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Critical What What Commentary: Critical Race Theory: A Commemoration: Afterword

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Afterword

Critical What What?

DEVON W. CARBADO

More than twenty years after the establishment of Critical Race Theory (CRT) as a self-consciously defined intellectual movement, defining oneself as a Critical Race Theorist can still engender the question: critical what what? When asked, the inquiry is not just about the appellation, though this is certainly part of what engenders the question. The query is about the whatness (or, less charitably, the “there, there”) of CRT as well. What is the genesis of CRT? What are the core ideas? What are its goals and aspirations? What intellectual work does the theory perform outside of legal discourse? What are the limitations of the theory? What is its future trajectory? This Afterword employs Kimberlé Crenshaw’s lead article, and the essay responds to it, to engage the foregoing questions.

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Critical What What?

DEVON W. CARBADO*

I. INTRODUCTION

More than twenty years after the establishment of Critical Race Theory (CRT) as a self-consciously defined intellectual movement, defining oneself as a Critical Race Theorist can still engender the question: critical what what? When asked, the inquiry is not just about the appellation, though this is certainly part of what engenders the question. Indeed, when my colleagues and I proposed the establishment of a Critical Race Studies specialization at UCLA School of Law more than a decade ago, the only push back we got was over the name. Why Critical Race Studies? Why not Civil Rights? Race and the Law? Anti-Discrimination Studies? Ultimately, we succeeded in persuading our faculty that it made sense for us to trade on and signal a connection to an intellectual movement of which several of us considered ourselves a part.¹ But the episode suggested that there was something in and about the name. By any other name,² our faculty meeting on the matter would have been considerably shorter. To borrow from George Lipsitz's contribution to this Commentary collection, our engagement with our colleagues about this particular institutional naming was a moment of "organizational learning."³

This should not lead one to conclude that the "Critical what what?" question is only about the name. The query is about the whatness (or, less charitably, the "there there") of CRT as well. What is the genesis of CRT? What are the core ideas? What are its goals and aspirations? What intellectual work does the theory perform outside of legal discourse? What are the limitations of the theory? What is its future trajectory? This Afterword employs Professor Kimberlé Crenshaw's lead article, and the responses to it, to take up the foregoing questions. As will become clear, my engagement, which includes a number of "internal" critiques of CRT, is decidedly incomplete and should be read more as a gesture towards answering each of the questions than as a definitive response to them.

* Professor of Law, UCLA School of Law. For comments on or conversations about the ideas expressed in this essay, I thank Paul Butler, Sumi Cho, Laura Gomez, Mitu Gulati, Cheryl Harris, Jerry Kang, Rachel Moran, Daria Roithmayr, Frank Valdes, and Leti Volpp. Alicia Verani and Jonathan Feingold provided invaluable research assistance. I thank the *Connecticut Law Review* editors for soliciting this Afterword and for editorial suggestions.

¹ See Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215 (2002).

² Cf. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

³ George Lipsitz, "Constituted by a Series of Contestations": *Critical Race Theory as a Social Movement*, 43 CONN. L. REV. 1459 (2011).

II. CRITICAL RACE BEGINNINGS: WHOSE GENESIS STORY IS IT, ANYWAY?

According to Crenshaw, a productive way to think about the genesis of CRT is “frame *misalignment*.” More particularly, Crenshaw argues that:

One might say that what nourished CRT and facilitated its growth from a collection of institutional and discursive interventions into a sustained intellectual project was a certain dialectical *misalignment*. Within the context of particular institutional and discursive struggles over the scope of race and racism in the 1980s, significant divergences between allies concerning their descriptive, normative, and political accounts of racial power began to crystallize. This misalignment became evident in a series of encounters—institutional and political—that brought into play a set of “misunderstandings” between a range of individual actors and groups.⁴

One of these groups consisted of progressive white legal academics who were part of the Critical Legal Studies (CLS) movement. Crenshaw’s argument, though not articulated precisely in this way, is that CLS created a condition of possibility for CRT not only in the sense of rehearsing a set of themes about the indeterminacy of law and about its productive capacity (think Foucault)⁵ to constitute social arrangements, social hierarchies, and social interests but also in the sense of failing to seriously engage the role of race as a phenomenon, not a epiphenomenon, in this process. When Crenshaw speaks of “misalignment” with respect to CLS, it is this “failing”—the extent to which race was peripheral to the movement—that she has in mind. To put the point as Crenshaw does elsewhere, “our dissatisfaction with CLS stemmed from its failure to come to terms with the particularity of race, and with the specifically racial character of ‘social interests’ in the racialized state.”⁶ This, among other misalignments with CLS, was generative of CRT.

David Trubek’s contribution to this volume most directly engages Crenshaw’s intellectual genesis story. One might read his piece as a competing “origin story” about the institutional, intellectual, and political

⁴ Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1259 (2011) [hereinafter Crenshaw, *Twenty Years*].

⁵ I share Bob Golder and Peter Fitzpatrick’s reading of Foucault. See BEN GOLDER & PETER FITZPATRICK, *FOUCAULT’S LAW* (2009) (contesting the idea that “[i]n Foucault’s modernity, law has been overtaken by the more insinuating and productive powers of discipline or bio-power”).

⁶ *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xiii, xxvi (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY: THE KEY WRITINGS*].

factors that contributed to the formation of CRT. As David Engel explains, the articulation and re-articulation of origin stories are “many things at once: an act of insight, a reinterpretation of the past, [and] a reaffirmation of core values and beliefs.”⁷ In this respect, origin stories shape not only our sense of the past; they shape how we experience the present and imagine the future. Given this constitutive dimension to origin stories, Trubek’s focus on Crenshaw’s account is all the more important.⁸

According to Trubek, Crenshaw’s description of the origins of CRT “is more of a foundational myth than a complete account of CLS’s attitudes towards race or its views about the sources of illegitimate hierarchy in America.”⁹ Trubek concedes that “the leadership of CLS was largely white and male; the movement was formed in the 1970s before women and minority scholars entered legal academia in significant numbers.”¹⁰ But things changed:

[O]nce women and minority scholars did get jobs in law schools, CLS tried to reach out to both groups. . . . Maybe there were one or two who explicitly criticized the CRT position as overstating the importance of race. But I know of no CLS text that raised the “essentialism” or “racialism” critiques Crenshaw mentions.¹¹

In some ways, my characterization of Trubek’s intervention as a “competing origin story” understates the register in which he articulates his claim. His thesis is not that Crenshaw overstates the misalignment thesis. Trubek certainly could make this argument, particularly because in an earlier account, in which Crenshaw and her co-authors raise similar concerns about CLS, they specifically employ the term “aligned” to characterize at least one side of the CLS/CRT relationship.¹² Moreover,

⁷ Engel was more specifically referring to “origin myths.” David Engel, *Origin Myths: Narratives of Authority, Resistance, Disability and Law*, 27 LAW & SOC’Y REV. 785, 792 (1993).

⁸ For other accounts of the genesis of CRT, see Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, *passim* (2000); Athena D. Mutua, *The Rise, Development and Future of Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006) [hereinafter Mutua, *Rise, Development and Future*].

⁹ David M. Trubek, *Foundational Events, Foundational Myths and the Creation of Critical Race Theory, or How To Get Along with a Little Help from Your Friends*, 43 CONN. L. REV. 1503, 1509–10 (2011).

¹⁰ *Id.* at 1510.

¹¹ *Id.*

¹² See CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 6, at xxvi–xxvii (“As a political and intellectual matter, the upshot of this [CRT’s] engagement with CLS can best be characterized as ‘coalition.’ We see CLS and CRT as aligned—in radical left opposition to mainstream legal discourse.”). This is not to say that the misalignment thesis is absent from this earlier articulation. On the contrary, in several places Crenshaw, et al. describe what they perceive to be the normative and theoretical tensions between CRT and CLS. My point is simply that it would not be unreasonable to read the earlier account as suggesting that CRT’s frame alignment and misalignment with CLS were equally formative of CRT.

Crenshaw's article in this volume is clear that CRT was both "attracted to and repelled by" CLS.¹³ Finally, Gary Peller, "in contrast [to Crenshaw] . . . partially focus[es] on what was aligned and in common between the dominant CLS project and CRT at its inception, and the particular theoretical direction that Crenshaw and others in CRT have since taken."¹⁴ All of this suggests that there is a debate to be had about whether and to what extent the genesis of CRT is a function of CRT/CLS alignment or misalignment. Trubek's characterization of Crenshaw's claim as "a foundational myth" is not a serious engagement of this issue.

So, how does Trubek support his argument? In part, his claim is based on the fact that he is familiar with, and Crenshaw cites to, "no CLS text that raised the 'essentialism' or 'racialism' critiques that Crenshaw" attributes to CLS.¹⁵ Fair enough. But there are a number of additional questions one might still need to ask. One is: Would we expect all of the contestations about CLS and race to appear in print? Another: How much of an engagement with race does one see in CLS prior to the moment in which CRT is explicitly organized as such? Of course, some CLSers, like Alan Freeman, were seriously engaging matters related to race and the law.¹⁶ But how many others and in what proportion? Moreover, to the extent that CLSers were taking up race in their work, to what extent was that engagement constitutive of the "imperial scholar" phenomenon Richard Delgado describes?¹⁷ I do not mean for these questions to be rhetorical. My point is that Trubek might need to answer them before characterizing Crenshaw's account as a foundational myth.¹⁸

Furthermore, Trubek might also need to contend with the literature produced by scholars of color specifically critiquing CLS for its conceptualization of race and rights. In addition to Crenshaw,¹⁹ Pat Williams,²⁰ Harlon Dalton,²¹ Richard Delgado,²² Anthony Cook,²³ and

¹³ Crenshaw, *Twenty Years*, *supra* note 4, at 1287.

¹⁴ Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1481 (2011).

¹⁵ Trubek, *supra* note 9, at 1510.

¹⁶ See Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978) (discussing the social implications and context behind civil rights legislation).

¹⁷ See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984) (discussing the extent to which white scholars writing about race typically cited to themselves producing an endless and racially exclusive loop).

¹⁸ Nor do I mean to put CLS scholars in some kind of "catch 22"—it's a problem if they don't engage race (they are vulgar anti-essentialist) and it's a problem if they do (they are imperial scholars). I simply mean to mark the fact that Trubek plays the empirical card against Crenshaw because she fails to identify CLS articles that reflect the racialism and essentialist critique of CRT but he makes no effort to empirically ground the counter-narrative he offers.

¹⁹ Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

²⁰ Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403–04 (1987).

²¹ Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440–41 (1987).

Mari Matsuda,²⁴ among others, are on record expressing a deep dissatisfaction with CLS's alienation/indeterminacy/legitimation claims about race and rights. These texts *are* out there, and they are relevant to the question of whether Crenshaw's account of CLS's role in the formation of CRT is a myth. While this body of work does not provide direct evidence of the CLS critique of CRT as racist or essentialist, it is direct evidence of CRT scholarship advancing a racial critique of CLS. Trubek's effort to broaden how we think about the genesis of CRT would have benefitted from an engagement with this scholarship.

Trubek might very well still conclude, even after an engagement with the CRT scholarship critiquing CLS, that Crenshaw's account remains a myth. This would not necessarily be a function of what Russell Robinson refers to as "perceptual segregation,"²⁵ but could rather derive from Trubek's sense of his own role, and the role of Wisconsin Law School, in the formation of CRT. According to Trubek, Crenshaw insufficiently or too narrowly describes these contributions. I have no basis upon which to weigh in on this particular point; I was not present during any of these foundational moments. My hope is that, going forward, CRT and CLS scholars who experienced this history will engage Trubek's response to Crenshaw's account. Is Trubek's counter-narrative corrective? Is it hyperbole? Is *it* a foundational myth? These questions deserve to be interrogated, not because doing so will lead to a definitive resolution but precisely because narratives about CLS's role in the formation of CRT are, like all genesis narratives, likely to be contested.

Another essay in this volume that bears on the genesis of CRT, and about which I will say much less, is Tukufo Zuberi's *Critical Race Theory of Society*. Zuberi's contribution argues that "[t]he antecedent ideas for Critical Race Theory existed in the social sciences long before the intellectual movement in law."²⁶ This, of course, begs the question of why one does not see CRT as an *organized* intellectual movement in the social sciences, a question that Crenshaw directly engages. Articulated another way, that CRT has disciplinary precursors does not answer the question of why those precursors did not become disciplinary-defining in the sense of

²² Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

²³ Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1005–12 (1990).

²⁴ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987).

²⁵ Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (discussing the extent to which race mediates our perception of events).

²⁶ Tukufo Zuberi, *Critical Race Theory of Society*, 43 CONN. L. REV. 1573, 1578 (2011).

producing in, say, sociology, what CRT produced in law.

This is not to say that social scientists have not critically engaged race. Of course they have. Indeed, Zuberi's contribution is a mini-intellectual history of sorts in which he identifies a number of scholars who, without articulating it as such, took the critical race turn in their work. As he puts it, "[t]he social sciences have always had their critical theorists of race."²⁷

Zuberi's articulation of this intellectual backdrop, as well as its relationship to intellectual contestations within the academy, including controversies about ethnic studies, is helpful to understanding the genesis of CRT in at least two respects. First, and as Crenshaw notes, the establishment of ethnic studies was the institutionalized product of a set of specific ideological contestations about the role of knowledge production and education in the pursuit of racial justice. In this respect, one might think of CRT as both an extension of this history and a replication of it in legal education.²⁸ Second, the first-generation Critical Race Theorists were familiar with the ideas reflected in the ethnic studies literature and had helped to institutionalize the field. Thus, while these would-be Critical Race Theorists were certainly not fully formed intellectuals either as law students or as young faculty within their respective institutions, nor were they empty intellectual vessels into which ideas about CLS could be poured. Many had been shaped by some of the very texts Zuberi mentions: *Black Folk Here and There*, *Narrative of the Life of Frederick Douglass*, *Black Reconstruction*, *Black Skin White Masks*—as well as many others, including *Ain't I a Woman*, and *All the Women are White, All the Men are Black: But Some of Us Are Brave*. The most cursory examination of the footnotes of early CRT scholarship bears this out.²⁹

Yet this background context for CRT is insufficiently acknowledged,³⁰ let alone meaningfully analyzed.³¹ As best I can tell, there is no law

²⁷ *Id.* at 1579.

²⁸ Crenshaw, *Twenty Years*, *supra* note 4 at 1301 (observing that "many of the critiques of racial power that were amplified and integrated within CRT had been generated by leading race scholars for nearly a century").

²⁹ See, e.g., Regina Austin, *Sapphire Bound*, 1989 WIS. L. REV. 539 (citing bell hooks); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991) (citing Patricia Hill Collins); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1701 (1993) (citing Du Bois); Matsuda, *Looking to the Bottom*, *supra* note 24 (citing Angela Davis); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (citing Paula Giddings); Kendall Thomas, *Rouge et Noir Re-read: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992) (citing Edward Said). Significantly, each of foregoing authors engaged a broader range of the ethnic studies literature than this footnote suggests. And there are other CRT scholars who have done so as well. This, then, is simply a very limited indication of the space ethnic studies occupies within CRT.

³⁰ To some extent this is simply a function of the historical insularity of law as a discipline.

³¹ But see Kimberlé Williams Crenshaw, *James Turner, Africana and the Development of Critical Race Theory*, in "FREE YOUR MIND": JAMES TURNER AND THE STRUGGLE FOR AFRICANA STUDIES (Scot Brown & Kimberlé Williams Crenshaw eds., forthcoming) (draft on file with author).

review article on ethnic studies and CRT that is analogous to Richard Delgado's *Liberal McCarthyism and the Origins of Critical Race Theory*, a re-telling of the genesis of CRT that focuses on white leftist intellectuals.³² To be clear: I am not arguing that CRT scholars should downplay the role of CLS in shaping the development of CRT. I, for one, have learned a great deal from this literature. Nor is my point that Richard Delgado should not have written about liberal McCarthyism; efforts to broaden the framework through which we understand CRT are important. What I am suggesting is that, against a background in which the intellectual agency and capacity of Blacks and Latinos are always already in doubt, it is all the more important to mark the ethnic studies intellectual antecedents to CRT. Zuberi's contribution is helpful in this respect. His essay is a reminder that "prior to the CRT Movement America experienced the African-American Studies Movement in the 1960s and 1970s."³³ We ought to understand this movement, along with the development in ethnic studies more generally, as part of CRT's intellectual and institutional history.

III. CRITICAL RACE BOUNDARIES: NOT IN OUR NAME

Related to debates about the genesis of CRT are debates about the whatness of CRT. How precisely do scholars define this intellectual movement? What are the core ideas? Crenshaw does not, in her Article, articulate a definition of CRT; she is clear that her contribution is not a primer on the theory, presumably because she has expressed her views about the boundaries of CRT elsewhere.³⁴ According to Crenshaw, "what is in play here is less of a definitive articulation of CRT and more of a socio-cultural narrative of CRT."³⁵ In the context of offering this narrative, Crenshaw describes CRT as an intellectual and political dynamic that is constantly being re-constituted. She writes:

CRT is not so much an intellectual unit filled with stuff—theories, themes, practices and the like—but one that

³² Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505 (2009). Delgado does in this piece make clear that CRT built "on the American civil-rights tradition, including the work of such figures as Martin Luther King, Jr., W.E.B. Du Bois, and César Chávez, as well as Continental and postcolonial writers." *Id.* at 1511; see also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 4 (2001) (observing that Critical Race Theory draws from "the American radical tradition exemplified by such figures as Sojourner Truth, Frederick Douglass, W.E.B. Du Bois, César Chávez, Martin Luther King, Jr., and the Black Power and Chicano Movements of the sixties and early seventies").

³³ Zuberi, *supra* note 26, at 1585.

³⁴ See, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS*, *supra* note 6; Charles R. Lawrence, III et al., *Introduction* to *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* 1–15 (Mari J. Matsuda et al. eds., 1993); see also Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1343–72 (2002).

³⁵ Crenshaw, *Twenty Years*, *supra* note 4, at 1260.

is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era. In the same way that Kendall Thomas reasoned that race was better thought of as a verb rather than a noun, I want to suggest that shifting the frame of CRT toward a dynamic rather than static reference would be a productive means by which we can link CRT's past to the contemporary moment.

In suggesting that we conceptualize CRT as a verb, Crenshaw is not urging us to jettison efforts to think of CRT as a "unit filled with stuff—theories, themes, practices and the like." She is urging that we do so recognizing that CRT "is dynamically constituted." This is an important point. We need more, not fewer, efforts to define the "dynamically constituted" borders of CRT.³⁶ Our failure to adequately build on earlier efforts has been costly.³⁷ For one thing, as Rachel Moran puts it, CRT is now a little "unruly."³⁸ While this unruliness has the virtue of rendering CRT both inclusive and capacious, it carries with it some costs. Ideas that ought to be repugnant to CRT—sexism, xenophobic nationalism, homophobia—sometimes openly travel under its name.³⁹ Concerned about a version of this problem, Sumi Cho expresses "the need for caution and accountability in what we are putting out under the critical race rubric."⁴⁰ In addition to the problem of accountability, there is a pragmatic reason for worrying about the boundaries of CRT: a theory without clear boundaries is hard to mobilize and describe as *a* theory.

But sometimes the very existence of boundaries, or the perception of how and where they are drawn, can splinter progressive formations. Some accounts of the breakdown of the CRT Workshop—that it was insufficiently attentive to LGBT rights and the racial experiences of people of color who are not African American—reflect this organizational splintering. The issue came up at the very first CRT workshop I attended

³⁶ There are now several CRT readers. In addition to texts already cited in this essay, see *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 1998); *CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002). For CRT casebooks, see *CRITICAL RACE THEORY: CASES, MATERIALS & PROBLEMS* (Dorothy A. Brown ed., 2003); and *RACE & RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Juan Perea et al. eds., 2d ed. 2007). Each of these texts owes a debt to Derrick Bell's *Race, Racism and American Law*.

³⁷ I do not mean to suggest that there have been no recent efforts in this respect. See, e.g., Darren Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 (2004); Mutua, *Rise, Development and Future*, *supra* note 8.

³⁸ Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2375 (2003).

³⁹ Although I will not here point to specific examples, a careful reader can identify "CRT" scholarship that instantiates the ideas.

⁴⁰ Sumi K. Cho, *Multiplicities and Intersectionalities: Exploring LatCrit Diversities: Essential politics*, 2 HARV. LATINO L. REV. 433, 434 (1997).

in Washington, D.C., and some LatCrit scholars link these concerns about boundaries to genesis narratives about LatCrit Theory—namely, that the theory was in part a reaction to the perceived black-centered and heterosexist-oriented nature of CRT.⁴¹ These are serious charges to which first-generation Critical Race Theorists should respond.⁴²

LatCrit theorists, for their part, need to more directly engage the theoretical and organizational relationship between LatCrit Theory and CRT. This, too, raises important questions about boundaries. I am not suggesting that there has been no engagement on this topic. Frank Valdes, for example, has taken up this issue in a series of LatCrit forewords and afterwords.⁴³ Indeed, as will become clear, some of the questions I raise

⁴¹ See Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151, 1187–88 (2008) (“In particular, the Black exceptionalist strand of CRT can wield a powerful exclusionism toward other outsider groups. Two anecdotes illustrate what we characterize as a form of identity assassination—that is, the discounting/erasure of the relevance of the group to which one belongs or identifies with—as a form of boundary policing. The first example comes from a 1994 CRT Workshop at the University of Miami Law School. A gay Asian and a gay Latino had included some readings critical of the ways the U.S. race discourse privileged, presumed, and centered Black heterosexual masculinity. During the portion of the workshop devoted to these readings, an African American male raised a strong normative objection (to paraphrase): ‘Critical Race Theory is about RACE, not sexuality.’ . . . Seeking to avoid these types of identity assassinations, the initial LatCrit conferences in part represented a reaction to the small invitation-only CRT workshops of the early-to-mid-1990s and were explicitly intended to be inclusive, open, and committed to community building.” (citations omitted)); Elvia R. Arriola, Forward, *Symposium on Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit*, 19 CHICANO-LATINO L. REV. 1, 6 (1998) (“In fact, ‘who are we?’ served as the question for plenary discussion on the first day of LatCrit II. As others and I learned, a late night gathering of professors in Puerto Rico shared stories of feelings of hurt, confusion and abandonment felt at CRT gatherings—gatherings that made no room for the experience and insights of Latinas/os in the law. By the evening’s end a venting of feelings had inspired a conference, and a vow among the organizers to assure that the panels and audience that would become LatCrit would be relentlessly characterized in substance and identity as inclusive and diverse.”); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 397–98 (2002) (“After all, LatCrit was born, in part, out of a sense of exclusion(s) from the Critical Race Theory Workshop (the annual meeting of RaceCrits), which was at the time dominated by African-American scholars. Additionally, the development of the Black/White Binary Paradigm of race critique by LatCrit scholars was met with substantial discomfort, and even some outright hostility, among our African-American fellow travelers. Nevertheless, because of LatCrit’s aggressive and often sensitive search for intersectionalities, and after strong debate, we have largely managed to reach common ground that allows us to rotate centers to focus on particular groups, without marginalizing other fellow outsiders.” (citations omitted)); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997) (stating that his article “illustrates the kind of contribution to critical theory that the emergent Latino Critical Race Studies (LatCrit) movement may make. This movement is a continuing scholarly effort, undertaken by Latino/a scholars and other sympathetic scholars, to examine critically existing structures of racial thought and to identify how these structures perpetuate the subordinated position of Latino/a in particular. LatCrit studies are, then, an extension and development of critical race theory (and critical theory generally) that focus on the previously neglected areas of Latino/a identity and history and the role of racism as it affects Latinos/as.”).

⁴² I am not suggesting that such a response would definitively resolve the issue. My point is rather that open and transparent engagement of the issue is in order.

⁴³ See, e.g., Francisco Valdes, *Foreword Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997); Francisco Valdes, *Afterword: Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 55 U. MIAMI L. REV. 1265 (1999).

below re-articulate queries Valdes has posed but that remain largely unanswered.⁴⁴ Does the annual LatCrit Conference render CRT conferences unnecessary? What work, if any, do LatCrit Conferences perform that CRT conferences cannot reproduce? How do people who are both LatCrit scholars and CRT scholars demarcate the boundaries of these intellectual identities? Is it analogous to being a feminist and critical race theorist? Or a feminist and a queer theorist? From a LatCrit perspective, is there something inherent in CRT that prevents the theory from taking up the issues LatCrit scholars continue to argue were (are) absent from CRT?

And what's in the name? Crenshaw describes how the term "Critical Race Theory" came into being this way:

Turning this question over, I began to scribble down words associated with our objectives, identities, and perspectives, drawing arrows and boxes around them to capture various aspects of who "we" were and what we were doing. The list included: progressive/critical, CLS, race, civil rights, racism, law, jurisprudence, theory, doctrine, and so on. Mixing them up and throwing them together in various combinations, one proposed combination came together in a way that seemed to capture the possibility we were aiming to create. Sometime toward the end of the interminable winter of 1989, we settled on what seemed to be the most telling marker for this peculiar subject. We would signify the specific political and intellectual location of the project through "critical," the substantive focus through "race," and the desire to develop a coherent account of race and law through the term "theory."⁴⁵

What mix of ideas went into the appellation LatCrit Theory? What are the implications of naming an identity in that movement? Should African Americans write under the rubric of BlackCrit theory? Is asking this question tantamount to asking whether law schools should have white law students' associations? Is the perception—still—that CRT is *de facto* BlackCrit theory? Was CRT hostile to the experiences of non-black

⁴⁴ Here are some of the questions Valdes has raised:

Is Critical Race Theory a project of or for Latinas/os qua Latinas/os . . . should it be, can it be? For Latina/o legal scholars, several key underlying questions immediately arise. Does the Black/White paradigm somehow define or delimit Critical Race Theory in a conclusive or definitive manner? Conversely, do or can critical race discourses and venues place Latinas/os at the center, at least for some significant portion of the time? Is critical "race" theory concerned with "ethnicity"? Should it be? Is, can, or should Critical Race Theory be a viable and inviting project to those with a Latina/o subject position?

Francisco Valdes, *Foreword: Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996).

⁴⁵ Crenshaw, *First Decade*, *supra* note 34, at 1360–61.

people of Color? How have Richard Delgado, Gerald Torres, Mari Matsuda, and Neil Gotanda (and other people of color who are not African American) responded to this claim? Did they feel excluded from or marginalized in CRT? Did they feel silenced or disciplined by the movement?

What role, if any, does safe space play in LatCrit organizing? Has LatCrit avoided some of the hard “critical” boundary questions by functioning as a “safe space” for everyone? Some of the fights within CRT explicitly centered on whether adopting a set of specific themes or normative commitments would be consistent with the notion of “safe space.”⁴⁶ Are similar fights occurring within LatCrit? Is LatCrit an effort to un-do the perceived boundaries of CRT? Is it an effort to re-do those boundaries? If so, along what lines?

I raise the foregoing questions about LatCrit, and about CRT in the earlier paragraph, because each resides at the interstices of Crenshaw’s conceptualization of CRT as both a “verb” and a “unit filled with stuff—theories, themes, practices and the like.” I raise these questions because they invite us to specifically discuss the boundaries of CRT—descriptively and normatively.

Yet, one might still worry about Critical Race Theorists doing so. As a counter-hegemonic project, the notion of Critical Race Theorists drawing boundaries is troublesome; boundary work is unavoidably fraught with the

⁴⁶ As Crenshaw explains:

The safe-space interests and the intellectual coherence objectives were occasionally pitted against one another. For example, some disagreement developed in the second workshop over the question of the relationship between resisting racism and resisting patriarchy and homophobia. Some of us felt that patriarchy and homophobia were intertwined in racial power and thus were inseparable from the scope of CRT. Others felt that racial subordination was distinct and should be theorized as such. Some participants framed the issue as a conflict over whether CRT would have a theoretical “line” or whether as a safe space, it was a big tent open to all comers. Yet others pointed out that, in some respects, the debate was really about competing visions over what was necessary to make CRT a safe space. If CRT resisted acknowledging and theorizing the intersection of racism with patriarchy and heterosexism, could it really be considered a safe space for all members of this diverse group of men and women of varying sexual identities?

One also could recalibrate other debates that were pitched as tension between the call for safe space and the call for substantive content as, in fact, a tension between competing conceptions of substantive content. For example, the organizational goal of “safe space” served as the provisional justification for the initial inclusion of people of color only. One might frame the issue as safe space values having trumped substantive content: Identity, rather than substantive criteria, won out as a defining factor in determining participation in the workshop. However, this, too, could be framed as competing substantive perspectives. Was CRT a product of people of color, or was CRT a product of any scholar engaged in a critical reflection of race? Because I subscribe to the latter proposition, I regard the traditional exclusion of whites from our workshops as an unfortunate development. But, of course, opinions on this and similar issues vary considerably among original and subsequent workshop participants.

Id. at 1362–63.

politics of inclusion and exclusion, as the preceding discussion attests. On the other hand, the absence of boundaries can be fraught as well.⁴⁷ The question of whether to draw lines, then, cannot be resolved *a priori* or in the abstract. Nor should our engagement of this issue reflect the formalism that all boundary work is fungible, whether it takes the form of CRT scholars deciding which ideas and normative commitments to include in the theory or the form of American legal institutions deciding which people to include in the nation. The tensions that boundary work inevitably produces should not be an argument against boundary work *per se*. Charles Lawrence puts this point well:

In hard times, I think it more important than ever to define clearly who we are and what we stand for. I am not for talking about the silly debate over whether certain individuals have been, or should be, barred from attending Critical Race Workshops. . . . But . . . we must be clear about what we stand for.⁴⁸

In arguing that Critical Race Theorists should more clearly define the normative and theoretical parameters of CRT, I am not proposing a once-and-for-all formulation of the theory. As Athena Mutua explains, “CRT is a work in progress.”⁴⁹ At the same time, in any given moment, there should be a set of (even provisional) ideas and frames that are available for mobilization and that are themselves re-constituted in the process.

George Lipsitz’s contribution is instructive on this point. In the context of conceptualizing CRT as a social movement, Lipsitz describes a dynamic relationship among political ideas, political actors, and political movements that is helpful to approaching how we might think about the “whatness” of CRT. According to Lipsitz:

The boycotters in Montgomery did not start out demanding an end to segregation on the buses. They protested the arrest and humiliating treatment accorded Rosa Parks for refusing to give up her seat to a white passenger and move to the back of the bus. Initially, they sought only a more humane form of segregation. When the city resisted their demands, however, making it clear that no concessions would be forthcoming, discussions at mass meetings made the Black population of Montgomery more aware of its

⁴⁷ Francisco Valdes & Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513 (2011) (discussing the problem of boundary-less market states).

⁴⁸ Charles R. Lawrence, III, *Foreword: Who Are We? Why Are We Here? Doing Critical Race Theory in Hard Times*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 36, at xvii–xviii.

⁴⁹ Mutua, *Rise, Development and Future*, *supra* note 8, at 331.

linked fate and more enthusiastic about the prospect for broader changes. The lunch counter sit-ins by students began with the modest goal of seeking the right to eat a hamburger next to a white person. But the disciplined collective action required to mount and sustain struggle in the face of vigilante violence, arrests, and incarceration led to the organization of SNCC and the recognition by Ella Baker and others that the struggle had become concerned with something “bigger than a hamburger.”⁵⁰

I am confident that we can do the same within CRT—that is, “organizationally learn” as we develop and deploy the ideas and frames we think should travel under our name. Indeed, we have already evidenced the ability to do so. CRT grew out of a series of organizationally learned lessons, what Paulo Freire would call moments of “[r]eflection and action”⁵¹—about ethnic studies, about safe spaces, about traditional civil rights, about CLS, about colorblindness, about retrenchment politics, and about the institutional cultures of law schools. These organizationally learned moments have helped to constitute the theory. Because CRT can neither speak for itself nor do its own work, CRT scholars should continue to frame CRT in terms of both the work the theory is performing and the work CRT might still need to do. Doing so is consistent with Crenshaw’s call to conceptualize CRT as a verb. Being specific about what CRT does and aspires to do is especially critical because, as Sumi Cho and Frank Valdes’s essay empirically demonstrates, post-racialism is quickly emerging as the rhetorical replacement for colorblindness.⁵² Against this backdrop, it is all the more important that we heed Charles Lawrence’s imperative that “[w]e . . . know who is us.”⁵³

The question, then, becomes: What are (or should be) some of CRT’s core ideas? One might start by saying that CRT rejects the standard racial progress narrative that characterizes mainstream civil rights discourse—namely, that the history of race relations in the United States is a history of linear uplift and improvement. Of course, America’s racial landscape has improved over time, and CRT scholars should be ready to point this out. The problem with the racial progress narrative, however, is that it elides what I would call the “reform/retrenchment dialectic” that has constituted America’s legal and political history.⁵⁴ Consider the following three examples: (1) the end of legalized slavery and the promulgation of the

⁵⁰ Lipsitz, *supra* note 3, at 1464–65.

⁵¹ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 75 (1982).

⁵² See Valdes & Cho, *supra* note 47.

⁵³ Lawrence, *Foreword*, *supra* note 48, at xviii.

⁵⁴ Crenshaw engages a variation of the problem in *Race, Reform and Retrenchment*, *supra* note 19. Her project in that piece is to “challenge[] both the New Left and the New Right critiques of the civil rights discourse.”

Reconstruction Amendments (the reform) inaugurated legalized Jim Crow and the promulgation of Black Codes (the retrenchment); (2) *Brown v. Board of Education*'s dismantling of separate but equal in the context of K-12 education (the reform) was followed by *Brown II*'s weak "with all deliberate speed" mandate (the retrenchment); (3) Martin Luther King, Jr.'s vision of racial cooperation and responsibility, which helped to secure the passage of the Civil Rights Act of 1964 (the reform), was re-deployed to produce a political and legal discourse that severely restricts racial remediation efforts: colorblindness (the retrenchment). A linear narrative about American racial progress obscures this reform/retrenchment dynamic.

Nor do racial progress narratives make clear that the episodes we celebrate today as significant moments of racial reform (e.g., *Brown*) were moments of national crisis, moments that contested what Lani Guinier has called the "tyranny of the majority,"⁵⁵ counter-majoritarian moments, moments preceded by mass political mobilization. Far from reflecting national harmony in which the country as a whole agreed that racial change was in order, racial reform typically has occurred when the equality interest of people of color converges with the interest of powerful elites; and "even when the interest convergence results in an effective racial remedy, that remedy will be abrogated at the point that policy makers fear that the remedial policy is threatening"⁵⁶ to the dominant social order. This, of course, is Derrick Bell's theory of interest convergence, which he offers as an explanation for the reform/retrenchment dynamic I have described. The broader point is that one of CRT's key claims is that racial reform and racial retrenchment are defining aspects of American law and politics.

In addition to rejecting the civil rights linear racial progress narrative, CRT repudiates the view that status quo arrangements are the natural result of individual agency and merit. We all inherit advantages and disadvantages, including the historically accumulated social effects of race. This racial accumulation—which is economic (shaping both our income and wealth),⁵⁷ cultural (shaping the social capital upon which we can draw),⁵⁸ and ideological (shaping our perceived racial worth)—structure our life chances. CRT exposes these inter-generational transfers of racial compensation. Building up over time to create racial shelters (hidden and protected racial privileges) and racial taxes (hidden and unprotected racial

⁵⁵ LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994).

⁵⁶ DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 69 (2004).

⁵⁷ See, e.g., MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1997).

⁵⁸ Cf. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE, AND HOMO-ACADEMICUS* (1962).

costs),⁵⁹ racial compensation profoundly shapes and helps to support the contemporary economies of racial hierarchy.⁶⁰ CRT intervenes to correct this market failure and the unjust racial allocations it produces.

One way the theory does so is by challenging two dominant principles upon which American anti-discrimination law and politics rest—to wit, that colorblindness necessarily produces race neutrality and that color consciousness necessarily produces racial preferences. By historically contextualizing existing racial inequalities, CRT is able both to contest the [colorblindness/race-neutrality]/[color-conscious/racial preferences] alignments and to reverse them. The theory effectuates this reversal by demonstrating how colorblindness can produce racial preferences and how color consciousness can neutralize and disrupt embedded racial advantages.⁶¹

CRT also weighs-in directly on the very idea of race, rejecting the conception of race as a biological fixed social category and arguing instead that race is socially constructed. Part of this effort includes describing race as a performative identity, one whose meanings shift not only from social context to social context but from social interaction to social interaction. Under this view of race, people actively work their identities to shape how others experience them.⁶² And even when a person does not intend to manage her identity in this way, the racial meanings others ascribe to her (Is she racially assimilationist? Is she racially counter-cultural?) will turn at least in part on her performative identity. Imagine, for example, two black women—one of whom has dreaded hair; the other's hair is relaxed. Neither intends to employ her hair to make a racial statement about herself. Notwithstanding the absence of that intent, both will be racially interpreted (and even interpellated, to draw from Althusser)⁶³ based at least in part on

⁵⁹ Cf. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1999).

⁶⁰ One might also think about this in terms of what I would call the “racial deficits” and “racial surpluses” we inherit.

⁶¹ See generally Devon W. Carbado & Cheryl I. Harris, *New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

⁶² See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. L. ISSUES 701 (2001); see also Mario L. Barnes & Angela Onwuachi-Willig, *By Any Other Name?: On Being “Regarded As” Black and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283; Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517 (2008); Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994). Scholars outside of the field of CRT have also drawn on this insight. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007).

⁶³ According to Althusser: “There are individuals walking along. Somewhere (usually behind them) the hail rings out: ‘Hey you there!’ One individual (nine time out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e., recognizing that ‘it really is he’ who is meant by the hailing. But in reality things happened without succession. The existence of ideology and the hailing or interpellation of individual as subject are one and thus the same thing.” LOUIS

their hair. As between the two women, people are more likely to “read” the woman with dreads as racially counter-cultural.⁶⁴ This is because, as Paulette Caldwell,⁶⁵ Angela Onwuachi-Willig,⁶⁶ and Margaret Montoya⁶⁷ have explained, hair is racially constitutive. Self-presentation or performance more generally is as well. This performative understanding of race suggests that people are not born raced, to re-articulate a point Simone de Beauvoir makes about sex; they become raced, in part through a series of cognizable acts.⁶⁸ These acts—which we rehearse, renew, and revise—become consolidated over time, constituting the very thing (race) we imagine to be ontologically prior.⁶⁹

CRT rejects the view that race precedes law, ideology, and social relations. Instead, Critical Race Theorists conceptualize race as a product of law, ideology, and social relations. According to CRT, the law does not simply reflect ideas about race. The law constructs race: Law has historically employed race as a basis for group differentiation, entrenching the idea that there are “in fact” different races; law has helped to determine the racial categories (e.g., Black, White, Yellow) into which institutions and individuals place people; law sets forth criteria or rules (e.g., phenotype and ancestry) by which we map people into those racial categories; law has assigned social meaning to the categories (e.g., Whites are superior; Blacks are inferiors; Japanese Americans are disloyal); law has employed those meanings to structure hierarchical arrangements (e.g., legalized slavery for inferior people (Blacks) and legalized internment for people who are disloyal (people of Japanese descent)); and those legal arrangements, in turn, have functioned to confirm the social meanings that law helped to create (e.g., the people who are enslaved must be inferior; that is why they are enslaved; the people who are interned must be disloyal; that is why they are interned).⁷⁰

CRT has also focused more specifically on how the law constructs

ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 174–75 (Ben Brewster trans., 1971).

⁶⁴ See generally Carbado & Gulati, *The Fifth Black Woman*, *supra* note 62 (discussing these dynamics).

⁶⁵ See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

⁶⁶ See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L. REV. 1079 (2010).

⁶⁷ Montoya, *Mascaras, Trenzas, y Grenas*, *supra* note 62, at 185.

⁶⁸ SIMONE DE BEAUVOIR, *THE SECOND SEX* 12–13 (Constance Borde & Sheila Malovany-Chevalier trans., Knopf 2009) (1949).

⁶⁹ Cf. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 523 (1988) (“[T]he body becomes its gender through a series of acts which are renewed, revised and consolidated through time.”). But see BRUCE WILSHIRE, *ROLE PLAYING AND IDENTITY: THE LIMITS OF THEATRE AS METAPHOR* (1982) (arguing that gender is not a performance).

⁷⁰ Devon W. Carbado, *What Exactly Is Discrimination on the Basis of Race?* (draft on file with author).

whiteness, thus, for example, Cheryl Harris's arguments about "whiteness as property"⁷¹ and Ian Haney López's white-by-law analysis of the naturalization cases.⁷² These efforts are part of a broader body of work demonstrating that, historically, whiteness has functioned as a normative baseline.⁷³ We are all defined with whiteness in mind. We are the same as, or different from, whites. Think, for example, about some of our contemporary debates about racial equality. Essentially, two competing paths exist to pursue racial equality in the United States: demonstrate either that people of color are the same as, or different from, whites. To draw from an observation that Catherine Mackinnon makes about sex: "The main theme in the fugue is 'we're the same, we're the same, we're the same.' The counterpoint theme . . . is 'but we're different, but we're different, but we're different.'" ⁷⁴ Both of these conceptions of equality implicitly have whiteness as their reference. Under the sameness framework, people of color are measured in terms of their correspondence to whiteness; under the difference framework, we are assessed according to our non-correspondence.⁷⁵

This sameness/difference dynamic helps to explain how race figures in equal protection analysis. Critical Race Theorists have long criticized what Jerry Kang and I call the *race per se* approach to equal protection—the presumption that any use of race is constitutionally suspect.⁷⁶ As a result of this presumption, the government needs to articulate a compelling justification for incorporating race into its decision-making.⁷⁷ To put the point more doctrinally, race-based governmental decision-making must survive strict scrutiny. The baseline effects of whiteness, and the

⁷¹ See Harris, *Whiteness as Property*, *supra* note 29, at 1713 (describing "whiteness" as a "valuable asset" that whites seek to protect).

⁷² IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006).

⁷³ See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997); STEPHANIE WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996). Feminists have made similar points about gender. See Martha Minow, *Feminist Reason: Getting it and Losing It*, 38 J. LEGAL EDUC. 47, 48 (1988) ("The norms and the dynamics of the natural world—the way its biological, evolutionary, and even chemical and physical properties are explained—embody unstated male reference points."); see also Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 316–17 (1993) (noting that "the law's incorporation of a male normative standard may be invisible but it is not inconsequential"). One can, of course, advance similar claims about heterosexuality. See Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76 (2000).

⁷⁴ CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 34 (1987); see also Carbado, *Straight*, *supra* note 73 (drawing on Mackinnon's sameness/difference analysis).

⁷⁵ Here, too, I am merely re-articulating a point Mackinnon makes about sex. See Carbado, *Straight*, *supra* note 73.

⁷⁶ Devon W. Carbado & Jerry Kang, *Scrutinizing Strict Scrutiny* (draft on file with author).

⁷⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Race-based classifications must also be narrowly tailored, which, roughly, means that even when the government has a compelling reason for incorporating race into its decision-making, the means by which it does so should be carefully thought out and narrowly circumscribed.

sameness/difference dynamic it produces, provides a *partial* explanation for why this is so. Because we are all (supposed to be) the same as whites—because race is ostensibly nothing but skin color⁷⁸—judges should “strictly scrutinize” instances in which the government treats us differently by relying on race.⁷⁹ At the same time, because we (people of color) are said to have different racial experiences than whites and this difference is perceived to facilitate the “robust exchange of ideas,” the government may, at least in the context of higher education, invoke diversity to justify relying on race.⁸⁰

At the front end of equal protection analysis, then, the notion is that people of color are *formally* the same as whites (taking race into account treats them differently and thus should be strictly scrutinized);⁸¹ at the back end of the analysis, the racial experiences of people of color are perceived to be *substantively* different (thus, the government can employ diversity as a compelling justification for affirmative action). Under the strained logic of this sameness/difference approach, people of color are the same as, but have different racial experiences than, whites. One way to make sense of this would be to say that equal protection doctrine reflects a strong imperative that people of color *should be* the same as whites; but, understanding that they are not, the doctrine reflects a weak and instrumental tolerance of their difference.

Neil Gotanda has engaged this problem of sameness and difference by critiquing what he refers to as the Supreme Court’s formal approach to equal protection.⁸² Under this approach, evidence of formal sameness in treatment precludes the finding of discrimination. Other CRT scholars, such as Charles Lawrence, have linked this problem of racial formalism to intent-centered models of discrimination, models that require evidence of

⁷⁸ *Shaw v. Reno*, 509 U.S. 630 (1993). According to the Court:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Id. at 647–48.

⁷⁹ *Adarand*, 515 U.S. 200.

⁸⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸¹ *Adarand*, 515 U.S. at 239 (Scalia, J., dissenting) (“[U]nder our Constitution there can be no such thing as either a creditor or a debtor race In the eyes of government, we are just one race here. It is American.”); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 987 (9th Cir. 2004) (quoting *Adarand* for the same proposition); *Bass v. Bd. of Cnty. Comm’rs, Orange Cnty., Fla.*, 256 F.3d 1095, 1103 (11th Cir. 2001) (same); *Equal Open Enrollment Ass’n v. Bd. of Educ. of Akron City Sch. Dist.*, 937 F.Supp. 700, 710 (N.D. Ohio 1996) (same); *U.S. v. Adair*, 913 F. Supp. 1503, 1513 (E.D. Okla. 1995) (same); *Clarke v. City of Cincinnati*, 1993 WL 761489, *27 (S.D. Ohio, 1993) (“[W]e are all members of one and only one race, the human race.”).

⁸² Neil Gotanda, *A Critique of “Our Constitution is Colorblind,”* 44 STAN. L. REV. 1 (1991).

discriminatory intent to sustain an anti-discrimination cause of action.⁸³ Still other CRT scholars, such as Darren Hutchinson, have demonstrated how the Supreme Court's commitment to treating people formally the same "has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude."⁸⁴ Each of these efforts is part of a broader CRT project to articulate racism as a structural phenomenon, rather than as a problem that derives from the failure on the part of individuals and institutions to treat people formally the same.

Informing CRT's structural account of racism is the notion that racism is endemic in society. It is, to put it the way Daria Roithmayr might, "locked-in."⁸⁵ This locked-in feature of racism is linked to our very system of democracy. Which is to say, historically, racism has been constitutive of, rather than oppositional to, American democracy. This does not mean that racism is an expression of American democracy. That would be putting the point too strongly. It is more accurate to say that racism was built into the constitutional architecture of American democracy. As Rachel Moran and I explain elsewhere, "[t]he drafters of the Constitution took a sober second look at the rhetoric of radical egalitarianism in the Declaration of Independence, and they blinked. The adoption of the Constitution in 1787 and its ratification one year later depended on a compromise, one that integrated slavery into the very fabric of American democracy."⁸⁶ The lingering effects of this foundational moment—or the ongoing relationship between racial inequality and American democracy—is precisely what Gunnar Myrdal referred to as an "American dilemma."⁸⁷

In describing racism as an endemic social force, CRT scholars argue that it interacts with other social forces, such as patriarchy,⁸⁸ homophobia,⁸⁹ and classism.⁹⁰ The theory is thus committed to what

⁸³ Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁸⁴ Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615 [hereinafter Hutchinson, *Unexplainable*].

⁸⁵ See generally Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000).

⁸⁶ DEVON W. CARBADO & RACHEL F. MORAN, *Introduction to RACE LAW STORIES* 8 (Rachel F. Moran & Devon W. Carbado eds., 2008).

⁸⁷ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

⁸⁸ See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 582 (1990).

⁸⁹ See generally Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2009).

Crenshaw has called “intersectionality”—and, more specifically, to an intersectional engagement of structural hierarchies.⁹¹ This engagement endeavors not only to “look to the bottom,” to borrow from Mari Matsuda;⁹² it also seeks to “look to the top.”⁹³ In other words, the theory seeks to make clear that there is a “top” and a “bottom” to discrimination⁹⁴ and that, historically, racism has been bi-directional: It gives to whites (e.g., citizenship) what it takes away from or denies to people of color. Framing discrimination in this way helps to reveal an uncomfortable truth about race and power: The disempowerment of people of color is achieved through the empowerment—material or psychological—of whites.⁹⁵ There is no disadvantage without a corresponding advantage, no marginalized group without the powerfully elite, no subordinate identity without a dominant counterpart. As Guy-Uriel Charles argues, “[l]ooking at the gaping racial disparities [in America] on most socio-economic indicators, there are clearly two classes of citizens: Whites and coloreds.”⁹⁶ Racism has historically drawn this line, effectuating and maintaining a relational difference that is based on power. CRT attempts to describe the role law plays in enabling this racial arrangement.

Critical Race Theorists pursue this project across racial groups,⁹⁷ and in the context of doing so try to avoid what Angela Harris might refer to as the pitfalls of essentialism.⁹⁸ While some would say CRT scholars *are*

⁹⁰ See generally Trina Jones, *Race, Economic Class, and Employment Opportunities*, 72 LAW & COMTEMP. PROBS. 57 (2009).

⁹¹ See generally Crenshaw, *Mapping the Margins*, *supra* note 29.

⁹² Mari J. Matsuda, *Looking to the Bottom*, *supra* note 24.

⁹³ See generally Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002).

⁹⁴ See *id.*

⁹⁵ Of course, whiteness is not a monolithic identity category. Class, sexual orientation, among other aspects of person, shape how whites experience their whiteness. Understood in this way, whites have differential access to the privileges of whiteness. See *id.* at 1297; see also Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497 (2010). At the same time, whites across differences can nevertheless trade on whiteness, if only psychologically. Du Bois's notion of the wages of whiteness speaks precisely to this idea. Du Bois argued that “the white group of laborers, while they receive a low wage, were compensated in part by a sort of public and psychological wage.” W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARDS A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880*, at 700 (1965). Du Bois's point was that, notwithstanding the material deprivations that working class whites historically have experienced, they were able to draw on the psychological wages of whiteness, which they treated as a material resource against the background of presumptions of black inferiority. See DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

⁹⁶ Guy-Uriel Charles, *Towards a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353 (2007).

⁹⁷ See, e.g., ROBERT CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUSTICE 177 (1997); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

⁹⁸ On the problem of essentialism in feminist legal theory, see generally Harris, *Race and Essentialism*, *supra* note 88.

anti-essentialist, it would be more accurate to say that we *aspire to be* anti-essentialist. The distinction is important. Because to invoke any social category is already to essentialize, the question is not whether we engage in essentialism but rather the normative work we deploy that essentialism to perform.

Part of that work entails highlighting the discursive frames legal and political actors have employed to disadvantage people of color. These frames include, but are not limited to: "colorblindness,"⁹⁹ "illegal alien,"¹⁰⁰ "terrorist,"¹⁰¹ "reverse discrimination,"¹⁰² "foreigner,"¹⁰³ "merit,"¹⁰⁴ "the border,"¹⁰⁵ "citizenship,"¹⁰⁶ "the war on drugs,"¹⁰⁷ and "the war on terror."¹⁰⁸ Even our most celebrated constitutional frameworks, such as "equal protection"¹⁰⁹ and "due process,"¹¹⁰ can function as repositories of racial power. CRT reflects "a desire not merely to understand . . . [these and other] vexed bond[s] between law and racial power but to *change* . . . [them]."¹¹¹ The theory is both pragmatic and idealistic. It grapples with the immediacies of now without losing sight of the transformative possibilities of tomorrow.¹¹²

⁹⁹ See, e.g., Gotanda, *supra* note 82.

¹⁰⁰ See, e.g., Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (discussing racialization of illegal aliens).

¹⁰¹ Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

¹⁰² Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994); see also Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123 (2007), <http://www.michiganlawreview.org/assets/fi/105/crenshaw.pdf>.

¹⁰³ Keith Aoki, "Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 ASIAN PAC. AM. L.J. 1 (1996); Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in the Birth of a Nation, the Cheat, and Who Killed Vincent Chin?*, 5 ASIAN L.J. 41 (1998).

¹⁰⁴ See Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Harris & Narayan, *supra* note 102.

¹⁰⁵ See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525; George A. Martínez, *Race and Immigration Law: A Paradigm Shift?* 2000 U. ILL. L. REV. 517.

¹⁰⁶ See HIROSHI MOTUMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285 (2002); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

¹⁰⁷ See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 43–36 (2009); Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873 (1999).

¹⁰⁸ See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004).

¹⁰⁹ See Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001).

¹¹⁰ See Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1 (1992).

¹¹¹ See CRITICAL RACE THEORY: THE KEY WRITINGS, *supra* note 6, at xiii.

¹¹² See WORDS THAT WOUND, *supra* note 34, at 3 (describing CRT as "both pragmatic and utopian").

Clearly, the foregoing ideas do not fully capture CRT. Nor is my summary articulation of them a particularly good window on the transformative work CRT can perform. Luke Harris's and Gary Peller's contributions to this Commentary volume are helpful in this respect. Harris's response employs narrative to challenge race neutral articulations of merit; Peller's response illustrates the importance of the claim that race is a social construction. I discuss each in turn.

Harris's contribution provides a narrative backdrop to a series of arguments he has advanced challenging both merit and race-neutrality, particularly as scholars, policy makers, and judges have deployed them in the affirmative action context.¹¹³ Part of his effort has been to demonstrate why a racial preference understanding of affirmative action is flawed. His narrative provides an answer.

Yale Law School was an unlikely destination for Luke Harris. "A myriad of factors paved the way," including "the hard work of a loving great Aunt . . . , the constructive interventions of a devoted and positive mentor outside of my school," affirmative action admissions, and a sense of self that the Civil Rights and Black Power Movements helped to create. According to Harris, his own life's story made it difficult for him to consider himself "special" or "exceptional" vis-à-vis black students who did not make it to that particular ivory tower. There were too many people like him for whom Camden—"one of the poorest urban communities in the United States"—would be their life and death. Harris was at Yale not because he was the "best black" and the people he left behind were "the worst," but because of the set of contingencies and convergences that had little to do with Harris's own "merit."

The narrative Harris articulates about Yale Law School reveals the ease with which Yale institutionalized the affirmative-action-as-preference frame. Virtually absent from the debate about black student admissions at Yale was "an institutional/structured analysis . . . of racialized hierarchy."¹¹⁴ The absence of that analysis meant that the different racial and social paths students traveled to enter Yale's admissions pool, and the extent to which Yale's admissions criteria embedded race—at the very least in the sense of producing racially disparate admissions outcomes—mattered far less significantly than the applicants' "numbers," that is, their GPAs and standardized test scores. In Yale's admissions process, GPA and LSAT scores functioned as race neutral proxies for merit.

More fundamentally, the students' different educational and life

¹¹³ See, e.g., Harris & Narayan, *supra* note 102, at 3 (arguing that because "Blacks are viewed as . . . [the] principal beneficiaries" of affirmative action policies, "the confusions and misconceptions, as well as the hand-wringing and soul-searching that looms over affirmative action, are most forcefully articulated with regards to race-based policies that pertain to African Americans").

¹¹⁴ Luke Harris, *Beyond the Best Black: The Making of a Critical Race Theorist at Yale Law School*, 43 CONN. L. REV. 1379, 1397 (2011).

trajectories—some marked by race and/or class privilege; others marked by race and/or class disadvantage—did not force Yale to reconsider the baseline assumption that Harris argues under-wrote Yale's admissions regime—that students were competing on a level and race-neutral playing field. To the extent that the admissions baseline is determined to be racially neutral, it becomes easy to view affirmative action as *the* moment in which race enters an otherwise colorblind admissions process.

Cheryl Harris and I have advanced a version of this argument, invoking what we call “the baseline assumption”:

Under one view, the baseline is formally and substantively equal and candidate X, who is black, and candidate Y, who is white, are similarly situated with respect to their opportunity to gain admissions. Affirmative action disrupts this baseline equality by tilting the process in favor of Candidate X over Candidate Y. Under another view, the baseline is unequal and affirmative action is necessary to counteract the structured impediments to Candidate X. Here, formally taking race into account helps to offset the current admissions practices that are stacked in ways that prefer whites and disadvantage blacks.¹¹⁵

In developing this argument, we built on Harris's prior work with Uma Narayan, specifically, their “anti-preference” framework for conceptualizing affirmative action.¹¹⁶ That framework remains under-utilized in CRT. In fact, many CRT scholars characterize affirmative action as preference; they simply argue that it is a preference for which there are compelling justifications. Harris's essay demonstrates why that framing is wrong. By incorporating his narrative into his anti-preference framework, Harris reveals how both “merit” and “racial neutrality” can mask the racial privilege and disadvantage they produce.

While Peller's response is not explicitly structured around the notion of race as a social construction, his argument demonstrates the importance of the idea. For the most part, when scholars invoke the claim that race is a social construction, they develop it to challenge biological conceptions of race. Peller's intervention is a productive reminder that race is constructed *ideologically* as well.

Consider this point with respect to what Peller calls “integrationism.” Integrationism constructs racial consciousness “to be the central evil of racism,”¹¹⁷ and colorblindness to be a necessary predicate for antiracism.

¹¹⁵ Carbado & Harris, *supra* note 61, at 1200.

¹¹⁶ Harris & Narayan, *supra* note 102, at 26 n.101 (“[T]he terminology of ‘preference’ that dominates the discourse on affirmative action impedes critical reflection.”).

¹¹⁷ Peller, *supra* note 14, at 1483.

Under integrationism, colorblindness and race neutrality are one and the same thing.¹¹⁸ Peller's argument identifies at least six ideas about race that (a particular brand of) integrationism ideologically produces:

- Race is irrelevant
- Discrimination derives from individual bias and unequal treatment
- Equal treatment produces racial equality
- Racial equality mandates colorblindness
- Colorblindness is racially neutral
- Color consciousness produces racial preferences

Each of the preceding ideas shapes how we think about race as an identity category, racism as a social practice, and racial remediation as an intervention. This is the sense in which these processes ideologically construct race. Peller's response highlights this role.

Peller's contribution also foregrounds another dimension of the social construction of race thesis—the essence/existence debate about race. On one side of the debate is the argument that, because there is no *essence* to race, there is no racial *existence*. On this view, race simply isn't real. Making race the subject of politics, or people the subject of race, reifies the social category. Indeed, for some, embracing the idea that an identifiable racial subject is a necessary predicate for politics is to enact a form of racial subjugation. Crenshaw refers to arguments of the foregoing sort (of which there are various articulations) as “vulgar anti-essentialism.” On the other side of the debate is the argument that the fact that race is socially constructed (in the sense of having no *essence*) does not mean that race is not real (in the sense of having no *existence*). For people on this side of the argument, the failure to make race the subject of politics, and people the subject of race, is to elide and entrench the non-essential/material ways in which race operates. As Peller's essay demonstrates, the vulgar anti-essentialism thesis cannot withstand scrutiny. According to Peller,

[T]he African American community *exists* as a group and can be followed through time and space even if the group can never be objectively and definitively defined; even if its borders are continuously contested; even if its meaning is multiple and indeterminate. It is true that the group's existence is partly constituted by performances, in which the group is produced by being articulated and rearticulated. It is true that the group may be constituted very differently in the

¹¹⁸ See Carbado & Harris, *supra* note 61, at 1195–98.

future, or maybe not “exist” in the future at all. But that contingency does not make the group less real.¹¹⁹

Peller’s argument is not that we should ignore the problems of essentialism. Nor is he unmindful of the ways in which our political and legal interventions sometimes over-determine the content of our categories, obscuring their contingency and false necessity.¹²⁰ His argument is simply that we should not conflate the social construction of race claim (or the absence of racial essence) with arguments about racial materiality (or the absence of racial existence).

IV. CRITICAL RACE TRAVELLING

A useful starting point for thinking about the extent to which CRT has travelled across disciplines is to invoke Edward Said’s concept of travelling theory. According to Said,

Like people and schools of criticism, ideas and theories travel—from person to person, from situation to situation, from one period to another. Cultural and intellectual life are usually nourished and often sustained by this circulation of ideas, and whether it takes the form of acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas and theories from one place to another is both a fact of life and a usefully enabling condition of intellectual activity. Having said that, however, one should go on to specify the kinds of movement that are possible, in order to ask whether by virtue of having moved from one place and time to another an idea or a theory gains or loses in strength, and whether a theory in one historical period and national culture becomes altogether different for another period or situation.¹²¹

In engaging this issue, Said was particularly worried about the extent to which theories lose their originality and insurgency as they travel from one domain to another. More than a decade later, Said revisited the topic, not so much to repudiate his prior position but to more fully articulate another possibility: that theories can become more insurrectionary and capacious as they travel.¹²² In other words, rather than domesticating or enervating

¹¹⁹ Peller, *supra* note 14, at 1501.

¹²⁰ For a discussion of the concept of false necessity in legal theory, see generally ROBERTO M. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987).

¹²¹ Edward W. Said, *Traveling Theory*, in *THE WORLD, THE TEXT, AND THE CRITIC* 226 (1983).

¹²² Edward W. Said, *Traveling Theory Reconsidered*, in *REFLECTIONS ON EXILE AND OTHER ESSAYS* 436–52 (Moustafa Bayoumi ed., 2000).

theories, “movement” might radicalize and invigorate them.

A concrete way of pursuing some of the concerns Said raises is to think about how Reverend Dr. Martin Luther King, Jr.’s “I Have a Dream” speech has discursively and normatively traveled. Many Americans are familiar with one particular line: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”¹²³ This line has travelled from animal rights organizing,¹²⁴ to disability rights advocacy,¹²⁵ to the gay rights movement,¹²⁶ to neo-conservative politics,¹²⁷ to contestations about race outside of the United States.¹²⁸

In marking these various domains to which portions of King’s speech have travelled, I do not mean to be normative. I present them to raise a set of questions about travelling theory. Are King’s words being lost in translation as they move across the foregoing civil rights contexts? Should King be able to restrict the ways in which his ideas circulate? In thinking about the applicability of King’s ideas outside of the precise context in which King articulated them, should we try to figure out what King himself would have wanted? If King appeared before us today and said: “I do not support the application of my ‘I Have a Dream’ speech to gay rights,” should that be authoritative of the relevance of his words to that struggle? Is there some principle of “fair use,” not in the strict intellectual property sense but in a normative sense, that should govern how we think about any of this? If so, what principles should guide our thinking?

Each of the preceding questions might be engaged with respect to how CRT has travelled to other disciplines. How should we assess the work CRT has performed across the disciplines? Should we adopt a kind-of Critical Race originalism—that is, examine the burgeoning CRT literature

¹²³ Martin Luther King, Jr., *I Have a Dream*, Address at March on Washington (Aug. 28, 1963), available at <http://www.mlkonline.net/dream.html>.

¹²⁴ See, e.g., Lynn Hoover, *I Have a Dream Speech*, President’s Message at First Annual International Association of Animal Behavior Consultants Conference (June 3–5, 2005) (incorporating Dr. King’s message into an address regarding the treatment of animals with behavioral problems).

¹²⁵ See, e.g., Interview by Disability News and Information Service with Shivani Gupta, et. al. (Dec. 3, 2009), available at http://www.dnis.org/interview.php?issue_id=12&volume_id=6&interview_id=130 (showing the various hopes and impacts of international disability rights advocacy in India).

¹²⁶ See, e.g., Dale Carpenter, *I Have a Dream . . . of What*, TEX. TRIANGLE, Sept. 4, 2003, <http://igiculturewatch.com/2003/09/04/i-have-a-dream-of-what/> (describing the impact of Dr. King’s speech on the gay community and the continued hesitance, even by Dr. King’s children and grandchildren, to accept gay marriage).

¹²⁷ DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 163 (1996); Dinesh D’ Souza, *Improving Culture to End Racism*, 19 HARV. J.L. & PUB. POL’Y 785, 788 n.10 (1996).

¹²⁸ *Selective Incorporation: The Dialectic of Free Trade and Protectionism in Brazil-US Race Discourse* presented at the conference, *Race and Racisms in Two Americas: A Dialogue On Inequality and Affirmative Action in the U.S and Brazil*,” at PUCI-Rio, Brazil (2007) [hereinafter *Selective Incorporation*] (draft on file with author) (critiquing the ways in which American racial discourses are being “selectively” incorporated into debates about race and affirmative action in Brazil).

outside of law in light of what our CRT Foremothers and Forefathers might have wanted—and might still want? When CRT travels to other disciplines, should we be concerned about what it carries back? While neither Gloria Ladson-Billings's nor Glenn Adams and Phia Salter's contributions directly engage all of these questions, their essays provide an opportunity to reflect on the interdisciplinary travels of CRT.

Ladson-Billings's response describes the development of CRT in the field of education. It's a story in which Crenshaw's *Race, Reform, and Retrenchment* article plays a pivotal role. As Ladson-Billings explains:

After reading that article we [Ladson-Billings and her co-author William Tate] realized that the earlier [CRT] pieces we had read . . . [also] took race as its central analytic tenet. Much of our own graduate school training had taken a more classical sociological tact on race where it was seen as a "variable" with a "stable" meaning. The . . . works we were starting to read from legal scholars suggested that actually the inverse was operating, i.e., race (and racism) were being made stable—a permanent feature of U.S. society. . . . Once we realized that legal scholars had begun to think differently about race and racism, we knew we had to spend more time in the law library rather than our School of Education Library.¹²⁹

In Ladson-Billings's account, part of what travelled from CRT to Education were the ideas that race could, and should, function as the analytical core of one's scholarly engagements; that race was a product of racism, not a pre-existing identity to which racism subsequently attached; and that education scholars and activists could enlist the general tenets of CRT to stage theoretical, institutional, and policy interventions in the context of education.

Ladson-Billings (and her co-author William Tate) would go on to write a key article that helped to form CRT in Education—*Toward a Critical Race Theory in Education*.¹³⁰ More than fifteen years later, CRT is now a vibrant part of the discipline, with LatCrit and Tribal Critical Theory spin-offs. One does not get the sense from Ladson-Billings's account that scholars of education are experiencing difficulty translating CRT into educational theory and policy-making; CRT is now "naturally" a part of the race and education literature. Indeed, Marvin Lynn and Adrienne Dixson, both scholars of education, are in the process of putting together

¹²⁹ Gloria Ladson-Billings, *Race . . . to the Top, Again: Comments on the Genealogy of Critical Race Theory*, 43 CONN. L. REV. 1439 (2011).

¹³⁰ Gloria Ladson-Billings & William F. Tate, IV, *Towards a Critical Race Theory in Education*, 97 TEACHERS C. REC. 47 (1995).

an anthology of CRT in education, or what they are tentatively calling "The Handbook of Critical Race Theory and Education."

CRT's relationship to psychology is less intellectually congenial, at least according to Glenn Adams and Phia Salter. They argue that "[a] Critical Race Psychology is not yet born."¹³¹ Adams and Salter offer two reasons why this is so, each of which, paradoxically, characterizes the context from which CRT emerged in the legal academy: (1) psychology is structured around a colorblind epistemology (this is true of law); and (2) psychology conceptualizes discrimination in terms of individual actors, rather than institutional structures (this is true of law). Their story, interestingly, then, is about misalignment. But whereas the misalignment between the colorblindness-centered and the individual actor-focus of law and the newly emerging field of CRT spurred the growth of the movement in legal academia, the very same misalignment in psychology has stunted CRT's development in that discipline.

What is particularly provocative about Adams and Salter's contribution is not their claim that it "would be premature or too generous to identify psychological science as a site where CRT flourishes,"¹³² but rather that part of the development of CRT includes an elision of the ways in which the discipline of psychology is racialized. Their concern, in this sense, is not just about *whether* CRT has travelled into psychology, but also about *how* psychology is travelling into CRT. They argue that "[i]n their understandable eagerness to appropriate empirical evidence that bears on the legitimizing authority of psychological science, perspectives like Critical Race Realism may turn a blind eye toward the racial positioning inherent in scientific theory and method."¹³³ Adams and Salter are clear to point out that they are not arguing that CRT scholars should abandon psychology. Their point is that we should recognize that psychology can function as a "'Trojan Horse' of racism."¹³⁴

I share their concern. Critical Race Scholars have not thought hard enough about the costs and benefits of CRT's empirical turn to psychology. The implicit bias studies are (psychologically?) seductive, particularly because they provide a tool with which CRT scholars can attempt to overcome two of the most difficult obstacles to race conscious remediation: colorblindness and the intent standard. Implicit bias studies see through colorblindness and beyond intentionality.¹³⁵ Adams and Salter are not asking us to give up these epistemological advantages. But they are

¹³¹ Glenn Adams & Phia S. Salter, *A Critical Race Psychology Is Not Yet Born*, 43 CONN. L. REV. 1355 (2011).

¹³² *Id.* at 1357.

¹³³ *Id.* at 1360.

¹³⁴ *Id.* at 1376.

¹³⁵ See generally Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010).

asking us to “be wary of the conceptual and ideological tools packed inside” psychology.¹³⁶ Boiled down, their admonition is that when CRT scholars travel to psychology, we should be mindful of the ideas about race and science we implicitly bring back. In this respect, their argument is not the standard pushback against science from the left, which critiques science as a legitimizing discourse that masks its own ideology.¹³⁷ Adams and Salter’s contribution stages a broader critique of the ways in which the disciplinary and disciplining conventions of science embed problematic ideas about race along three interrelated axes—discursively (shaping how scientists talk about race), methodologically (shaping how they investigate race), and organizationally (shaping how scientists demographically and culturally constitute themselves as an intellectual community).

V. CRITICAL RACE FUTURES

I won’t, in this part, articulate what Jerry Kang and Kristin Lane might call a future history of CRT.¹³⁸ But I do want to think a little bit about our Critical Race future, employing Tanya Hernández’s and Sumi Cho and Frank Valdes’s contributions to do so. What unites their responses is the sense that CRT’s future will include a more robust engagement with global affairs. Hernández’s global turn is to “focus more deeply on comparative law.”¹³⁹ According to Hernández, “[c]omparative law can make a useful contribution in the effort to refocus the [U.S.] racial lens.”¹⁴⁰ Hernández seeks to do so by comparing Brazilian racial dynamics to the racial dynamics in the United States.

A standard way to think about the Brazilian and the American racial landscapes comparatively is to say that whereas America’s racial culture is “hard,” Brazil’s is “soft”; whereas Brazil is a domain of racial fluidity, America is the land of racial rigidity; whereas racial rigidity is bad, racial fluidity is good.¹⁴¹ Hernández’s comparative analysis disrupts these associations. Her response demonstrates that, notwithstanding that Brazil was not a *de jure* Jim Crow state in the way that America was, its problems with racial inequality are no less severe. By every social index, Afro-Brazilians, particularly Afro-Brazilian women, fare worse than other Brazilians. In the context of advancing this empirical claim, Hernández

¹³⁶ Adams & Salter, *supra* note 121, at 1376–77.

¹³⁷ See Jerry Kang, *Implicit Bias and Pushback from the Left*, 54 ST. LOUIS L. REV. 1139, 1139–50 (2010).

¹³⁸ See Kang & Lane, *supra* note 135.

¹³⁹ Tanya Kateri Hernández, *The Value of Intersectional Comparative Analysis to the “Post-Racial” Future of Critical Race Theory: A Brazil-U.S. Comparative Case Study*, 43 CONN. L. REV. 1407 (2011).

¹⁴⁰ *Id.* at 1410.

¹⁴¹ *Selective Incorporation*, *supra* note 128 (contesting this hard/soft dichotomy and more generally critiquing the reproduction of American colorblind logics in Brazilian racial discourses).

also notes the contradiction between Brazil's collective sense of itself as a "racial democracy" and the prevalence of some of the quintessential markers of what David Theo Goldberg has called the "racial state"¹⁴²:

- Racial profiling and harassment by the police
- Racial disparities in prosecution and conviction
- Rampant employment discrimination
- Residential segregation
- Racial inequities in education and health care
- Stereotypes of Afro-Brazilians as lazy, dirty, intellectually inferior, sexually promiscuous, and criminally inclined

The existence of these social facts in Brazil highlights an important similarity between Brazil's nation-building ideology (racial democracy) and our own (colorblindness): they both obscure and facilitate the very racial dynamics against which they are formally positioned.¹⁴³

Sumi Cho and Frank Valdes's global turn seeks to encourage CRT scholars to take up the global phenomenon of "market states"—states that are created by the "free market" movement of capital transnationally. According to Cho and Valdes, "[e]xperience suggests that the market-state overtakes the nation-state both from within and without."¹⁴⁴ To put the point slightly differently, the nation state becomes ("mainly/merely?") the mechanism through which market states are globally consolidated. This process, I would add, is dialectical in the sense that *unbounded* market states play a constitutive role vis-à-vis *bounded* nation states. Which is to say, market states do not *undo* nation states; they *re-do* them. America's participation in and facilitation of international economic and political events helps to construct its national identity. As Aslı Bâli and Aziz Rana argue in another context, "American commitment to spatial omnipresence—particularly through a continually growing network of military outposts—has become central to national self-understanding and to presumptions about its global purpose."¹⁴⁵

Part of the intervention Cho and Valdes make is to demonstrate the continuities between the role law plays domestically with respect to

¹⁴² DAVID THEO GOLDBERG, *THE RACIAL STATE* (2002).

¹⁴³ Crenshaw's Global Affirmative Action Project (GAAP) has been interested in examining precisely this relationship between national ideologies (e.g., French Civil Republicanism) and racial inequality across a number of national contexts. For an indication of the scope of GAAP, see AFRICAN AMERICAN POLICY FORUM, aapf.org (last visited May 30, 2011).

¹⁴⁴ Valdes & Cho, *supra* note 47, at 1564.

¹⁴⁵ Aslı Bâli & Aziz Rana, *American Overreach: Strategic Interests and Millennial Ambitions in the Middle East*, 15 *GEOPOLITICS* 210, 213 (2010).

questions of race, power, and privilege, and the role law plays internationally. They argue that international law is structured around three primary projects: (1) managing the former colonies so as to maintain “neocolonial privilege”; (2) shaping the international scene ideologically, in part by a formal commitment to human rights; and (3) structuring international economic arrangements to reproduce “neocolonial hierarchies.”¹⁴⁶ From this, they maintain, “the origins of international law—like the origins of law generally—are found in the more specific need of the ruler to rule the ruled.”¹⁴⁷

And, indeed, one can describe American domestic law along the lines of the three entailments Cho and Valdes set out, namely that, historically, American law has (1) managed the nation state to maintain white privilege or what Cheryl Harris calls whiteness as property¹⁴⁸ (this tracks Cho and Valdes’s point about “neocolonial privilege”); (2) shaped the domestic scene ideologically, in part by articulating a formal commitment to colorblindness (this tracks their argument about international law’s formal commitment to human rights); and (3) structured economic arrangements to reproduce historical racial hierarchies (this tracks Cho and Valdes’s claim about the reproduction of “neocolonial hierarchies”). Understood in this way, international law, like domestic law, constitutes the very environments it purports merely to regulate.

Cho and Valdes conclude their article with a series a questions about CRT and market states:

How will CRT get ahead of the curve regarding the predicted, and perhaps impending, paradigm shift between nation-state and market-state systems? How will CRT, rooted in the (legal) academy of the United States, engage the Global South to ensure that old and new sovereignties do not converge to rearticulate and reinscribe across this Earth “traditional” patterns of racial stratification? In this brackish moment of traditional and prospective sovereignties, how will CRT strive to rearticulate citizenship to ensure that this legal concept does not once again revert to a facile tool of white supremacy and anti-color xenophobia? And how will CRT help translate democracy from its current, formalistic practice within weakened nation-states that prop up unjust neocolonial skews to a robust engine of social justice that perhaps could lead to a truly “post”-colonial and functionally post-racial society? How, in other words, should CRT

¹⁴⁶ Valdes & Cho, *supra* note 47, at 1568.

¹⁴⁷ *Id.* at 1567.

¹⁴⁸ See generally Harris, *Whiteness as Property*, *supra* note 29.

endeavor to interconnect the legal, the socio-legal, and the socio-economic in time of flux and paradox that nonetheless converge again on racial erasure in favor of white-identified capital and “traditional” biases that structurally and culturally privilege whiteness and neocolonial elites in general?¹⁴⁹

These strike me as important questions for CRT scholars to engage as they continue to think about the directions in which to take CRT’s global turn.

VI. CRITICAL RACE CONCLUSIONS

Like her other work, Kimberlé Crenshaw’s article in this Commentary volume will be generative. Indeed, this volume is already a window into the kind of engagement we can expect. Rather than summarizing what I have already said, and in the spirit of looking backwards to move forwards, this conclusion identifies ten themes, issues, and problems CRT scholars might need to take up to push the theory further along.

1. *Marking Boundaries.* I have already expressed my hope that part of the future of CRT will include more efforts to define the core concepts within the movement, without ever rendering CRT an intellectual accomplishment, whose parameters are fully worked out. I worry that our failure to do so will render the *idea* of CRT more important than the *ideas* within CRT? In other words, I worry that CRT could become (is becoming? has become?) a “name” that has no clearly identifiable “thing.”¹⁵⁰

2. *Assessment.* How should we assess the work that CRT has performed? The number of law review articles that reference the term? Cases that cite to our work? Our numbers in the legal academy? The reach of the literature outside of law? Our engagement with communities outside of the academy? Who is our primary constituency? Should we think of ourselves first and foremost as academics? In short, how do we know whether we are measuring up—and with respect to what standard? After twenty years, we have to begin asking ourselves—and answering—these questions.

3. *The Critique of the Black/White Paradigm.* Notwithstanding the currency of the term “the Black/White Paradigm,” it remains decidedly under-theorized in CRT.¹⁵¹ My hope is that scholars will think harder about what this term means and what work, if any, Critical Race Theorists should mobilize the “Black/White Paradigm” rubric to perform. Currently, the term stands in for too much (any discussion of black and white race

¹⁴⁹ Valdes & Cho, *supra* note 47, at 1571–72.

¹⁵⁰ Cf. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963) (referring to sexism as the “thing that has no name”).

¹⁵¹ This part draws heavily portions of Carbado, *Race to the Bottom*, *supra* note 93, at 1305–12.

relationships seem to trigger the term)—and too little (offering insufficient guidance on what our multi-racial engagements should look like and producing instead a proliferation of identity-specific theorizing). While I am not against identity-specific theorizing *per se*, that intellectual activity should not stand in for multi-racial analyses. Declaring, for example, an “Asian American moment,” as Bob Chang did almost two decades ago, a move that crucially highlighted Asian American legal subjectivity, is not the same thing as declaring a Multiracial Moment.¹⁵² The two are, of course, related. The more we know about Asian Americans, the more complete our racial picture of the American landscape. Chang’s article brought pieces of that landscape into sharper focus. Written in 1993, Chang’s intervention was an important early effort to further expose and disrupt the racialization of Americans as both “perpetual foreigners” and “model minorities.” His work built on and helped to generate organizational and theoretical efforts that challenged the duality of this racial construction.

As Athena Mutua explains, “[b]y shifting the Critical Race Theory lens to other racialized [i.e., non-Black] groups, . . . analyses [like Chang’s] brought in important discussions of both historical and contemporary . . . [significance].”¹⁵³ She would thus encourage more work of the sort that Chang produced, as would I. But she would also encourage “shifting bottoms,” which she articulates “as a complement to the process of ‘rotating centers.’”¹⁵⁴ The basic idea here is that no one group should permanently occupy the center of our anti-racist analysis. No one group should stand in for “the bottom” or monopolize our racial imagination. While this framework leaves some questions unanswered (by what criteria do we shift or rotate the bottoms?), Mutua’s argument moves us in the right normative direction. Thus, I build on it below.

In addition to shifting bottoms or rotating centers, a Multiracial Moment might require more “racially integrative” modes of analysis. Here, the question would not be whether we have moved from discussing Black/white relations to, for example, discussing Asian/white relations. Rather, the question would be whether our racial analyses integrate the experiences of multiple racial groups. Two examples of work in this category are Laura Gómez’s book, *Manifest Destinies*, and Bob Chang and Neil Gotanda’s article, *The Race Question in LatCrit Theory and Asian American Jurisprudence*.¹⁵⁵ I discuss each project in turn.

¹⁵² Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1265 (1993).

¹⁵³ Mutua, *Rise, Development and Future*, *supra* note 8, at 338.

¹⁵⁴ Athena Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit II and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1178, 1179 (1999).

¹⁵⁵ LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); *see also* Robert S. Chang & Neil Gotanda, *LatCrti XI Symposium: Working and Living in the*

Nowhere in *Manifest Destinies* does Gomez employ the term the Black/White paradigm. Yet, her work is one of the most sophisticated and historically robust accounts of how people of Mexican descent became a race, of the role law played in that process, and of the ways in which that racialization interacted with, shaped, and was itself shaped by, the racialization of other subordinate groups. Calls to get beyond the Black/White paradigm often stand in for, but do not actually perform, this kind of intellectual work. This is part of what troubles me about the critiques of the Black/White paradigm.

Bob Chang's and Neil Gotanda's, *The Race Question*, similarly offers a robust account of multiracialism. While, unlike Gómez, Chang and Gotanda embrace the Black/White Binary terminology, *The Race Question* is a careful argument about both the role racism plays in structuring minority-minority interactions and the anti-racist potential of different forms of multiracialism. Part of what is productive about their analysis is their explicit claim that the problem—and potential—of racial binaries transcends whether they are articulated in black and white terms. My hope going forward is that LatCrit and CRT scholars will build on their work.

In addition to the limited way in which multi-racialism figures in the Black/White Paradigm critique, there are other difficulties with the standard arguments scholars rehearse against the Black/White Paradigm, some of which I sketch out below.¹⁵⁶

The Black End of the Binary. Scholars should not employ the Black/White paradigm to suggest, explicitly or implicitly, that America has grappled fully with the nature and extent of racism against Blacks. The fact that Blacks may occupy a central racial space in the American social and political imagination does not mean that the ways in which Black people are imagined (a) comport with how Blacks see themselves or (b) reflect their cumulative social experiences on the bottom.

Nor should arguments against the Black/White paradigm obscure the costs associated with occupying one end—the negative and subordinating end—of a polarity. Much of the critique of the Black/White paradigm focuses on how the Black/White paradigm privileges the racial victim status of African Americans. Little attention is paid to the ways in which African Americans might be disadvantaged as a result of being included in the paradigm. Consider, for example, that while Blackness can stand in for general criminality (because of stereotypes about race and crime), welfare abuse (because of the racial trope of the welfare queen), and the

Global Playground: Fronstage and Backstage: The Race Question in LatCrit Theory, 7 NEV. L.J. 1012 (2007).

¹⁵⁶ One of the few critiques of the discourse on the Black/White paradigm is Janine Young Kim, *Are Asians Black?*, 108 YALE L.J. 2385 (1999). I do not agree with all of her claims, but the essay constitutes a very thoughtful intervention. For another thoughtful critique, see Athena Mutua, *Shifting Bottoms*, *supra* note 154.

unqualified affirmative action beneficiary (because of racial assumptions about black intellectual deficit), the category cannot stand in for general working class disadvantage, including joblessness (because of arguments about black cultural pathology and work ethic), the difficulties of motherhood (because of the perception of black women as bad mothers), or the problems of mass incarceration (because of the perceived criminal propensities of black men and women). These are just some of the costs of occupying the subordinating end of a polarity.

Multiracialism and the Black/White Paradigm. The critique of the Black/White paradigm should not essentialize or monolithically represent Black/White understandings of American racial dynamics. There is not one Black/White framing of American race relations, but several. Critiques of the Black/White paradigm implicitly suggest that Black/White framings of race advance a single thesis about American race relations that is primarily or exclusively about White and Black Americans. But a Black/White analysis of race can have a multiracial focus. One could, for example, examine the ways in which all people of color, and not just Blacks, have been racially subject to Black/White-structured legal and political regimes. Three examples will suffice to make this point.

First, in *People v. Hall*,¹⁵⁷ the Supreme Court considered whether a California law that prohibited Blacks, Mulattos, and Native Americans from serving as witnesses in cases in which a White defendant was on trial also prohibited people of Chinese descent from so serving. Hall was charged with the murder of a Chinese woman. At trial, after hearing testimony from three Chinese witnesses and one White witness, the jury returned a verdict of guilty.¹⁵⁸ The Supreme Court overturned the conviction. Reasoning, in effect, that Blackness is a racial metaphor, a signifier for non-White identity, the Court held that the testimony of the three Chinese witnesses was improperly admitted.¹⁵⁹ Under the Court's view, the Chinese witnesses were, for purposes of California law, Black.

Second, in *Ozawa v. United States*,¹⁶⁰ the Supreme Court was called upon to determine whether Takao Ozawa was eligible for naturalization under an immigration and naturalization statute that granted the right of naturalization to "free white" people and persons of "African nativity" and of "African descent."¹⁶¹ Invoking both his skin tone and his assimilated lifestyle, Ozawa asserted that he was White. The Supreme Court rejected his claim. Ostensibly applying a scientific test, the Court argued that

¹⁵⁷ 4 Cal. 399 (1854).

¹⁵⁸ See *id.* at 399.

¹⁵⁹ See *id.* at 403–04.

¹⁶⁰ 260 U.S. 178 (1922).

¹⁶¹ Act of July 14, 1879, ch. 255, § 7, 16 Stat. 254 (1942) (superseded by 8 U.S.C. § 703 (1943)). It was not until 1952 that the Black/White ban for naturalization was disrupted. See Immigration and Naturalization Act of 1952, ch. 2, § 311, 66 Stat. 239 (codified as amended at 8 U.S.C. § 1422 (2001)).

people of Japanese descent are "clearly of a race which is not Caucasian A large number of the federal and state courts have so decided These decisions are sustained by numerous scientific authorities" ¹⁶² Here again, the experiences of a non-Black/non-White group are being shaped by a law that is articulated in Black/White racial terms. Because Ozawa was neither Black nor White, he lacked the racial standing to naturalize.

A final example of this phenomenon is *Gong Lum v. Rice*. ¹⁶³ Gong Lum challenged the separate but equal regime in Mississippi when his daughter, Martha Lum, was denied the right to attend an all-White high school. His argument was that because Martha was not "colored . . . mixed blood, but . . . is pure Chinese," ¹⁶⁴ the state of Mississippi could not legally prevent her from attending the all-White high school in her district. ¹⁶⁵ The Supreme Court affirmed the Mississippi Supreme Court's rejection of Lum's argument. The Mississippi Supreme Court had held that the Mississippi Constitution required the state to have colored schools and White schools. ¹⁶⁶ It reasoned that because there was no controversy with respect to Martha being non-White, she was ineligible to attend the White schools. ¹⁶⁷ Central to the Court's analysis was the idea that while the term "colored" emerged with reference to Black identity, its meaning in the Mississippi Constitution was broader, covering non-White identity as well. Stated differently, for purposes of Mississippi law, Martha Lum, was not simply non-White; she was also colored.

Hall, *Ozawa*, and *Gong Lum* illustrate that while legal regimes are sometimes framed in Black and White racial terms, they will often have a multiracial regulatory effect. The critique of the Black/White paradigm should reflect an awareness of the historical manifestation and contemporary significance of this racial dynamic.

Racial Compartmentalism. Part of the problem with discussions about race is that they tend to link each racial group to a particular form of racism. Rachel Moran and I call this "racial compartmentalism." ¹⁶⁸ While establishing such linkages is important, they can over-determine how we think about the relationship between racial identity and racial vulnerability. This over-determination helps to explain why Asian Americans disappear in the context of discussions about Jim Crow laws and why Black people disappear in the context of discussions about immigration. We compartmentalize particular racial technologies and apply them to explain

¹⁶² *Ozawa*, 260 U.S. at 198.

¹⁶³ 275 U.S. 78 (1927).

¹⁶⁴ *Id.* at 81.

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* at 82, 84.

¹⁶⁷ *See id.* at 81–82.

¹⁶⁸ CARBADO & MORAN, *supra* note 86, at 1–36.

the racial subordination of particular racial groups.¹⁶⁹ The Black/White paradigm critique should not facilitate or contribute to this phenomenon. Proponents of the critique should help us understand the multiracial impacts of the various racial regimes—Jim Crow, immigration, colonialism—under which the people on the bottom have lived. As mentioned earlier, Laura Gómez's *Manifest Destinies* is instructive on this point.

Inter-racial Distancing. The Black/White paradigm critique is almost always employed to suggest that non-Black people of color have been harmed by the Black/White paradigm. Critics argue that, as a result of the Black/White paradigm, antidiscrimination laws and antidiscrimination efforts more broadly do not always respond to the racial harms Asian Americans, Latinas/os, and Native Americans experience. This critique has considerable force.¹⁷⁰ Often it is part of a broader argument that the Black/White paradigm victimizes non-Black people of color because it does not capture the nature and extent of their respective racial subordination.

However, this claim does not tell the whole story about the political and racial relationship that non-Black people of color have had to the Black/White binary. Non-Black people of color have not always been interested in identifying themselves with the Black or marginalized side of this dichotomy. In fact, there are moments in American history when certain Asian Americans and Latinas/os have attempted to achieve equality not by asserting that they are Black or like Blacks or even non-White—but that they are White. To be sure, the reasons for these assertions are complicated. Sometimes they reflect pragmatic racial politics. Sometimes they reflect the terms upon which these groups are forced to engage the legal system. Still other times they reflect difficult questions about agency, about choices under constraints. Nonetheless, discussions of the Black/White paradigm should address head-on the phenomenon of non-Black assertions of White (or non-Black) identity. I call this “interracial distancing”: The extent to which one minority group adopts a “civil rights” strategy to distance itself racially and politically from another minority group. Certainly Blacks have engaged in this strategy. Indeed, in another paper I am examining whether interracial distancing is implicated in Black civil rights responses to Japanese American internment.¹⁷¹ The point, then,

¹⁶⁹ Cf. SUE GOLDING, *THE EIGHT TECHNOLOGIES OF OTHERNESS* (1997).

¹⁷⁰ Consider, for example, the argument that Asian Americans and Latinas/os should not be entitled to affirmative action. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 890, 896–97 (1995). This idea has been and should continue to be vigorously challenged. Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 413–14 (1997).

¹⁷¹ See generally Devon W. Carbado, *Race, Law & Citizenship: Black Civil Rights Responses to Japanese-American Internment* (unpublished manuscript on file with author).

is not that non-Black people of color have engaged in interracial distancing and that Black people have not. I am simply suggesting that the critique of the Black/White paradigm is incomplete to the extent that it fails to identify the specific ways in which people of color have (a) engaged in interracial distancing and (b) attempted to occupy both the marginalized and the privileged ends of the Black/White polarity.

The Space for Race-Specific Interventions. Notwithstanding that the faces at the bottom of the well are multi-racial,¹⁷² the Black/White paradigm critique should be tolerant of, and appreciate the necessity for, race-specific, including Black-specific, antiracist discourse and political activity. Moreover, the critique should be careful not to mark Asian- or Latino-specific analyses of race as multi-racial over and against Black-specific engagements. It should recognize, instead, that we can, should, and sometimes must racially particularize our civil rights engagements. Antiracism that is structured around a particular racial group is potentially problematic, but not inevitably so.

The Authors of the Black/White Paradigm. If part of the Black/White paradigm critique is the suggestion that Blacks (on the bottom) have played a role in constituting this paradigm, it should indicate the nature of this role (and it ought to be something more than Blacks writing about Blacks) and how this role differs from or is the same as the role that Whites (on the top) play in constituting the paradigm. I raise this point to suggest that, even to the extent that Blacks and Whites are racially invested in the Black/White paradigm, the nature of their racial investment is sometimes quite different. Black investment might reflect what Angela Harris calls "Black exceptionalism"—the notion that Black people are and historically have been the racially subordinated amongst the racially subordinated.¹⁷³ White investment, in addition to reflecting this form of exceptionalism, will sometimes reflect another form of exceptionalism: racially speaking, Blacks are exceptionally different from Whites, that is, the very opposite of Whites.¹⁷⁴ Under this latter form of exceptionalism, White is what Black is not (and never can be), and Black is not what White is (and never can be). In other words, there may be meaningful differences between the stories that Black people employ the Black/White paradigm to tell and those that White people tell using the very same paradigm. Certainly, it is not the case that, in a broad political sense, Black people and White people are working together to tell the same Black and White story about American race relations. At least discursively, the notion of a

¹⁷² See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (1992).

¹⁷³ Leslie Espinoza & Angela Harris, *Afterword: Embracing the Tar-Baby—LatCrit and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1596 (1997).

¹⁷⁴ Cf. Crenshaw, *Race, Reform and Retrenchment*, *supra* note 19, at 1373 (observing the ways in which White identity is constructed in opposition to Black identity).

Black/White paradigm obscures this racial difference and helps to legitimize an historically inaccurate narrative in which Black people and White people exist in equipoise with respect to the Paradigm and are united in advancing a common Black/White racial story about American law, history, and politics.¹⁷⁵

None of the foregoing is intended to suggest that the critique of the Black/White Paradigm has been unproductive. It is important for Critical Race Scholars to address the concerns that inform the Black/White paradigm critique. Antiracist politics and legal interventions should not reflect the notion—implicitly or explicitly—that racial subordination and Black subordination are one and the same thing. Repudiating the claim that Blackness has the representative capacity to capture the racial experiences of other people of color is entirely right. Unfortunately, the critique of the Black/White paradigm does far more than that. That is why I am suggesting that LatCrit Scholars and Critical Race Theorists think carefully not only about the arguments people advance against the Black/White Paradigm but about the very notion of the paradigm itself.

4. *Class.* CRT scholars should more directly engage class. For the most part, scholars outside of the field of CRT are framing the debate about race and class. The CRT literature on race and class is decidedly thin.¹⁷⁶ I am certainly not the first CRT scholar to call for a more meaningful engagement of class within CRT. Richard Delgado,¹⁷⁷ Athena Mutua,¹⁷⁸ Daria Roithmayr,¹⁷⁹ Lani Guinier and Gerald Torres,¹⁸⁰ Angela Harris,¹⁸¹ Anthony Farley,¹⁸² Trina Jones,¹⁸³ and Darren Hutchinson,¹⁸⁴ among others, have urged the same. Nor do I want to overstate the absence

¹⁷⁵ As I have suggested elsewhere, perhaps we should jettison the term the Black/White Paradigm in favor of the White over Black Paradigm. Carbadó, *Race to the Bottom*, *supra* note 93, at 1306 n.54. Athena Mutua has suggested the same. See Mutua, *Shifting Bottoms*, *supra* note 154, at 1179.

¹⁷⁶ This is not to say there has been no writing on the subject. See, e.g., Symposium, *Going Back to Class? The Reemergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L. (Fall 2005).

¹⁷⁷ See, e.g., Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY, *supra* note 36 (critiquing the direction of CRT and calling for greater examination of the relationship between race and class)).

¹⁷⁸ Mutua, *Rise, Development and Future Direction*, *supra* note 8, at 345–47; see also Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008).

¹⁷⁹ See generally Daria Roithmayr, *Barriers to Entry*, *supra* note 85.

¹⁸⁰ See generally LANI GUINIER & GERARD TORRES: *THE MINER'S CANARY: RE-THINKING RACE AND POWER* (2002).

¹⁸¹ See Harris, *supra* note 88, at 585 (arguing that the work of other theorists, “though powerful and brilliant in many ways, relies on what [she] call[s] gender essentialism—the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience”).

¹⁸² Anthony Farley, *Accumulation*, 11 MICH. J. RACE & L. 51, 51 (2005).

¹⁸³ See generally Jones, *supra* note 90 (examining the relationship between race and class).

¹⁸⁴ See, e.g., Hutchinson, *Unexplainable*, *supra* note 80 (examining the roles of race and class in the Court’s Equal Protection jurisprudence).

of class in CRT analyses. Some scholars are in fact taking class seriously.¹⁸⁵ Still, I agree with Richard Delgado and Jean Stefancic that Critical Race Theory has yet to develop a comprehensive theory of class.¹⁸⁶

This does not mean that I share the material/discursive dichotomy that Delgado has articulated as a point of departure for his “materialist” critique of CRT. According to Delgado, “after a promising beginning, [CRT] began to focus almost exclusively on discourse at the expense of power, history, and similar material determinants of minority-group fortunes.”¹⁸⁷ While it is beyond the scope of the point I am making here to fully engage the discourse/power disaggregation that underwrites Delgado’s claim, it might be helpful to invoke Michael Omi and Howard Winant’s notion of a racial project to explain why that disaggregation is flawed. Omi and Winant describe a racial project as “*simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.*”¹⁸⁸ Under their theory, which they link to broader claims about “racial formation,” interpretations and representations (what Delgado would presumably call the discourse or discursive) are constitutive of reorganizations and redistributions (what Delgado would presumably call the material). Nevertheless, Delgado is entirely right to suggest that we can, and should, do better with respect to the space class occupies in CRT.

One indication that we have not paid enough attention to class is that CRT scholars are virtually absent from the debates about corporate power and income redistribution. Cheryl Wade,¹⁸⁹ Len Baynes,¹⁹⁰ Dorothy Brown,¹⁹¹ Beverly Moran,¹⁹² Steven Bender,¹⁹³ Emma Jordan and Angela

¹⁸⁵ See, e.g., Symposium, *supra* note 176.

¹⁸⁶ DELGADO & STEFANCIC, CRITICAL RACE THEORY, *supra* note 32, at 107.

¹⁸⁷ Delgado, *Crossroads*, *supra* note 177, at 122. For a thoughtful critique, see Kevin R. Johnson, *Roll Over Beethoven: “A Critical Examination of Recent Writing about Race,”* 82 TEX. L. REV. 717, 722–26 (2004).

¹⁸⁸ MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 56 (1994) (emphasis in original).

¹⁸⁹ See, e.g., Cheryl L. Wade, *African-American Entrepreneurs: Integration, Education, and Exclusion*, 32 W. NEW ENG. L. REV. 483 (2010); Cheryl L. Wade, *Attempting To Discuss Race in Business and Corporate Law Courses and Seminars*, 77 ST. JOHN’S L. REV. 901 (2003).

¹⁹⁰ See, e.g., Leonard M. Baynes, *The Q-626 Report: A Study Analyzing the Diversity of the 626 Largest Businesses, and the 105 Largest Minority-Owned Businesses*, in *Queens*, 80 ST. JOHN’S L. REV. 1007 (2006); Leonard M. Baynes, *Principal Making the Case for a Compelling Governmental Interest and Re-Establishing FCC Affirmative Action for Broadcast Licensing*, 57 RUTGERS L. REV. 235 (2004).

¹⁹¹ See, e.g., Dorothy A. Brown, *Pensions and Risk Aversion: The Influence of Race, Ethnicity, and Class on Investor Behavior*, 11 LEWIS & CLARK L. REV. 385 (2007); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Dorothy A. Brown, *Race, Class and the Obama Tax Plan*, 86 DENV. U. L. REV. 575 (2009).

¹⁹² See, e.g., RACE AND WEALTH DISPARITIES: A MULTIDISCIPLINARY DISCOURSE (Beverly I. Moran ed., 2008); Beverly I. Moran, *Capitalism and the Tax System: A Search for Social Justice*, 61

Harris,¹⁹⁴ and Tom Joo,¹⁹⁵ among others, have each taken up various aspects of these themes in their work. But not enough of us are doing so. CRT interventions are directed primarily at anti-discrimination law, constitutional law and, to a lesser extent, criminal justice reform. We have paid little attention to corporate governance, taxation, and income redistribution.

Another indication that CRT scholars insufficiently engage class is the fact that class-based critiques of racial remediation have gone largely uncontested.¹⁹⁶ These critiques issue not only from the left (via the argument that “the real question that haunts American politics is the class question”¹⁹⁷), but also from the right (via the argument that affirmative action and other racial remediation policies privileges middle class people of color and the focus is typically on Blacks)¹⁹⁸ and do little to help the truly disadvantaged.¹⁹⁹ What are the Critical Race responses to these arguments? How precisely should CRT theorize the relationship between race and class? What does Critical Race Theory have to say about middle and upper class communities of color? Are CRT’s engagements with race sufficiently particularized with respect to class? While the CRT literature on intersectionality and gender is far from complete, it is much more robust than the CRT literature on intersectionality and class. Going forward, CRT scholars need to pay more attention to class than they have heretofore.²⁰⁰

5. *Implicit Bias and Other Forms of Empiricism.* In 2005, Jerry Kang

SMU L. REV. 337–78 (2008); Beverly I. Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 4 FORDHAM URB. L.J. 1219 (2007).

¹⁹³ Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996).

¹⁹⁴ ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS (Angela P. Harris & Emma Coleman Jordan eds., 2011); WHEN MARKETS FAIL: RACE AND ECONOMICS (Angela P. Harris & Emma Coleman Jordan eds., 2005).

¹⁹⁵ See, e.g., Thomas W. Joo, *Corporate Governance and the “D-Word,”* 63 WASH. & LEE L. REV. 1579 (2006); Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 ST. JOHN’S L. REV. 955 (2005).

¹⁹⁶ But see Harris & Narayan, *supra* note 102.

¹⁹⁷ See Barry Grey, *A Historical Milestone? Reflections on Class and Race in America*, WORLD SOCIALIST WEB SITE (Nov. 7, 2008), <http://www.wsws.org/articles/2008/nov2008/pers-n07.shtml>. This argument is actually also rehearsed by the right.

¹⁹⁸ D’SOUZA, *END OF RACISM*, *supra* note 127, at 491. This argument is actually also rehearsed by the left.

¹⁹⁹ WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

²⁰⁰ This should include, but not be limited to, an engagement of class dynamics within communities of color. On this issue, see EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880–1920*, at 187–207 (1993); ROBIN D.G. KELLEY, *HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION* (1990); ROBIN D.G. KELLEY, *RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS* (1994); James Forman, Jr., *From Martin Luther King to Bill Cosby: Race and Class in the Twenty-First Century*, 50 VILL. L. REV. 213, 213–25 (2005); and Orde Coombs, *Soul in Suburbia*, HARPER’S MAG., Jan. 1972, at 149, 149–60.

published the *Trojan Horses of Race* in the *Harvard Law Review*.²⁰¹ The article continued a project begun early by, among others, Charles Lawrence²⁰² and Linder Krieger²⁰³ of mobilizing social psychology to broaden our understanding of discrimination. Kang's specific intervention was to draw on a number of implicit bias studies to critique anti-discrimination models that require plaintiffs to prove discriminatory intent. His article has helped to generate a body of implicit bias literature within CRT²⁰⁴ and is a foundational article in the still-emerging intellectual movement—"behavioral realism."²⁰⁵ These developments are, I think, enormously important.

At the same time, I echo Glenn Adams and Phia Salter's concern about the scientification of epistemology. What does it mean for Critical Race Scholars to turn to science as a marker of truth—and if not truth with a capital "T," as a marker of facts? What are the normative implications of CRT's empirical turn? Are some empirical methods more simpatico with CRT than others? Are some disciplines better suited to advance a CRT empirical project than others? Darren Hutchinson has argued, for example, that empirical findings within political science might be particularly helpful to CRT's normative claims about majoritarian politics and the ideological nature of Supreme Court jurisprudence.²⁰⁶ Should CRT scholars employ these and other empirical findings pragmatically—that is, be results-oriented in their appeal to "verify" facts? This last question suggests that CRT's engagement with science might not need to be about *truth per se* but about "facts."

The difference between "facts" on the one hand and "truth" on the other is not semantic; it tracks the realism versus anti-realism debate within the philosophy of science.²⁰⁷ But, quite apart from whether facts are "true" in the sense of capturing "reality" is whether they matter in the sense of influencing decision-making—and clearly they do. Which is to say, facts, and perhaps especially scientific facts, perform epistemological work. This helps to explain why, currently, as best as I can tell, not a single CRT scholar is on record rejecting Claude Steele's work on stereotype threat, notwithstanding that the work is clearly "science."²⁰⁸ Instead, CRT

²⁰¹ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

²⁰² Lawrence, *supra* note 83.

²⁰³ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

²⁰⁴ See, e.g., Robinson, *Perceptual Segregation*, *supra* note 25.

²⁰⁵ See, e.g., Symposium, *Behavioral Realism*, 94 CALIF. L. REV. (2006).

²⁰⁶ Hutchinson, *Critical Race Histories*, *supra* note 37, at 1213–14.

²⁰⁷ See Kang, *Implicit Bias*, *supra* note 137, at 1145–46. For an indication of this debate, see generally JAMES ROBERT BROWN, WHO RULES SCIENCE: AN OPINIONATED GUIDE TO THE WARS (2001).

²⁰⁸ See, e.g., Joshua Aronson & Claude M. Steele, *Stereotypes and the Fragility of Academic Competence, Motivation, and Self-Concept*, in HANDBOOK OF COMPETENCE AND MOTIVATION 436 (Andrew J. Elliot & Carol S. Dweck eds., 2005); Claude M. Steele & Joshua Aronson, *Stereotype*

scholars invoke the “scientific fact” of stereotype threat to critique existing anti-discrimination regimes. More generally, CRT’s most powerful critiques of law and society turn precisely on facts—that racism exists; that whiteness confers privileges; that discrimination exists outside of intentionality; that society is not colorblind. Conservatives, for their part, contest these factual assertions. How do we settle these competing factual claims when omniscience is impossible? Standpoint epistemology? Presumably not.

This is not to say that CRT scholars should eschew standpoint epistemology; in many ways, the debate about narrative in CRT is a debate about the legitimacy and efficacy of standpoint epistemology as a form of legal scholarship.²⁰⁹ While I have always thought that Critical Race Theorists overstate the extent to which narrative is central to and a crucial methodological component of CRT (I do not believe that narrative is a necessary entailment of CRT), the methodology is important, and I have certainly employed it in my own work.²¹⁰ Thus, I am not arguing against standpoint epistemology *tout court*; I am simply suggesting that it is an unlikely candidate for resolving the “factual” contestations I describe above.

This brings us back to Adams and Salter’s admonition about science, which Critical Race Theorists should take seriously. Doing so does not portend the wholesale rejection of science but rather a critical engagement with science. Part of this might entail more direct analyses of the interrelated problems of “facts” and “truth”—and not reactively in response to critiques that CRT is insufficiently foundational and inattentive to questions of “facts” and “truth,”²¹¹ but proactively in the sense of articulating CRT’s terms of engagement with science—terms that should spell out precisely why CRT is turning to science and precisely what the

Threat and the Test Performance of Academically Successful African Americans, in THE BLACK-WHITE TEST SCORE GAP 401 (Christopher Jencks & Meredith Phillips eds., 1998); Claude M. Steele et al., *Contending with Group Image: The Psychology of Stereotype and Social Identity Threat*, in 43 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 379 (Mark P. Zanna ed., 2002); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797 (1995); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

²⁰⁹ DELGADO & STEFANCIC, CRITICAL RACE THEORY, *supra* note 32, at 37–49; Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 686 (1992); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 744–46 (1993); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

²¹⁰ See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (employing narrative in the prologue); Devon W. Carbado, *Motherhood and Work in Cultural Context: One Woman’s Patriarchal Bargain*, 21 HARV. WOMEN’S L.J. 1 (1998).

²¹¹ Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

theory seeks to bring back. This, I believe, is what Adams and Salter are urging us to do.

One could, of course, frame the foregoing questions about science in terms of empiricism more generally. What precisely should CRT's engagement with empiricism look like? To what extent should CRT be empiricized? As indicated earlier, Jerry Kang has framed this issue in terms of "Behavioral Realism." Mitu Gulati and I engaged it via an exploration of what we called "The Law and Economics of Critical Race Theory."²¹² Laura Gómez²¹³ and Laura Beth Nielsen²¹⁴ have pursued the relationship between CRT and empirical methods in the context of law and society scholarship. And Osagie Obasogie and Joan Williams have taken up the issue in the context of two workshops at which CRT scholars and empiricists—political scientists, sociologists, and social psychologists—critically engaged each other's work. I do not mean to suggest that these are the only efforts to explore whether and to what extent CRT should be empiricized. I reference them simply to suggest that the time is ripe for what one might call "Critical Race Empiricism"—that is, a methodological approach that would constitute an empirical intervention into CRT and a CRT intervention into empirical studies.

6. *Immigration and Global Affairs.* Critical Race Theorists should continue to grapple with the problems of race and immigration. Kevin Johnson's work in this area has been particularly helpful.²¹⁵ One issue ripe for engagement is the ways in which immigration interacts with, and shapes the doctrinal content of, other areas of law, including, welfare law, employment law, family law, and criminal law and procedure. In the context of criminal procedure, for example, the Supreme Court expressly permits immigration officials to employ race as one factor among many in deciding whether a person is undocumented.²¹⁶ Put another way, the Court expressly authorizes immigration officials to racially profile people of "apparent Mexican ancestry" on the assumption that such persons are "illegal." According to the Court, employing Mexican ancestry as a basis for suspicion does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.²¹⁷ The Court's ruling in this respect is

²¹² See Devon W. Carbado & G. Mitu Gulati, *Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003).

²¹³ Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. L. & SOC. SCI. (2010).

²¹⁴ Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175–201 (2010).

²¹⁵ See, e.g., Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

²¹⁶ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

²¹⁷ *Id.*

not limited to immigration enforcement at the border; it applies to immigration enforcement in the interior as well.²¹⁸ This is just one example of how the plenary power of immigration interacts with race to weaken the procedural protections another area of law affords. These other areas of law in effect domesticate the plenary power doctrine, or more accurately, the plenary doctrine becomes domesticated in these other areas of law.²¹⁹ Critical Race Scholars should more systematically mark these dynamics. Doing so would help to paint a more complete picture of the racial dimensions of immigration law and enforcement.

CRT Scholars should also continue to engage global affairs. Adrien Wing has been pushing this point for quite some time.²²⁰ Here, too, progress has been made. An emerging intellectual movement among international law scholars—Third World Approaches to International Law or TWAIL—is explicitly shaped by, and considers itself an expression of, CRT.²²¹ Crenshaw has also helped to establish “Critical Race Theory Europe,” an annual retreat that draws lawyers, law students, and activists together to discuss and develop a CRT approach to understanding the role of law in the context of European debates about racism, Islamophobia, and homo-nationalism. These efforts should be encouraged and supported, not only because international legal norms and international political organizing are both increasingly becoming mechanisms through which legal and political actors seek to effectuate domestic racial reform,²²² but also because of the transnational racial dynamics that Sumi Cho and Frank Valdes describe and the comparative dimensions of race that Tanya Hernández highlights.

7. *Race and Sovereignty.* CRT Scholars have insufficiently analyzed the

²¹⁸ See Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. (forthcoming 2011) (discussing some of the ways in which the Supreme Court has watered down Fourth Amendment protections to facilitate immigration enforcement).

²¹⁹ See *id.*

²²⁰ For an indication of how Professor Wing has employed CRT to engage global affairs, see, for example, ADRIEN K. WING, *GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER* 141 (1996); and Adrien K. Wing, *Gender Equality and Governance in Africa: A Critical Race Feminist Perspective*, in GOVERNANCE IN AFRICA: BUILDING THE CAPABLE STATE 113 (Cornell Univ., Institute for African Development 1997).

²²¹ See Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 VILL. L. REV. 887, 891 (2000); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000).

²²² For a discussion of the extent to which, historically, American civil rights activists have turned to the international arena to secure racial reform “at home,” see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955* (2003); BRENDA GAYLE PLUMMER, *RISE WIND: BLACK AMERICANS AND U.S. FOREIGN AFFAIRS, 1935–1960* (1996); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2002); and see also *Eyes On the Prize: America's Civil Rights Years 1954–1965* (PBS Home Video 2009).

intersection of race and sovereignty.²²³ This inquiry deeply implicates but is not exhausted by concerns about indigeniety. Race and Sovereignty was the focus of UCLA's 5th Annual Critical Race Studies Conference that Cheryl Harris and Addie Rolnick organized. To provide an indication of the kinds of questions CRT Scholars might pursue, I quote extensively from our program description:

Sovereignty, like race, has been invoked, understood, and deployed in contradictory ways. Historically, sovereignty has been an important vehicle through which hegemonic power has been enforced, for example, by articulating citizenship as a racial project rooted in the power to exclude. Sovereignty has also been an important tool of anti-colonial resistance crucial to libratory struggles of people of color in the U.S. and worldwide. Race shares this complex dimension, serving as both a technology of oppression and a vehicle for resistance to that oppression.

Despite these parallels, race and sovereignty have, for the most part, been engaged as separate and mutually exclusive projects: sovereignty has primarily been linked to the struggles of Native Americans and other indigenous peoples, while the struggles of other people of color have largely been cast through a standard anti-racist narrative of citizenship and inclusion. The symposium proposes, instead, to examine how race and sovereignty intersect and are mutually constitutive, even as important distinctions remain. We propose to examine how race enters into concepts of sovereignty and how sovereignty enters into concepts of race.

Among the questions to be considered are the following:

How has the exercise of national sovereignty explicitly and implicitly relied upon race as a criterion of membership?

How might a sovereignty framework provide a counter-

²²³ See J. KĒHAULANI KAUANUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY* 10–11 (2008) (critiquing Critical Race Theory for failing to fully consider the relationship between racialization, land dispossession and the denial of sovereignty for indigenous peoples). *But see* Sumi K. Cho & Gil Gott, *The Racial Sovereign*, in *SOVEREIGNTY, EMERGENCY, LEGALITY* 182 (Austin Sarat ed., 2010) (exploring the racial contingency of sovereignty); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. (forthcoming 2011) (contesting binary legal framework which associates sovereignty with Indians and race with other minorities and exploring instead anti-racism inherent in assertions of group political rights); Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on "Indigeniety" and "Whiteness,"* 18 WASH. J.L. & POL'Y 55, 55–98 (2005) (discussing relationship between whiteness, challenges to indigenous identity, and sovereign rights).

narrative to the story of inclusion often associated with civil rights?

How can a comparative racial analysis contribute to understanding the possibilities and limits of sovereignty? How has race influenced the cognizability of claims to sovereignty? Does the assertion of sovereignty by oppressed peoples stand subject to the same or similar critiques of the exercise of sovereign power by dominant national formations?²²⁴

There is not nearly enough CRT scholarship exploring the foregoing themes.

8. *Post-racialism*. We need to think very carefully about how we articulate CRT's relationship to post-racialism. As I suggested earlier, post-racialism is becoming, but is not yet, the rhetorical replacement for colorblindness. What do we do about that? We could engage post-racialism as though it were already the new colorblindness. And, in fact, there are CRT scholars who have critiqued post-racialism in precisely those terms. Alternatively, we could attempt to re-claim, or "normatively turn," the still-emerging ideological valence of post-racialism. Which approach makes the most sense? This, for me, is a genuinely hard issue: Should we treat post-racialism as though its racial valence is exhausted by a colorblind normativity? Can we do to post-racialism what conservatives have done to colorblindness—make it our racial project? Crenshaw articulates the "[t]he stakes in interrogating post-racialism" this way:

In interrogating the many possible ways that "post" can be thought to be doing a certain kind of ideological work, it is apparent that "post racial" need not take on the meanings to which I attribute the term herein. For example, the "post" in post-colonial or post-apartheid signals that the past does not simply precede the present but partly constitutes it. In this sense, the significance of "post" is not in the signaling of a before and an after, but in signaling a range of factors—potentially undefined—that make the contemporary social order a variation of the prototype, not its opposite. By contrast, the function of the "post" that garners considerable traction in post-racial discourse today operates not only to de-historicize race in American society, but also to reframe the contours of this contemporary moment as constituting the opposite of what preceded it. By these lights, a post-racial

²²⁴ *Fifth Annual Symposium: Race and Sovereignty*, UCLA SCHOOL OF LAW, CRITICAL RACE STUDIES, <http://www.law.ucla.edu/academic-programs-and-courses/specializations/critical-race-studies/5th-annual-symposium/Pages/default.aspx>.

America is a racially egalitarian America, no longer measured by sober assessments of how far we have come, but by congratulatory declarations that we have arrived.²²⁵

Whether the “post” in post-racial comes to mean “the variation of the prototype” turns at least in part on how CRT Scholars describe and mobilize the term.

9. *Doctrinal Interventions.* Critical Race Theorists should spend more time thinking about doctrinal interventions, notwithstanding that the space for doctrinal reform is decidedly cramped. Against the backdrop of juridical retrenchment, it makes sense that most of our work would be deconstructive. But what are the reconstructive possibilities? This question need not, and indeed should not, be limited to Supreme Court jurisprudence. Nor should we focus entirely on federal law. Finally, in pursuing this effort, we should be thinking about legislative and administrative reform possibilities as well. This project might be especially important given CRT’s engagement with CLS on the question of race, rights, and reform.

10. *Reproducing CRT.* What are the current institutional mechanisms for reproducing CRT? I mean to ask this question on multiple levels, including law school admissions practices, trajectories into teaching, and venues for nurturing the development of CRT. Where are we having collective conversations about how to reproduce CRT Scholars and scholarship? Is this what LatCrit Conferences currently do? Should the CRT Workshop be revived? If so, what institutional form should it take? Frank Valdes gave a wonderful presentation at the National People of Color Conference at Rutgers Law School, Camden, last year (which I hope he will publish) in which he indicated the careful and strategic organizing that led to the development and institutionalization of the Federalist Society. Are CRT scholars engaged in a similar organizational effort? Should they be? How would any such effort interact with the American Constitution Society, which fashions itself as the progressive alternative to the Federalist Society?

The foregoing questions invite us to think about our collaborative interactions more generally. While UCLA continues to be the only law school with a Critical Race Studies Specialization, there are several law schools with race law centers of one form or another. Earlier this year, Trina Jones organized a meeting at UC Irvine Law School to get people affiliated with the various race centers in the same room to discuss our respective programs.²²⁶ Each program representative responded to a

²²⁵ Crenshaw, *Twenty Years*, *supra* note 4, at 1313.

²²⁶ I represented UCLA’s Critical Race Studies Program; Bob Chang represented the Fred Korematsu Center for Law and Equality at Seattle University School of Law; Guy Charles represented the Center on Law, Race, and Politics at Duke Law School; Charles Daye (by teleconference)

number of crucial questions: What kind of events does your center organize? How many faculty are affiliated? Do you hire fellows? Sponsor summer programs? Organize lecture series? Is there a curricular component? If so, are there clinical offerings? What kind of budget do you have? Do you engage in community outreach? Does your center have a pipeline program to facilitate the entrance of people of color into law schools? Do you file amicus briefs? Sponsor symposia? Is there a publication arm? A blog? A newsletter? What's your vision for the center going forward? This meeting was an important first step. Clearly, not everyone affiliated with these centers would self-describe as a Critical Race Theorists. Still, the centers do present organizational opportunities that we have yet to exploit.

The foregoing issues and themes are not exhaustive of the questions one can raise about CRT. But engaging them might help us take up Crenshaw's challenge of "looking backwards to move forward."

represented the Center for Civil Rights at the University of North Carolina Law school; Peter Edelman represented the Center on Poverty, Inequality and Public Policy at Georgetown Law Center; Rob Smith represented the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School; Alex Johnson represented the Center for the Study of Race and Law at Virginia Law School; Trina Jones represented the Center on Law, Equality and Race at the University of Irvine School of Law; Melissa Bamba represented the Center for the Study of Race and Race Relations at University of Florida School of Law; Mary Louise Frampton represented the Thelton E. Henderson Center for Social Justice at UC Berkeley School of Law; Janai Nelson represented the Ronald H. Brown Center for Civil Rights and Economic Justice at St. Johns University Law School; and Stephanie Wildman and Deborah Moss-West represented the Center for Social Justice and Public Service at Santa Clara Law School.

