ordinary people can act irresponsibly until whites appreciate them and confess wrongdoing or until the consortium empowers them so that they gradually weaken and permanently end structural forces. Read differently, Race Critics believe that ordinary people are liberal subjects who cannot truly be autonomous agents of their co-creative powers to embrace ideas that rob them of liberation, including racial identity and race consciousness. Why then would American Indian narratives matter if they cannot act on the implicit power within their own stories? Why bother assessing, reassessing, and rearticulating if Race Critics leave ordinary people as raced subjects, a false liberal construct? Race Critics do not address these issues, preferring to place the locus of white structural oppression outside of ordinary people.

Unfortunately, Race Critics cannot imagine that ordinary people use their beliefs, thoughts, emotions, and imagination to co-create personal experiences and social realities. Co-creation rests on four indispensable elements: beliefs, thoughts, emotions, and imaginations.<sup>206</sup> If we add intensity to the emotional element,<sup>207</sup> then social events happen relatively quickly and permanently.<sup>208</sup> And so core beliefs, deep thoughts, strong emotions, and powerful imaginations project love, joy, and fear into an “external” world.<sup>209</sup> Consider race and racism. Historically, ordinary people have individually or collectively shared strong feelings about this topic. We co-created slavery, and we ended it. Today, we have equally strong feelings. Here are some examples: First, race is socially real and politically meaningful. Second, white racism is a permanent feature of

206. See Reginald Leamon Robinson, *Poverty, 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, 1380-81 (2001) (book review) (explaining how thinking, talking, and acting inform a person’s consciousness and how this consciousness, in turn, confirms a person’s conception of the nature of social reality).

207. See ROBERTS, *supra* note 45, at 74 (asserting that beliefs motivate a person’s “emotions and imagination” and that when a certain belief is no longer held, “emotions and imagination” attach themselves to other beliefs).

208. See ROBERTS, *supra* note 31, at 34 (proffering that people may feel connections with others arising out of shared social events that have affected their consciousness at some level).

209. See *id.* at 58 (stating that a person’s central beliefs influence his or her conception of reality because similar beliefs are concentrated around them).

American life. Third, blacks are plagued by daily discrimination. Fourth, as an external, objective reality, white structural oppression is a victimizer of ordinary people. Society mirrors these core beliefs. Thus, external, objective reality cannot exist without ordinary people. In effect, social reality is ordinary people.<sup>210</sup>

*B. Negated Subjectivity: The Central Problem of Practice and Praxis*

Practice and Praxis negate the self as subject. By pushing the subject under, Williams and Yamamoto cannot use these antisubordination practices to engage in “fundamental criticism.”<sup>211</sup> By negating the self as subject, they assume that structural forces are the determining text over which ordinary people have no authority. Accordingly, ordinary people do not read this text, for reading requires decoding, which in turn confesses encoding. Encoding translates text, making it conform to pre-existing understandings.<sup>212</sup> In this sense, encoding is co-creation. The determining text tells ordinary people who they are, what events mean, where they can live, how they can engage the enemy, and what they can imagine. When structural forces act like determining text, they become the “seat of meaning.”<sup>213</sup> This text eclipses an ordinary person’s self, “leaving [her] at best an empty vehicle for the reiteration of the meanings generated by interpretative communities.”<sup>214</sup> By effectively annihilating the self as subject, Williams and Yamamoto relieve ordinary people of personal responsibility and co-creative power.

Yet, Williams and Yamamoto suggest that this determining text leaves space in which ordinary people can engage in meaningful antisubordination practice. If left scholars teach students how to listen, they can find fair, moral solutions to oppression buried within American Indian narratives. By listening to these solutions, law students validate American Indians who

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210. See *id.* at 78 (arguing that people have the power to change reality by focusing on positive beliefs to the exclusion of negative beliefs; for example, by focusing on “health, vigor, and abundance” instead of “poverty, illness, or lack”).

211. See John C. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2136 (1992) (defining “fundamental criticism” as criticism that “overview[s] the communities-of-assumptions and challenges them when they become detached from reality”).

212. See Schlag, *supra* note 26, at 37. Literary critic Morris Zapp stated, “To understand a message is to decode it. Language is a code. *But every decoding is another encoding.* If you say something to me I check that I have understood your message by saying it back to you in my own words, that is, different words from the ones you used, for if I repeat your own words exactly you will doubt whether I have really understood you. But if I use *my* words it follows that I have changed *your* meaning, however slightly . . . .”

*Id.*

213. *Id.* at 42.

214. *Id.* at 43.



have been marginalized by structural forces and who cannot use these stories as powerful, positive co-creative forces in their own communities. By applying these solutions, law students can reach fair results, illustrating that disenfranchised people have been wrongly deprived of their rightful place in society. Likewise, if the consortium can assess, reassess, and rearticulate ways of experiencing structural forces, then racial groups can purge themselves of false consciousness, end interracial conflicts, and form coalitions out of which each group promotes racial justice. To the extent that the negated self has been treated as a dumping group for oppressive seats of meaning, then Practice and Praxis wipe out false consciousness. Without the totalizing influences of structural forces, ordinary people who have had their true consciousness negated can reclaim their selves as subjects and can eradicate subordinating practices like interracial conflicts.

If Practice and Praxis throw life jackets to negated subjects, then Williams and Yamamoto imagine that ordinary people know that something is wrong. That is, ordinary people know that some irreducible “thing” exists within them, and they seek to reclaim it. Do they know that structural forces cannot truly determine how they must live (e.g., practice)?<sup>215</sup> Do they sense that the determining text never escapes interpretation because ordinary people read this text in a way that reinforces their extant customs? If so, Williams and Yamamoto do not let on. They also never tell us what false consciousness, or the determining text, has displaced. Is true consciousness the displaced, irreducible “thing” that monitors how ordinary people negotiate these structural forces through their daily practices?<sup>216</sup> What is true consciousness? Is it a language game? Does it have content? In any event, this irreducible “thing” must be a prior consciousness that prods the contingent, liberal self to practice as it pleases.<sup>217</sup> By suggesting that ordinary peoples’ negated selves can appreciate a reassessment and rearticulation, Williams and Yamamoto confess that ordinary people not only co-create what they experience to some real, discernible degree, but also that they purposefully engage in subordinating practices like interracial conflict.

Is it possible to privilege the self so that it can reclaim its prior non-liberal consciousness and so that it can function within a liberal society? Is the negated subject a false construct? The self becomes embattled at

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215. *Id.* at 44 (contending that structural forces cannot account for the broad range of human behavior because they are limited by their own “universal,” “systematic,” and “univocal” nature).

216. See R.D. LAING, *THE POLITICS OF EXPERIENCE* 6 (1967) (suggesting that all people have a “personal idiom,” or personal way of experiencing their body, others, and reality).

217. See TERRY PINKARD, *DEMOCRATIC LIBERALISM AND SOCIAL UNION* 6 (1987) (discussing how Kant’s true self engages in autonomous action by following the essential self and not the contingent self).

home.<sup>218</sup> Behind the doctrine of family privacy, the liberal state permits parents to transmit values to their children.<sup>219</sup> Parents thus make their children liberal subjects when they give them a race and when they pass along racialized lenses. Long before white racism becomes the determining text, parents nudge their children's true, non-race consciousness aside<sup>220</sup> so that they adopt the interpretive practices (e.g., actions) of authority figures.<sup>221</sup>

Can derogatory text displace an ordinary person's interpretive practice? In *Antwone Fisher*,<sup>222</sup> Antwone's foster parent called him nigger so much that he thought his name was nigger. He knew which nigger was meant for him and which was meant for his two foster brothers. *Antwone Fisher* told us that it was Antwone's foster parent's abuse, not white racism, that injured him.<sup>223</sup> Yet, Antwone hated whites and his deep, angry distrust surfaced whenever his peers ridiculed him. Antwone did not rely on empowering stories. Having a false self, he did not work well with others. Did structural forces abuse Antwone? Was his foster parent an agent of white structural oppression?<sup>224</sup> As a child, Antwone often ran away to his friend's house when he suffered abuse. Did he feel that these practices were wrong? Would Williams and Yamamoto fault "borderland" oppression? Is this form of oppression an interpretive practice? Is it a determining text on which structural forces rely to divide and conquer?

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218. See JERRY HICKS & ESTHER HICKS, *ABRAHAM SPEAKS: A NEW BEGINNING I—HANDBOOK FOR JOYOUS SURVIVAL* 42 (1996).

[At home], you are surrounded by beings who have already arrived at many conclusions. They have created within themselves many beliefs based upon the life experience that they have lived—or upon the stories that they have heard from those who surrounded them at the time that they were born.

*Id.*

219. See, e.g., *Moe v. Dinkins*, 533 F. Supp. 623, 629 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (finding "that the governmental power should supercede parental authority in all cases because some parents may act in other than the best interest of their children [and that] is 'repugnant to the American tradition'").

220. See Clarence Page, *Biracial Kids Face Burden of Two Worlds*, *HOUS. CHRON.*, Mar. 14, 1996, at 1D (denouncing blacks who instruct multiracial children to "identify strictly as black" because this "internalization of white supremacist attitudes" transmits and enforces these same attitudes in multiracial children more effectively than efforts by white supremacists).

221. See ROBERTS, *supra* note 31, at 67 (saying that individuals possess their own identity but that parents make efforts to ensure that their young children "relate in physical terms" to the world).

222. Fox Searchlight Pictures (2002).

223. See ROBERTS, *supra* note 31, at 67 (noting that "[t]hese [core beliefs] will reinforce the family group when the child most needs protection" and that "this sharing of mutual ideas not only protects the new offspring from dangers obvious to the parents; it also serves as a framework within which the child can grow").

224. See Williams, *Checks and Balances*, *supra* note 19, at 1022 (noting that a person's understanding of a specific situation can be impaired by his or her perceptions of larger, social discourses without realizing such an understanding may be based on prejudice or stereotypes).

Nevertheless, Antwone used his therapy to reclaim his lost self. He sought out his birth mother, only to engage in an unrequited speech. He found his foster parent, only to reject her warm welcome with a fiery speech about overcoming. Who spoke to his mother and his foster parent? Was it the monitoring, irreducible “thing” that knew he was not a nigger? Or was it still his contingent, liberal self who proclaimed the right to live as a proud, un-niggered black man?<sup>225</sup> In these antisubordination practices, Williams and Yamamoto never tell us who surfaces—whether it is true consciousness or a relatively unburdened liberal self.

Despite their antisubordination practices, ordinary people who are raced may be relatively unburdened liberal selves, but they still have negated subjectivities.<sup>226</sup> With guidance from the consortium, they can deconstruct structural forces, believing that they can now interpret the world as relatively autonomous subjects. Having jettisoned annihilating mindsets, they can name their own reality by reclaiming their racial heritage. They can now live as free black or Asian people. By reassessing and rearticulating (e.g., naming), ordinary people can heal and end interracial conflicts.<sup>227</sup> They can throw false consciousness away or lighten its burdensome weight, so that they can reclaim an identity, however interpreted, that ironically grew out of slavery. Do they realize that they co-created this false consciousness? Do they remember that they always had the power to alter their lives? Within liberalism, ordinary people can only be relatively autonomous selves, intuitively knowing that they can never escape a regulative practice. With relative autonomy, ordinary people now have choices. They can choose a positive black image or a self-annihilating one. Is this choice evidence of co-creation? Without accessing ordinary peoples’ co-creative powers, antisubordination practices cannot liberate them.<sup>228</sup> Ordinary people are negated subjects.<sup>229</sup>

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225. See Calmore, *supra* note 211, at 2145 (entertaining that such a contingent liberal self would have to “constantly question and challenge” every aspect of life, searching out “[w]hite speech, white schooling, white law, white work, white religion, white love, even white lies . . .”).

226. See Williams, *Checks and Balances*, *supra* note 19, at 1021.

The power in this system of privileges, its hidden and overt traces . . . distorts our very ways of seeing and knowing the world . . . . Our inability to understand how this complex system of oppression might operate in contexts less familiar than our own is radically subverted by our inability to escape totally its meaning in and for our lives.

*Id.*; see also *INTERACIAL JUSTICE*, *supra* note 39, at 109-14 (discussing positionality as an aspect of simultaneity).

227. See Schlag, *supra* note 26, at 47 (emphasizing that “the self realizes that it is always already operating within a context of interpretive practice that it has not chosen and cannot fully articulate”).

228. See ROBERTS, *supra* note 31, at 31 (contending that liberation is achieved when people realize that they form their own reality, take responsibility for their own being, and change areas of their life that are displeasing to them).

Unfortunately, CRT resonates with liberal constructs. In the West, classical liberalism grants ordinary people a safe haven, so that they can experience a constrained agency, one purporting to promote social goods and avoid social wrongs. As myth goes, ordinary people established by contract an external, objective thing called “the state.” They partitioned the liberal world into private and public spheres, so that through utilitarian rules, they could pursue selfish, private utilities, such as life, liberty, and property. The currency by which they would transact these utilities is rights. In a Rawlsian world, justice that requires equality of opportunity mediates rights.<sup>230</sup> In the modern world, ordinary people have more or less the same rights, unless race and white racism devalue their currency, giving them smaller margins or diminishing returns.<sup>231</sup> In this world, demanding the right to live as unfettered black citizens, ordinary people turn to the state. After all, they are not powerful reality creators. Social things are happening to them and so they experience themselves as having an agency undermined by larger, sociological events. For CRT, these experiences flow out of a state captured by white racists and informed by white structural oppression. Accordingly, Race Critics like Williams and Yamamoto have proffered antistatist practices that gradually return ordinary people to empowered citizens who can transact in rights currency in a larger, structural world that makes no qualitative distinction between citizens’ rights. Unfortunately, it is a world in which agency confronts structure. A world in which structure victimizes ordinary people, who by necessity become bearers of inferior currency—“minority rights.”

Within these antistatist practices, Williams and Yamamoto keep ordinary people in a liberal construct. Even if they use these practices to end white structural oppression, ordinary people seek racial justice. That is, ordinary people have a race, and it is real. Refusing to accept that race is without content, a never-been-there trope, ordinary people can only see themselves as raced liberal subjects, and as such they must eradicate the structural forces that negate this existence. Ordinary people have thus linked their negated self-image with an external, objective reality. Within

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229. See *id.* at 13 (repeating that people create their own reality through their beliefs about themselves and the nature of reality or, that people “create [their] experiences through [their] expectations”).

230. See JOHN RAWLS, A THEORY OF JUSTICE 65-70, 130-39 (rev. ed. 1999) (theorizing that under the difference principle, the wealthy cannot have high expectations unless they work to improve the situations of the poor members of society).

231. See Calmore, *supra* note 211, at 2142. Calmore states that:

[T]he so-called American dilemma—the increasing gap between the nation’s egalitarian ideals and its actual practices—is conveniently resolved by ‘white America’ by rejecting the terms of racist domination and oppression and referring instead to African American inability or disinclination to take advantage of the true equality of opportunities the nation offers.

*Id.*

CRT and these antisubordination practices, they experience themselves as simply vessels filled with white racism's determining text. Racial justice surgically removes this text from the minds of ordinary people. Without it, the deeply resonating, irreducible "thing" that has always been there cannot surface. With it, this "thing" can sing hosannas. It has been delivered. It need not prowl beneath racism's determining text. But what is this "thing"? In CRT terms, it is a raced consciousness. Without racial justice, ordinary people simply cannot "be" themselves. With it, they can walk the streets, experiencing real, raced citizenship, perhaps for the first time. They know that if whites utter the nigger invective, they will have substantive, legal recourse. Practice and Praxis liberate ordinary people so that they can live well as liberal, raced, and thus negated subjects.

As such, Williams and Yamamoto have not imagined these antisubordination practices placing ordinary people outside of a liberal framework. Within this framework, ordinary people become nothing more than rights-bearing subjects who pursue the ideal of classical liberalism. As rights-bearers, they must constantly monitor the state so that they can protect that which nature endowed to them: self-determination. To this extent, ordinary people perennially negotiate with the state (e.g., courts) so that stakeholders can mediate competing rights through an accommodation scheme that advances one set of rights without doing undue injury to another.<sup>232</sup> In this way, human agents must patrol the visible borders between rights and structural forces. If rights mean agency, these practices have not taken ordinary people beyond a "structure" versus "agency" dialectic. Seeking to empower American Indian cosmologies and to eradicate interracial conflicts, these practices proffer modest, liberal solutions that invite ordinary people to imagine themselves not as *earthly gods* on which social reality depends for its very existence, but as *entitled rights-bearers* upon whom structural forces have laid the determining text, thus denying them the power of their stories and keeping them arrayed against each other in interracial conflicts. In effect, these antisubordination practices reinforce the idea that structural forces victimize ordinary people.

### C. *Radical Departures: The Limits of Giddens' Duality of Structure and Agency*

Anthony Giddens' structuration theory radically departs from this traditional sociological approach to understanding and modeling social experiences.<sup>233</sup> Giddens focuses on human agency. By *agency*, he means

232. See, e.g., *Nat'l Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (maintaining that an employer's rights over property must be balanced against the employees' rights to self-organization).

233. See ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY*

“the stream of actual or contemplated causal interventions of corporeal beings in the ongoing process of events-in-the-world.”<sup>234</sup> Agency is intentional, purposeful action,<sup>235</sup> which is the “continuous flow of ‘lived-through experience.’” Agency’s “categorization into discrete sectors or ‘pieces’ depends upon a reflexive process of attention of the actor, or the regard of another.”<sup>236</sup> Structure is not “social structure.” Traditionally, social structure meant something that was outside and external to human action. Rather, existing only in and through human action, structure reveals “*form and shape* to social life.”<sup>237</sup> Human action thus becomes the giver of social life. To understand its form and shape, we should analyze human imaginations. As a feature of social life, structure has no describable qualities. Structure has only a virtual existence. For example, language has structure and form, but it is invisible. To the extent that language exists, it lives as a part of human activities.<sup>238</sup> In this way, structure flows from human memory. It takes form and shape when humans construct rules to govern their activities. Rules are not regulative norms that carry punishment. Rules are habitual practices that reproduce social practices.<sup>239</sup> Rules are not structural properties, and we cannot study structure by examining human rules.

Under a theory of structuration, human action gives social systems a not-there existence in time-space. This virtual existence emanates from human thought. Structure reveals not only aggregating action but also experiences on which ordinary people place value. Although he rejects radical subjectivism, Giddens blends minds, agency, and experience. It is the duality of structure and agency.<sup>240</sup> Within this theory, structure means *rules* and *resources* that exist over time-space by which society, through human action, reproduces itself. Within this theory, structure possesses two kinds of rules: normative elements and codes of signification.

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OF STRUCTURATION xx-xxi (1984) [hereinafter CONSTITUTION OF SOCIETY] (explaining a structuration theory that merges two opposing camps of modern sociological theory, the “subject” and the “social object,” into one theory, thus giving rise to his “duality of structure”).

234. ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS 55 (1979).

235. See Martin O’Brien, *The Sociology of Anthony Giddens: An Introduction*, in CONVERSATIONS WITH ANTHONY GIDDENS: MAKING SENSE OF MODERNITY 1, 9 (Anthony Giddens & Christopher Pierson eds., 1998) (reiterating that “sociology *should* attend to the world as a world that holds meaning and personal significance for its members, whose intentions, in one way or another, are central to sociological understanding”).

236. ANTHONY GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD 81 (1993).

237. Anthony Giddens, *A Reply to My Critics*, in SOCIAL THEORY OF MODERN SOCIETIES: ANTHONY GIDDENS AND HIS CRITICS 249, 256 (David Held & John B. Thompson eds., 1989) [hereinafter THEORY OF MODERN SOCIETIES].

238. See CONSTITUTION OF SOCIETY, *supra* note 233, at 76 (establishing that language exists “in so far as it actually forms part of what people do in their day-to-day use of it”).

239. *Id.* at 19-21.

240. *Id.* at xxi.

Resources come in two kinds of packages: authoritative and allocative. Authoritative resources coordinate human action, while allocative resources control material products or the material world.<sup>241</sup> In this way, unlike traditional sociology that places agency simply with human beings, structuration theory argues that agency flows out of ordinary people's actions and connects directly to their self-consciousness.

Under structuration theory, structural properties and social systems have real properties. However, they have no physical existence. They are not things like cars. Existing in time-space, structural properties, like institutional practices, and social systems, like American slavery, depend on human routines (e.g., actions and habits). Nevertheless, they can be fixed and hard. For example, ordinary people still struggle with racial attitudes, many of which originate in a time-space outside of their immediate experiences. In the Durkheimian sense, "society is a structured phenomenon."<sup>242</sup> A group's or a society's structural properties "have effect upon the way people act, feel and think."<sup>243</sup> Not existing as external, tangible objects, it is clear that ordinary people must reproduce these structures, not only in how they use language but also in their attitudes. For example, language does not exist anywhere. Yet, it has rules and regulative practices. If an ordinary person violates these rules and practices, society reacts. By using language, ordinary people bring it to life. Therefore, "society only has form and that form only has effects on people in so far as structure is produced and reproduced in what people do."<sup>244</sup>

Under structuration theory, practical consciousness thus becomes very important.<sup>245</sup> At any given time, society's structure confesses its norms, rules, and regulations. Groups and communities have perhaps similar structures, perhaps micro-structures. At a broader social level, practical consciousness is what ordinary people "know about what they do, and why they do it—their knowledgeability as agents."<sup>246</sup> Like tacit knowledge, ordinary people simply know things, and they rely on these almost intuitively known social structures even if they cannot directly explain how and what they know.<sup>247</sup> They can tell you why. They may refuse to talk. They might not know the answer.<sup>248</sup> In this way, practical consciousness

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241. *Id.* at xxxi.

242. O'Brien, *supra* note 235, at 77.

243. *Id.*

244. *Id.*

245. CONSTITUTION OF SOCIETY, *supra* note 233, at xxiii ("The significance of practical consciousness is a leading theme of the book.").

246. *Id.*

247. *Id.*

248. *Id.* at 3 ("To be a human being is to be a purposive agent, who both has reasons for his or her activities and is able, if asked, to elaborate discursively upon those reasons

works interdependently with discursive consciousness and unconscious motives.<sup>249</sup> Regardless, through routinization, ordinary people produce and reproduce social life, including the rules and resources on which structural and institutional features of social systems depend.<sup>250</sup> They also reflectively monitor themselves and others. After all, purposive action can produce unintended consequences. Through this monitoring, they understand themselves, and they justify (e.g., rationalize) the routine in which they may knowingly engage.<sup>251</sup>

To a degree, Giddens' duality of structure and agency directly folds ordinary people into the reproduction of social life, including white racism and white structural oppression. Ordinary people are purposive agents, and through the rules, routines, and resources of structure, they reproduce social life. This life can be deeply embedded, thus becoming structural properties (e.g., constitutions). To the extent that ordinary people reproduce aspects of social life that build on these properties, they produce practices that appear to move across time-space, thus becoming institutions (e.g., slavery).<sup>252</sup> By implication, ordinary people who were slaves and masters played indispensable roles in producing, reproducing, and transforming the institution of slavery. As such, "all rules are inherently transformational."<sup>253</sup> By depending on rules and by engaging in purposive act, structure cannot constrain what ordinary people do.<sup>254</sup> Instead, structure, which reflects a wide range of purposive actions, enables *and* constrains human agency. It follows that under a structuration theory, ordinary people directly participate in the reproduction of white structural oppression, even if they do not intend to do so.

For example, based on the practical consciousness principle, ordinary people like blacks know the social rules by which they participate in reproducing social life. All human agents have this knowledge. Based on this knowledge, ordinary people have a sense of what they can do, get, achieve, and experience. On the subject of employment, they may say that corporations simply refuse to hire blacks.<sup>255</sup> Is this statement a rule? Are they describing a social practice? Are they formulating a rule that explains their unemployment? In either case, by describing or formulating, they

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(including lying about them).").

249. *Id.* at 7.

250. *Id.* at xxxi.

251. *Id.* at 3-4.

252. *Id.* at 17.

253. *Id.*

254. *THEORY OF MODERN SOCIETIES*, *supra* note 237, at 269.

255. See, e.g., Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, Feb. 28, 2004, at B1 (discussing a study that found the number of black men employed in New York City to be 51.8%, a lower proportion than other ethnic and gender groups).



have interpreted the rules.<sup>256</sup> As Zapp would say, they have encoded the rule, thus co-creating it.<sup>257</sup> How many times must ordinary people repeat this rule before they begin to reproduce the experience as part of their social life?

By applying the structuration theory, Giddens' radical departure from traditional sociology rejects the theory that social structures exist autonomously and independently from ordinary people who are human agents.<sup>258</sup> Although this rough summary cannot do justice to Giddens' very complex and nuanced theory, it boils down to this proposition: with practical consciousness, human agents engage in purposive practices that produce and reproduce structures and social systems, and if structures and systems exist across time and space, they become structural properties and institutions, thus telling us about human agents. Over time, structures change, and this change can be directly attributed to human agents who use rules transformationally. By implication, structures constrain and enable agents, and to this degree, even if resource dependent, human agents can alter practices and social systems. In this way, human agents cannot be victims, for this concept contradicts the inherent power of agency. To fault society, human agents must implicate themselves. They reproduce social life too. They must account for the ways in which they intentionally and unintentionally reinforce practices about which they complain. Under structuration theory, human agents are absolutely indispensable ingredients in reinforcing and transforming social life.

Therefore, under structuration theory, Yamamoto cannot relieve ordinary people of reflective, personal responsibility. With practical and reflective consciousness, ordinary people adopt practices that produce immediate effects in their lives and in the aggregate reproduce social life. These practices impact them and others. In this way, even if they cannot understand the Gulf War II's grand design, ordinary people can support it in their words, deeds, feelings, and imagination. They can protest the war too. As such, ordinary people cannot be victims, and they actively participate in their own victimhood.<sup>259</sup> Under reflective consciousness, ordinary people can be socially influenced and socialized.<sup>260</sup> Regardless,

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256. See CONSTITUTION OF SOCIETY, *supra* note 233, at 23 (citing laws as an example of rules that are formulated and subsequently codified).

257. See Schlag, *supra* note 26, at 37-38 (referring to literary critic and professor Morris Zapp's theory that language must be decoded to be understood and then encoded again to communicate it to another).

258. CONSTITUTION OF SOCIETY, *supra* note 233, at xxxi-ii.

259. See McWHORTER, LOSING THE RACE, *supra* note 40, at 35-36 (asserting that blacks in the United States refuse to discuss their successes in the presence of whites, preferring to continue a cult of victimology whereby blacks are to keep whites "on the hook").

260. See Janet E. Helms, *The Beginnings of a Diagnostic Model of Racial Identity*, in BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE 83, 94-96 (Janet

they have ultimate responsibility for what they do, say, feel, and imagine. Although Yamamoto's practice has many subtleties, he impermissibly relieves ordinary people of personal responsibility by adopting a relatively abandoned idea of structuralism that overrides judgments, morality, and self-awareness, leading to a distasteful Nuremburg defense. By describing ordinary people as knowledgeable agents, Williams and Yamamoto can develop a model that teaches right action, right mind, and right practice.<sup>261</sup> Right now, they have proffered an antisubordination practice that victimizes ordinary people by describing them as human vessels who have had their true consciousness displaced by a determining text.<sup>262</sup> Along with a broader rebuke to social structures, this approach indicts the parents of ordinary people.<sup>263</sup> Giddens advances a better model because structuration posits that human agents have always been strategically monitoring and engaging in practices that maximize their biological survival.<sup>264</sup> Unlike Williams and Yamamoto, Giddens suggests that a proper critical theory can prompt a better outcome if it attempts to re-educate human agents who monitor and learn anyway. If they monitor, learn, and forbear, then ordinary people can make choices, and if they make choices, they can take personal responsibility.

Consider how structuration might operate in popular culture. Consider *Rabbit Proof Fence* as a cine-narrative about critically thinking Aborigines who used their minds and agency to control their destiny.<sup>265</sup> In *Rabbit Proof Fence*, Mr. Neville, a white charged with the resettlement of half-caste Aborigines, reminds a constable that blacks do *think* too, saying "just because they use Neolithic tools, it doesn't mean that they are Neolithic thinkers." Pushed by his failure to find three half-caste Aborigine children who had run away from their settlement dorm and who, with his passive participation, had managed to "outwit" a superb tracker, Mr. Neville, called Mr. Devil by the half-caste Aborigine children, uttered privately the

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E. Helms ed., 1990) (citing a study that found that racist parents who opposed miscegenation socialized their children to dislike the idea).

261. See generally ZEN MIND, *supra* note 11, at 23-49 (describing the author's technique for effective Zen meditation).

262. See INTERRACIAL JUSTICE, *supra* note 39, at 110 (noting that postcolonial theory tells us that newly empowered groups can redeploy the oppressive structures against which they fought); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33, 52 (1995) (observing that in postcolonial countries, racial groups previously victimized may redefine their role and become victimizers relative to other minority groups).

263. See Helms, *supra* note 260, at 94-96 (utilizing several studies of black and white children and their parents' political ideology to support the claim that children are prone to perceiving their race in a similar manner to their parents).

264. See ORNSTEIN, *supra* note 36, at 29 ("[O]ur 'agreement' on the nature of reality, done among right-thinking people, of course, is of course limited, because all of us share the limitations that have presumably evolved to ensure the biological survival of the race.").

265. RABBIT PROOF FENCE (Miramax Films 2002).

unthinkable: Aborigines can think, sometimes outwitting the most attuned white Australian. In this popular example based on actual events, it is more than clear that blacks have agency, something that whites acknowledged by actively enforcing racialized divides through force, violence, and public authority.

In *The Tracker*, an Australian film in which a Tracker leads a white Fanatic, along with a Young Soldier and an elderly Conscript, to find an accused Aborigine man who they seek for allegedly killing a white woman.<sup>266</sup> Throughout the entire movie, the Fanatic, who represents an overzealous, black extremist constantly harangues the Tracker, telling him at every turn that he is dumber and lower than the Young Soldier who the Fanatic views an incurably stupid. Yet, it becomes clear that the Fanatic fears that the Tracker will awaken an awesome power that flows naturally from the greater wisdom and unfathomable tolerance that the Tracker already possesses. Despite the Fanatic's constant badgering, he realizes that without the Tracker he will certainly be lost in an Australian outback where visible roads and organized civilization must be rare hen's teeth. In desperation, especially after the Tracker quietly disappears, ostensibly to kill wild game so that they can all eat that night, the Fanatic orders the Tracker shackled in a yoke, the chain-linked end of which he keeps in his hand. Symbolically, the Fanatic reveals that what truly threatens the white liberal state must be that blacks, regardless of their continental origins, will awaken to embrace their already exercised power to think, to feel, to act, and to talk—*minds* and *agency*. Unfortunately, for the Fanatic, the yoke simply crystallized two points. First, the white liberal state did not have power in a vacuum. Rather, this power depended inexorably on a relationship with the Tracker. Second, the Tracker had to accept that until he changed his mind, he would live this yoked existence. When the Tracker decides to release himself from the yoke, ending the Fanatic's tyranny, causing the symbolic collapse of the state, the Tracker removes the Fanatic from his horse, the means by which the Fanatic (the state) publicly displayed his authority and power. In effect, the state cannot tower over the bipedal Tracker (or over blacks) if they use their mind to remember their human potential (or personality).

In sum, *Rabbit Proof Fence* and *The Tracker* dramatize that white hegemony depends actively on blacks not exercising their mind and agency. Accordingly, in America, like *Rabbit Proof Fence* and *The Tracker*, white society uses force, violence, and public authority to “encourage” blacks to co-create their personal experiences and social

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266. THE TRACKER (Vertigo Productions Party Ltd. 2001).

worlds through race, racial identity, and race consciousness.<sup>267</sup> Although this race, identity, and consciousness lack specific content, white society requires blacks to think of themselves through socio-legal categories. In fine Austinian fashion, one could find black and its meaning within statutes, court rulings, and legislation. During the Antebellum era, whites could perform presume that all blacks were slaves. And with this presumption, society has encouraged whites, especially the poorest and most ignorant, to think that they were better than blacks. Thus, educated blacks suffered affronts little different from slaves when either of them encountered a poor white farmer. And so in the America context, as dramatized by *Rabbit Proof Fence* and *The Tracker*, white society uses race as a concept not just to structure relationships between group X and group Y, but also to steal, to “hook,”<sup>268</sup> the mind.<sup>269</sup> And it preferred stealing a *black* mind—one modified by the socially constructed and defined adjective. What it meant to be black emanates out of socio-legal imperatives. And so when a so-called black identifies with a “black identity” and thinks through a “race consciousness,” she inflicts levels of force, violence, and public authority onto herself, most of the effects escaping her most immediate attention. More often, she will think that she must naturally possess this identity, think through this lens, if she intends to survive. By avoiding physical displays of force, violence, and public authority, she internalizes the state’s myths, effectively limiting herself to a horizon not initially of her own making. But lest we forget, when I mention the state’s myth, please remember that her parents placed the first narrative discourse into their children’s mouths, thus becoming a delivery system that could potentially destroy their children’s mind, body, and spirit. By taking on a black identity and by thinking through a race consciousness, blacks give homage to their parents’ limited horizons, and they do symbolic and mythic damage to themselves.

In this way, Giddens’ radical departure from a “structure” versus “action” model to a duality of structure and agency takes Williams and Yamamoto much further down the road to real, substantive agency. Under his approach, Race Critics cannot simply develop more subtle versions of structuralism, so that they can declare a border skirmish in which ordinary people can be both victims and victimizers. Unfortunately, this construct

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267. See HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492-PRESENT 35 (2000) (describing the process by which slave owners taught discipline through equating blackness with inferiority).

268. See MIGUEL RUIZ, THE FOUR AGREEMENTS—A PRACTICAL GUIDE TO PERSONAL FREEDOM: A TOLTEC WISDOM BOOK 3 (1997) (commenting that we learn what we do because adults teach us what to believe).

269. See Helms, *supra* note 260, at 3, 6 (discussing social stereotypes about racial groups and ascribed (e.g., voluntary) racial identity).

does not advance ordinary people toward validating “bottom up” stories and interracial justice. First, Williams and Yamamoto premised their practices on the idea that ordinary people do not reproduce social life except to the extent that a determining text overrides who they really are. Second, they purport to eradicate the subordination and interracial conflicts that flow from this degree of self-annihilating oppression by opening the minds, hearts, and eyes of ordinary people so that they can see what they can do about it. Third, Williams and Yamamoto need to ask: why does CRT need to construct ordinary people as victims? Do these practices replace a determining text of self-loathing with a framework that can never imagine ordinary people as powerful reality creators? Fourth, by adopting a model of radical subjectivism, Williams and Yamamoto would require ordinary people to examine how their beliefs, thoughts, words, actions, feelings, and imagination form a practice (e.g., a habit) that reproduces oppression-like experiences. Under this subjectivism, they would require ordinary people to focus within themselves, so that they can appreciate that their so-called external, objective reality approximates their core beliefs. This approach reveals that the locus of their personal experiences and social realities emanates from within ordinary people. Under a structuration theory, Giddens comes very close to this latter proposition. However, he rejects radical subjectivism, and to this extent, Giddens’ theory cannot found a new paradigm in which ordinary people are not victims but *earthly gods*.

*D. Pure Consciousness and Human Agency:  
A Provisional Model for True Human Liberation*

Unlike Williams and Yamamoto’s antisubordination practice in which the ordinary person perennially struggles to reclaim her proper place of dignity which she lost at the hands of the liberal state, and unlike Giddens’ radical departure from even Yamamoto’s complex structuralist model in which human agents produce and reproduce virtual structures that cannot exist without their day-to-day routines, a pure consciousness model of human agency begins with a mind that exists prior to social awareness. In a structuration model, human agents produce and reproduce social life, thus having the power to change virtual institutions and structural properties that appear to exist across time-space. In Giddens’ world, even human agents who are resource dependent can transform so-called powerful agents.<sup>270</sup> Yet, for epistemological reasons, Giddens refuses to acknowledge what he

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270. See CONSTITUTION OF SOCIETY, *supra* note 233, at 16 (“But all forms of dependence offer some resources whereby those who are subordinate can influence the activities of their superiors. This is what I call the *dialectics of control* in social systems.”).

impliedly suggests: human agents not only construct social life but also transform structures. Accordingly, the locus for social reality is day-to-day human activities. Neither of these approaches views ordinary people as truly empowered. In liberal theory, the state grants legal personhood to citizens. In structuration theory, Giddens never questions this presumption, but rather focuses on human agents reproducing structures to which they bind themselves. They can reinforce or transform social life, and to this extent, ordinary humans can be agents for freedom, justice, and peace.

In the pure consciousness model of human agency, the power on which ordinary people rely always exists prior to social life. It is innate to every human being, and it is the very way in which architects develop a drawing and elevations out of which later springs the Empire State Building. What is prior is pure consciousness. By pure consciousness, I mean an intelligent, extremely knowledgeable energy on which all living things depend.<sup>271</sup> It is aware and alert. It has a voice through which it “talks” to ordinary people, and it is the “psychological strength from which your physically oriented self springs.”<sup>272</sup> In this sense, this consciousness extends to the “inner ego,” directing inner activities, correlating information that it perceives beyond the physical senses: “It is the inner perceiver of reality that exists beyond the three-dimensional. It carries within it the memory of each of your past existences. It looks into subjective dimensions that are literally infinite and from these subjective dimensions all objective realities flow.”<sup>273</sup>

In this model, the inner and outer egos work together. The inner ego brings ordinary people delicate inner perceptions (e.g., intuitive knowing), without which they could not maintain their physical existence. The outer ego permits ordinary people to change the world.<sup>274</sup>

Nevertheless, a consciousness exists that has a deeper identity, and it forms the inner and outer egos. It decided that an ordinary person would be a physical being in this time and place. This consciousness forms the core of an ordinary person’s identity, the veritable psychic seed from which she springs, the multidimensional personality of which she is a part.<sup>275</sup> Between the inner and outer egos, the subconscious rests. Yet, no real separation exists between them.

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271. ROBERTS, *supra* note 31, at 9 (referring to a theoretical division of the mind of which the conscious mind is unaware, but which is essential to the functioning of the physical existence).

272. *Id.*

273. *Id.*

274. *See id.* (noting that it is the outer ego that allows people to operate and to manipulate the world around them).

275. *Id.* at 9-10.

In this taxonomy, the outer ego becomes vital, but ordinary people give too much weight to it. They thus become their gender, their race, their class, their nationality. By identifying too strongly with the outer ego, ordinary people adopt artificial limitations. They limit their potential. They become ignorant. They cut themselves off from natural abilities.<sup>276</sup> In social life, ordinary people thus deny these abilities, but they cannot alter them.<sup>277</sup>

In social life, the outer ego is a jealous god. It needs to be served. It rejects the reality of any dimensions except that to which it has become comfortable and can understand. In manipulating this physical existence, the outer ego was meant to aid ordinary people, but by denying their natural abilities, ordinary people have assisted the outer ego in becoming a tyrant. Despite the dominant position ordinary people have given the outer ego, it is resilient, and it is eager to learn. Although somewhat rigid, the outer ego is innately curious. This curiosity has great value.

And so by denying their natural abilities and by adopting a limited concept of the nature of reality, ordinary people experience the physical world through an outer ego that will do its very best to keep ordinary people in a very small, fixed area of accepted reality. Yet, with the impulses from the inner ego, ordinary people's intuition and creative instincts still have freedom.<sup>278</sup>

In this pure consciousness model, ordinary people create physical reality. It cannot exist without them. Relying on this prior consciousness, they project their thoughts outward into physical form. It is an awesome gift. It carries great responsibility. And so, en masse, ordinary people collectively create glories and terrors. By failing to appreciate this gift, ordinary people blame God, fate, and society's failures. Yet, ordinary people bear this responsibility.<sup>279</sup>

In this model, powerfully gifted ordinary people are like Kant's autonomous subject,<sup>280</sup> and they are not too different from the latest findings in physics and neuroscience. Kant's autonomous subject legislates for herself. Not minding human anthropology, this subject acts according

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276. See ROLLO MAY, *THE DISCOVERY OF BEING: WRITINGS IN EXISTENTIAL PSYCHOLOGY* 18 (1983). For May, natural abilities are unconscious potentialities that humans, perhaps those who embrace a radical identity, repress. He writes: "[The unconscious] inescapably raises the question of the human being's margin of freedom with respect to his potentialities, a margin in which resides his responsibility for himself which even the therapist cannot take away." *Id.*

277. ROBERTS, *supra* note 31, at 12.

278. *Id.* at 12-13.

279. See *id.* at 6 (stating that each person creates their own physical reality and that shortfalls in this reality should not be blamed on a higher being).

280. See PINKARD, *supra* note 217, at 5 (defining Kant's autonomous subject as a moral person who acts according to his own idea of laws that can be applied to every rational person).

to her idea of law. Accordingly, this subject guides herself according to principles that can be universally valid for every rational agent. By acting according to these self-given but universally valid rules, an ordinary person becomes Kant's autonomous subject. To this extent, this subject models morality itself.<sup>281</sup> In Kant's schema, the autonomous subject exists in her rational self, her essential self, and she eschews her liberal, contingent self. Moreover, her actions express our true self.

In this pure consciousness model, Kant's autonomous subject is the ordinary person. Like Kant's subject, the ordinary person never forgets her natural connection to pure consciousness, and she minds her inner ego as much as she does her outer. In this way, she can manipulate the physical world, but she does so in a way that bears witness to her awesome gift to co-create physical reality. In her dealings with others, she acts morally. Always channeling a higher consciousness that resides in a multidimensional reality, she subscribes to powerful reality creating principles that apply universally. She thus acknowledges no difference between herself and other earthly gods. In this way, she is always a rational agent because she abides by higher, spiritual principles in the way she encounters her thoughts projected out into the physical world, including every ordinary person she meets.

To this extent, the ordinary person in the pure consciousness model and Kant's autonomous subject have abilities that physicists and neuroscientists have come to acknowledge. John Wheeler, a physicist, states that when humans observe, they create physical reality.<sup>282</sup> Karl Pribram, a neurophysiologist and brain surgeon, states that what humans perceive as an "out there" experience is really brain processes.<sup>283</sup> That is, the nature of

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281. *Id.*

282. See, e.g., Tim Folger, *Does the Universe Exist if We're not Looking?*, DISCOVER, June 2002, at 46 (quoting Wheeler's belief that we shape reality through our observations). According to Andrei Linde, quantum physicist from Stanford University:

The universe and the observer exist as a pair. . . . You can say that the universe is there only when there is an observer who can say, 'Yes, I see the universe there.' These small words—it looks like it was here—for practical purposes it may not matter much, but for me as a human being, I do not know any sense in which I could claim that the universe is here in the absence of observers. We are together, the universe and us. The moment you say that the universe exists without any observers, I cannot make any sense out of that. I cannot imagine a consistent theory of everything that ignores consciousness. A recording device cannot play the role of an observer, because who will read what is written on this recording device? In order for us to see that something happens, and say to one another that something happens, you need to have a universe, you need to have a recording device, and you need to have us. It's not enough for the information to be stored somewhere, completely inaccessible to anybody. It's necessary for somebody to look at it. You need an observer who looks at the universe. In the absence of observers, our universe is dead.

*Id.* at 48.

283. See KARL PRIBRAM, *LANGUAGES OF THE BRAIN: EXPERIMENTAL PARADOX AND THE*



reality is holographic; its concreteness is an illusion. Eastern mystics have always told us that consciousness affects matter and alters it.<sup>284</sup> Lastly, Ronald Laing, a psychologist, sees no separation between inner and outer experiences.<sup>285</sup>

In this model of pure consciousness, ordinary people can achieve true liberation. They control their destiny. They control what happens in the very next second of their lives. If our destinies are composed of a million billion seconds, we can deliberately co-create our very futures by the degree to which we take personal responsibility for becoming the autonomous subject that Kant describes. We enjoy this degree of liberty if we discipline our beliefs, thoughts, emotions, and imaginations. With these three elements, we co-create every experience. We physically materialize our mental acts as physical matter.<sup>286</sup> Seth writes:

You are intuitively aware that you form your [bodily] image, and that you are independent of it. You do not realize that you create your larger environment and the physical world as you know it by propelling your thoughts and emotions into matter—a breakthrough into three-dimensional life. The inner self, therefore, individually and en masse, sends its psychic energy out, forming tentacles that coalesce into form.<sup>287</sup>

Endowed naturally with these gifts, ordinary people co-create their personal experiences even if they refuse to acknowledge this power.<sup>288</sup> This refusal simply means that they have placed their fate in others: parents, Race Critics, the state, God, or ignorance. Unfortunately, this refusal does not cease co-creation. Rather, these ordinary people still use their minds to create, influence, and form matter. If they like their experiences, they perhaps will feel blessed and thank a higher power. If they dislike their experiences, they most assuredly will feel defeated, abandoned, oppressed, or marginalized. By embracing the gift to co-create with which every human being is endowed, ordinary people become

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PRINCIPLES OF NEUROPSYCHOLOGY 99 (1971) (arguing that based on animal studies, subjects construct external reality using two-sided, balanced brain sensory stimulation); GERALD M. EDELMAN & GIULIO TONONI, A UNIVERSE OF CONSCIOUSNESS: HOW MATTER BECOMES IMAGINATION 18 (2000) (“[E]ach conscious state is experienced as a whole that cannot be subdivided into independent components. . . . [E]ach conscious state is selected from a repertoire of billions and billions of possible conscious states, each with different behavioral consequences.”).

284. TALBOT, *supra* note 2, at 102 (quoting Satprem, who stated, “[c]onsciousness can act on Matter and transform it. This ultimate conversion of Matter into Consciousness and perhaps one day even of Consciousness into Matter is the aim of the *supramental yoga*.”).

285. See R.D. LAING, THE POLITICS OF EXPERIENCE 21 (1968) (“The ‘inner,’ then, is our personal idiom of experiencing our bodies, other people, the animate and inanimate world; imagination, dreams, fantasy, and beyond that to even further reaches of experiences.”).

286. ROBERTS, *supra* note 31, at 38.

287. *Id.* at 41.

288. See *id.* at 25 (“Using the inner senses, we become conscious creators, cocreators. But you are unconscious cocreators whether you know it or not.”).

proverbial captains of their fate. By modeling themselves after Kant's autonomous subject and by opening themselves to multidimensional energy, these ordinary people can achieve a liberation that CRT promises and that antidiscrimination practices seek, and they do so by constantly examining their thoughts, emotions, and imaginations. True liberation means that ordinary people not only use their naturally endowed gifts to co-create their personal experiences and social realities, but also act responsibly toward other things and subjects, knowing full well that what they encounter is simply an extension of their own thoughts.

#### CONCLUSION: CAN WE IMAGINE ORDINARY PEOPLE AS EARTHLY GODS?

In the main, I have difficulty with CRT and antisubordination practices because Race Critics simply cannot imagine that ordinary people have always been powerful reality creators, earthly gods. Even during slavery, they had always exercised levels of human agency that allowed them to overcome social and personal hurdles. In large and small ways, ordinary people have altered the magnitude of many social experiments, and even today, they play a vital role in co-creating a better world for all of us. Ella Fitzgerald, Mahatma Gandhi, Martin Luther King, Jr., Ang San Suu Kyi, and Rosa Parks perhaps did not know that they were powerful reality creators. Yet, they were fired by a vision of a better, freer world from which we would all benefit. I imagine that they did not use self-defeating terms like victim. I also imagine that they took their visions and behind them, they placed their minds (e.g., thought) and deeply felt desires (e.g., emotions). We see the results. Although they lived (and still live) in challenging times and places on our planet, they nevertheless fulfilled their life's purpose that was (and is) quite unique to their multidimensional awareness. These ordinary people were (and are) Kant's autonomous subjects. Although ordinary people, they embraced an unspoken power to co-create, and they did so as *earthly gods*.

In their antisubordination practices, Williams and Yamamoto could not imagine ordinary people as already empowered. They cannot see them as earthly gods, beings who use their human agency to co-create in every second of their lives. As Giddens would say, the double hermeneutics of sociology means that Williams and Yamamoto must ask themselves if they are in fact empowered people. Do they have co-creative control and power in their lives? If so, how are they different from the ordinary people about whom they write? If not, how can they actually construct an antisubordination practice that truly promotes interracial justice and group agency? Is it not like parents teaching their children to read when they have never learned themselves? Is there something inherent in CRT that preaches empowerment and permits Race Critics to hold imaginations in

which the very people they wish to help must perforce be victims and unwitting stooges for structural forces? None of these questions ever gets taken up by Race Crits. Emboldened by a liberal framework that purports to be critical theory, Race Crits simply launch into the usual speech about an evil world that needs changing for people for whom they hold in contempt. Why save people who based on theoretical assumptions cannot imagine saving themselves? In my community service days and in my personal space, I have attempted to save people; I failed miserably. Like giving sight to the blind, I can only heal those who have already deeply committed themselves to seeing!

In this Article, I hope that I have illustrated why CRT is not the way of liberation. This theory does not require Race Crits to examine themselves. It does not question what it can achieve. As we know, this theory can achieve no more than Race Crits can imagine, and if they cannot imagine themselves as powerful reality creators who walk this planet as living earthly gods, then who do they imagine ordinary people to be? We can begin by refusing to use “victims” to describe any human agent. We can begin by examining CRT so that we can unearth where we have buried our personal fears and self-defeating ideas. In their antisubordination practices, Williams and Yamamoto simply assumed that CRT can deliver us, and without asking critical questions about this critical theory, they blamed structural forces. They promised liberation, justice, and agency, but they more often than not suggested that white supremacy and structural shifts better explain what ordinary people experience in their lives. In effect, these antisubordination practices rescue ordinary people from a burning building, and after helping them find a new place to live, they watch them light a cigarette and get into the bed. They never tell them that smoking in bed is dangerous. Yet, they tell them to lock the front door. After all, society can be a very dangerous place. CRT must examine ordinary people and the way they believe, think, feel, and imagine the world. By doing so, Race Crits will find the keys to true liberation.

Unfortunately, the provisional ideas for a pure consciousness model of human agency cannot answer all of the questions that I have raised against antisubordination practices and CRT. It is sketchy, and I have not worked through all of its practical problems. Yet, I started down this epistemological road some years ago when I wrote a book review of *Black Wealth/White Wealth* and *American Apartheid*.<sup>289</sup> In part, I wrote:

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289. See Reginald Leamon Robinson, *Poverty, 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, 1420-21 (2001) (book review) (arguing that blacks must take responsibility for their own poverty and residential segregation and advocating for a New Age race consciousness).

Neither *Black Wealth/White Wealth* nor *American Apartheid* accepted the idea that we can change our historically derived points of view. Although both books prescribed what it would take to create material equality between blacks and whites and to end residential segregation, neither book positioned blacks or minorities in the center of the human chemistry that co-created the social and economic inequalities in the first place. As such, both books relegated the co-creative subject to historical footnotes and partially interesting marginalia. Unlike Oliver and Shapiro and Massey and Denton, I think that we can re-imagine ourselves as the powerful reality creators. In this case, we become subjects/agents. Despite the powerful sociological narratives that *Black Wealth/White Wealth* and *American Apartheid* represented, they described blacks and whites as action figures, all of whom were posed by the deft hand of social structures. In these narratives, we looked at whites as racists and wrongdoers, failing to see them for what they are—angelic humans working through social experiments, some wonderfully successful, some dangerously wrong.<sup>290</sup>

I still feel that ordinary people must be placed at the core of what they experience, and in so doing, we can hold them and ourselves responsible. Right now, these antistatist practices advocate an empowerment that dies aborning. It permits purportedly liberated, empowered people to fault others. Under his duality of structure and agency, Giddens nicely ends this self-defeating practice, but he rejects radical subjectivism even though his sociological model urges us in that direction.<sup>291</sup> Unfortunately, I cannot blame his model for my New Age Legal Theory, in which human beings remain my primary locus for analysis because I know that by examining them and myself, I can co-create a liberation experience that I can share.<sup>292</sup>

By bridging my way through Giddens, I hope that I have convinced some of you to venture down this road with me. Yet, I can imagine I have frightened off many of you, and some of you knew what you would get before you picked up this Article. Even assuming that my New Age Legal Theory is just pure fiction, my fiction liberates.<sup>293</sup> To the extent that I have described universal principles that govern us all, I do not have to be correct. I have to keep you interested. In this sense, “I am in the business of

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290. See *id.* at 1441 (concluding that the two books reviewed do not portray an adequate picture of how blacks should approach a sociological theory of race).

291. CONSTITUTION OF SOCIETY, *supra* note 233, at 1-2.

292. See MAY, *supra* note 276, at 14-15 (arguing that we can help people if we can share the immediacy of an experience, and so he preferred Kierkegaard’s experience of anxiety because he “knew anxiety” as opposed to Freud who “knew about anxiety”).

293. Schlag, *supra* note 26, at 46 (referring to Fish’s statement: “My fiction is liberating.”).

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making texts and of teaching others to make them by adding to their repertoire of strategies.”<sup>294</sup>

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294. *Id.* (citing STANLEY FISH, *IS THERE TEXT IN THE CLASS?* 180 (1980)).