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The First Decade: Critical Reflections, or "A Foot in the Closing Door"

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THE FIRST DECADE: CRITICAL REFLECTIONS, OR "A FOOT IN THE CLOSING DOOR"

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INTRODUCTION[1]

In the introduction to *Critical Race Theory: The Key Writings That Formed the Movement*,[2] Gary Peller, Neil Gotanda, Kendall Thomas, and I framed the development of Critical Race Theory (CRT) as a dialectical engagement with liberal race discourse and with Critical Legal Studies (CLS). We described this engagement as constituting a distinctively progressive intervention within liberal race theory and a race intervention within CLS. As neat as this sounds, it took almost a decade for these interventions to be fleshed out fully. Reflecting on the past ten years of CRT, this Article explores the course of these interventions from the personal perspective of an organizer and early participant of CRT. Looking forward, I offer some speculative and aspirational views about our future.

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1. The original iteration of this Article is forthcoming in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, edited by Francisco Valdes, Jerome McCristal Culp, & Angela P. Harris eds., which Temple University Press is publishing in 2002.

2. *See Critical Race Theory: The Key Writings That Formed the Movement*, at xiii–xxxii (Kimberlé W. Crenshaw et al. eds., 1995).

It should be noted at the outset that this dialectical engagement occurred not in the abstract but in a context shaped by specific institutional struggles over concrete issues that were set in motion by certain individuals. While the broad ideological trajectory of CRT was set forth in the Introduction to *Key Writings*, here I amplify that analysis by setting forth more of a social narrative of CRT's origins: a series of interactions, events, personal relationships and institutional engagements that prefaced a conscious recognition of CRT. Some of these interactions were consciously undertaken to develop CRT as a movement, others were only later revealed to have contributed significantly to the formation of CRT as a movement.

Though aimed at setting forth a social narrative of CRT's first iterations, this account is inherently a personal narrative that reflects the multiple positions from which I have historically related to the events I tell here. From the vantage point of a student, a young professor, an organizer, and now as a first-generation participant of a multigenerational project, I recall events that not only inspired CRT's formation, but that also shaped me. It thus is a personal narrative in the sense that the author and narrative tell each other. No doubt many of the events I discuss here are especially memorable because they shaped my perspectives about a number of things, including the teaching profession, institutional politics, organizing and leadership (particularly its gender and race dimensions), the media, and, of course, the functional dynamics of race in post–civil rights society.

There are, consequently, as many different points of departure in the narrative of early CRT as there are people associated with it. In this account, the contributions of one scholar stand out, a scholar whose academic insurgency lit the path toward Critical Race Theory and one to whom we owe an enormous intellectual debt: Derrick Bell.

I. DERRICK BELL: FROM "RACE, RACISM, AND AMERICAN LAW" TO THE "ALTERNATIVE COURSE"

Bell was at the center of the germination of CRT in at least two important ways. Institutionally, it was his (first) departure from Harvard Law School in 1981 that prompted a group of students to struggle with the dean over the curricular marginalization of race. As students of the post-integration generation, many of us were close enough to an activist tradition to question certain institutional arrangements—specifically the dearth of minority law professors and the relative complacency of those convinced that this problem lay outside the discourse of desegregation and antidiscrimination. As the civil rights movement segued into various liberationist movements, students and young activists were confronting the reality that formal segregation was not the only mechanism through which racial power would

find expression in American institutions. These realities were readily apparent in the hallowed halls of Harvard Law School, where many of us found ourselves in the midst of a struggle over the curricular and personnel consequences of Bell's departure. We understood that Bell's departure was in part a consequence of his long and only partly successful struggle with the law school on issues relating to the recruitment of professors of color. In the wake of his departure, the school failed to put in place any plans to have Bell's courses taught. In our view, not only should Bell's courses be taught, but this curricular vacuum provided the school with an important opportunity to desegregate the faculty by hiring a person of color.

The articulated resistance to our demands was enlightening. Not only did our dean question the value that a course such as "Constitutional Law and Minority Issues" would add to our curriculum, but he also made the rather startling claim that there were few if any people of color in the country "qualified" to be hired at Harvard Law School. This framing of the issue gave many of us involved in that struggle a clear sense about how conceptions such as colorblindness and merit functioned as rhetorics of racial power in presumptively race-neutral institutions. Bell's resignation thus set in motion a chain of events that would ultimately erupt into a controversy surrounding affirmative action that drew national attention. The ensuing struggle would provide fertile ground for the emergence of a critical discourse around contemporary forms of race and social power. The ensuing struggle would also provide the occasion for scholars across the country to gather in the heat of this contest and to develop important intellectual relationships that would strengthen and grow in a series of subsequent connections.

Professor Bell was influential not only in setting the context for contesting the exclusionary practices of elite law schools, but also in helping to establish a scholarly agenda that placed race at the center of intellectual inquiry rather than at the margins of constitutional theory. Bell's bold departure from the discursive conventions of legal scholarship laid down an analytical track that would satisfy our quest for new ways of framing the complex relationships between law and our everyday experiences of race in America. This was no small undertaking.

At a long-overdue tribute to Bell in 1992,[3] I recounted how I had come to understand Bell's stance in academe as analogous to that infamous image of Tommy Smith and John Carlos, two African Americans who raised their black-gloved hands in a Black Power salute while the National Anthem

3. Organized by Charles Ogletree, the tribute to Bell drew numerous colleagues and former students to Harvard. For a published tribute to Bell, see Charles R. Lawrence III, *Doing the "James Brown" at Harvard: Professor Derrick Bell as Liberationist Teacher*, 8 HARV. BLACKLETTER J. 263 (1991).

played in their honor at the 1968 Olympics.[4] I was a child at the time, yet I remember vividly the near-hysteria that overtook the country at the very sight of these sleek athletes imposing this powerful symbol of Black liberation at such an august occasion. Although the labeling of and debate about identity politics was not fully articulated at the time, critics condemned the act as a dangerous and ill-conceived performance of racial grievance that tragically undermined and fractured the presentation of the American subject. That this explicit critique of America was performed on the world stage at precisely the moment that America's pluralistic superiority was to be celebrated struck some as virtually treasonous. To their critics, this reckless decision to insert racial politics into that pristine, patriotic moment had embarrassed the country in front of the world. For this act, Smith and Carlos were certain to be punished.

There was a lot that I didn't understand about race at the time, but I certainly knew from the angry reports at the time that Smith and Carlos were in serious trouble for performing something Black in front of the world.[5] In explaining to me why so many people seemed to be so angry, my parents likened such reactions to how they themselves would respond if I had acted out in church. (Interestingly enough, my mother's term for such misbehavior was called "performing in public," and the punishment for such transgressions was severe.)

Given my family's own rules about acting outside the family's approved public script, it struck me that, unlike many Americans, my family was not at all mad at Smith and Carlos. My brother, a Panther wanna-be (actually, I'd really have to say that Panther politics were shared by my mom, as well), said "Right on!" when he saw the replay of the raised-fist salute. My mother said something about the fate of Jesse Owens, an earlier "colored" Olympian who apparently had done what he was supposed to do at Hitler's Olympics—win—and in return was rewarded with the opportunity to race against horses following his heroic homecoming. My father, impressed by the courage of Carlos and Smith, talked about how everything was going to "hit the fan" as a result of that raised-fist salute. "They're tellin' it like it is," they all agreed with pride.

4. *See generally* Mark Conrad, *Major Legal Events of the Century: 1961–1972*, N.Y.L.J., Aug. 13, 1999, at 5 (Aug. 1999) (describing the events and their aftermath); Howard Manly, *A Powerful, Two-Fisted Documentary*, BOSTON GLOBE, Aug. 8, 1999, at D4 (introducing a documentary made about Carlos and Smith).

5. *See generally* Paul Galloway, *Whose Olympics?*, CHIC. TRIB., July 16, 1996, at 1 (discussing the interaction between the Olympic Games and politics); Larry Platt, *They Bad*, N.Y. TIMES, Nov. 14, 1999, § 6 (Magazine), at 114 (discussing the making over of Black athletes for white America).

Maybe that vivid memory was why I immediately resonated with Bell's text, *Race, Racism and American Law*,[6] when first I opened the pages to find that sketch of Smith and Carlos. It was 1981, and I was one of many students who had chosen Harvard because the renowned Derrick Bell was there, only to be disappointed to find that he had departed a few months earlier. I bought the book nonetheless, eager to see whether the pages of his text filled in the gaps between what our very expensive education offered and what many of us felt we needed to know.

From the very first chapter, it was apparent that Bell's approach diverged from standard fare in several important respects. Traditional scholarship on race was at this point firmly grounded in the liberal individual rights model. The objective was to get these second-class citizens some rights, but the efforts to secure these rights had to be reconciled with other important interests, such as federalism, the free market economy, institutional stability, vested expectations, and the like. Anticipating a conservative counter-critique, early scholarship around race sought to legitimize a certain amount of judicial "activism" in the face of concerns about judicial overreaching, social engineering, political agenda setting, and recommitting the interventionist errors of *Lochner*.[7]

Bell's approach diverged from this conventional orientation in at least two important ways. First, for Bell, the question was not how to justify judicial interventions on behalf of the interests of racial equality against independent, preexisting interests. These interests themselves often functioned as repositories of racial subordination. Nor, in his view, should success in achieving constitutional protection be measured solely in terms of individual rights. The point was to understand how law contributed to the systemic disempowerment of African Americans more broadly. Moreover, Bell understood that the measure of civil rights law is its concrete effectiveness in helping to contest the actual conditions of racial domination. Bell, there-

6. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW (2nd ed. 1980).

7. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-discrimination Principle*, 90 HARV. L. REV. 1 (1976); Jesse H. Choper, *Thoughts on State Action: The "Government Function" and "Power Theory" Approaches*, WASH. U. L.Q. 757. For a critique of the assertion that judicial intervention on behalf of racially subordinated groups constitutes a revisiting of *Lochner*'s sins, see Gary Peller, Neutral Principles *in the 1950's*, U. MICH. J. L. REFORM 21 561 (1988). *See also* Cass R. Sunstein, *Lochner's Legacy*, COLUM. L. REV. 873–84 (1987) ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government. This view has spawned an enormous literature and takes various forms."). For an excellent critique of liberal race jurisprudence, see Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978), *reprinted in* CRENSHAW ET AL., *supra* note 2, at 29. Among the more provocative critiques of traditional liberal scholarship is Richard Delgado, *The Imperial Scholar: Reflection on a Review of Civil Rights Literature*, 132 U. PENN. L. REV. 561 (1984), *reprinted in* CRENSHAW ET AL., *supra* note 2, at 47.

fore, was a realist in that he looked at legal rules in terms of their function in a racial world; he was a Crit in that he understood the indeterminate and frequently contradictory character of law.[8] Bell was thus not only a racial realist but an early Critical Race Theorist.

No one, of course, was using the "Critical Race Theory" label at the time—it would be years before that term would be coined. But it was clear that Bell marched to a different beat, and a lot of us wanted more exposure to that rhythm through a course that the school was prepared to let slip into obscurity. We students felt that it was unfortunate that Professor Bell had left Harvard Law School (HLS), but we did not understand why his course had been dropped from the curriculum, and why no plans were in the offing to use this curricular need as an opportunity to recruit minority professors. Pressing the matter against an initially disinterested administration, nearly five hundred students signed a petition urging HLS to reinstate "Constitutional Law and Minority Issues" and to hire tenure-track professors to teach this and other courses addressing minority issues. At a follow-up meeting with the dean to underscore our concerns, Dean Vorenberg asked a startled student delegation whether we wouldn't prefer "an excellent white teacher" over a "mediocre black one." To emphasize his point, the dean contrasted a leading white civil rights lawyer with a nameless mass of unqualified minorities. This stunning invocation of one of the principal justifications for the dearth of minority professors set the terms for the protracted contest over affirmative action that would eventually spill over into the national arena.

While the dean's inartful articulation of the "pool problem" was more than enough to make the meeting significant, the dean also articulated a more subtle challenge to our demands that would eventually generate a powerful response. What was it, he queried, that was unique about a course on constitutional law and minority issues that required such a specific course. Why couldn't we students distill what we wanted from existing courses—say,

8. See, for example, BELL, *supra* note 6, at xxiii, in which Bell notes that for all the "furor" of the civil rights cases and laws dealing with racial problems in the three decades before the second edition of his casebook in 1980,

> these civil rights cases and laws are today [1980] increasingly regarded as either obsolete or insufficient . . . before they could [have been] enforced effectively. In a nation dedicated to individual freedom, laws that never should have been needed face neglect, reversal, and outright repeal, while the discrimination they were designed to eliminate continues in the same or a more sophisticated form.

Id. For a more recent account of the same themes, see Derrick A. Bell, Jr., *Racial Realism*, CONN. L. REV. 24 363 (1992), *reprinted in* CRENSHAW ET AL., *supra* note 2, at 302 (noting that "every civil rights lawyer has reason to know—despite law school indoctrination and belief in the 'rule of law'—abstract principles lead to legal results that harm blacks and perpetuate their inferior status."). Bell recognized that "[l]egal precedents we thought permanent have been overturned, distinguished, or simply ignored," and "[p]recedents, rights theory, and objectivity merely are formal rules that serve a covert purpose; even in the context of equality theory, they will never vindicate the legal rights of black Americans." *Id.* at 306–07.

"Constitutional Law"—in conjunction with a legal-aid placement? We knew we lacked the language to explain what was unique and important about such a course. We also knew that if the burden remained on students to articulate what we would learn in a course that had not yet been offered, the school was poised to win by default.

The Black Law Student Association's (BLSA's) response to the pool problem was to generate a list of over thirty minority professors around the country whom it urged the law school to consider as candidates to teach the course. Yet, by year's end, the course remained unstaffed. In the midst of growing tension around the law school's apparent reluctance to engage any of the available minority law professors to teach the course, the school announced that ten white male professors had been hired. While this announcement served to sharpen the conflict and broaden the coalition of students demanding affirmative action, it was the law school's next move that tipped agitation into active protest. In response to student demands for the course "Constitutional Law and Minority Issues," the school offered a three-week mini-course on civil rights litigation, an inadequate response on numerous fronts. First, we wanted a full-semester course—something that would constitute a sustained treatment of race throughout the entire term. Second, we wanted a course with a broader scope than one that focused on civil rights practice as such. We understood that the course being offered was a review of remediation structures; while we knew remediation was important, we wanted to ground our studies in a thorough understanding of how law constituted the problem of race in the first place. At this time, we were encountering heavy silence about race throughout the curriculum, even though we knew that it lay just beneath the surface of many of our courses.

Finally, we wanted the school to use the course opening as a target of opportunity to recruit a full-time minority law professor. Harvard certainly was behind the eight ball in terms of integrating its faculty: At the time, there was one tenured and one untenured faculty of color among Harvard Law School's seventy-plus professors. Thus, the crux of the difficulty between us students and the administration was that we saw racial experience as a "plus" factor, whereas conventional and widely held opinion dictated that such considerations be rejected as discriminatory and backward. Nevertheless, we remained convinced that we needed more professors of color at Harvard, not simply because of the superficial "color" they would bring to the halls, but because we valued the varying perspectives on law that would be brought into the classroom by those who have lived nonwhite lives in American legal culture.

Clearly, other criteria mattered, as well, but it was obvious to us that traditional criteria did not begin to value a range of experiences that we

thought were qualifying while the administration did not. To the considerable extent that the school's down-to-the-wire decision to offer a mini-course taught by two visiting civil rights lawyers was grounded in the assertion that there were no qualified people of color to be hired by Harvard Law School to teach race-related courses, we felt it was imperative to demonstrate our deep rejection of that logic. But our student boycott was neither a rejection of the importance of studying civil rights practice, nor a rejection of the well-respected men who were coming to teach it. Rather, it was a rejection of the mini-course as a completely inadequate response to our pedagogical demands and of the institutional rhetoric through which our demands were distorted and ultimately dismissed.

Necessity is the mother of all invention, and so it was with the dean's refusal to have the course taught. The Third World Coalition decided to organize an "Alternative Course."[9] The coalition was made up of representatives from all the student-of-color organizations. We worked with the support of other students groups, as well. We pooled our resources and raised money from other sources to invite academics of color to come to Harvard to teach a chapter out of Bell's book. We saw our efforts not only as an attempt to create for ourselves the educational experience the school had denied us, but also as an opportunity to provide a showcase of intellectual talent that effectively would counter the dean's claim that the pool of qualified scholars of color was prohibitively shallow. Among the scholars who answered our call were several who would become central figures in CRT: Chuck Lawrence, Richard Delgado, Linda Greene, Denise Carty-Bennia, and Neil Gotanda. Other participants in the course who were similarly engaged in a critical project were W. Haywood Burns, Robert Coulter, John Brittain, Ralph Smith, and Harold MacDougall. There were students, too, who would later contribute to the development of a new intellectual moment, including Mari Matsuda and myself. CLS faculty members at Harvard con-

9. The Third World Coalition was an umbrella committee made up of representatives from organizations representing African American, Arab, Asian American, Chicano, Native American and Puerto Rican law students. Founded in 1979 as the united voice of students of color at Harvard Law School, the Coalition sought to

> forge the shared hopes and frustrations of its member groups into affirmative policy expressions which bring to the fore the legal needs and legal injustices which characterize the daily lives of men and women of color in this country and in the world. A critical part of [the Coalition's] efforts has been devoted to providing a meaningful and realistic critique of legal education in this country: What is taught; how it is taught, and who is teaching.

Letter, Third World Coalition, February 8, 1983 (on file with author.) Some of the members of the Coalition involved in the events described herein include: George Bisharat, W. Burlette Carter, Kimberlé Crenshaw, Jose Garcia, Ibrahim Gassama, Mari Mayeda, Cecil McNab, Glenn Morris and Nick Sheats. For a contemporaneous account of the Alternative Course, including a chronology, syllabus, position papers, and sample letters, see Crenshaw, The Case for an Alternative Course (1983) (unpublished manuscript on file with author).

tributed to the effort as well by attending lectures and by giving students independent-study credit for papers written in conjunction with the course.

With a registered enrollment of over two hundred students and the participation of a dozen faculty throughout the country, we counted the Alternative Course as a success. It would also be a gift to the future that keeps on giving. The Alternative Course served as an important precursor to CRT, having brought legal scholars and students together from across the country to address race from a self-consciously critical perspective. The Alternative Course and the institutional struggle that created it produced a critical mass of people of color who were intellectually and politically connected to one another and to a particular transformative moment. This critical mass of academics would now have in common an institutional *text* from which to decipher the institutional rhetorics of racial exclusion, and a collective engagement with an alternative *textbook* that provided a sustained counter-critique to prevailing conceptions of equality. Of course, at the time we did not fully appreciate the opportunity that the law school had given us to ground a future movement. To be sure, we were sorely disappointed by Harvard's reaction to our demands. Yet, in terms of future dividends, the school's rejection may have been the best thing to have happened to us. Indeed, it could be that CRT was conceived in the very moment we were challenged to articulate what was compelling and unique about an inquiry focused on the relationship between race and law.

Of course, the Alternative Course was just an embryonic consequence of our determination to exercise political will against institutional resistance; its viability as a sustained enterprise was scarcely imaginable at the time. Yet the intellectual muscle many of us gained from being forced to create a meaningful dialogue about race and law in the teeth of institutional resistance was apparent even then, and it has served us well since. We gained proficiency in negotiating the institutional politics of race, including the ability to nurture cross-racial coalitions. We learned to decipher the institutional language through which racially subordinating values and preferences would be encoded, whether intentional or not. We learned to anticipate gross distortions of our viewpoints.[10] Through the sometimes vicious attacks

10. The magnitude of the attack against the boycott was as crushing as the media's distorted coverage of the controversy. *See, e.g.*, Carl T. Rowan, *Bad Behavior at Harvard*, WASH. POST, Aug. 20, 1982, at A15 ("Now we have black students in the exalted climes of Harvard declaring all whites guilty of something—because they are white."); Editorial, *Blind Pride at Harvard*, N.Y. TIMES, Aug. 11, 1982, A22 ("There is little point to pride if its price is ignorance"); Martin Kilson, *Ethnic Arrogance at Harvard*, WASH. POST, Aug. 13, 1982, at A19 (accusing the BLSA of "intellectual infantilism" and "banal ethnocentricism" and declaring that "Black students who require ethnocentric crutches as part of their academic regime have to start growing up—and soon—for they will be overwhelmed by the intellectual sophistication and scholarly rigor associated with good and superior levels of learning and performance at places like Harvard Law School."); Bayard Rustin,

we received from the media, especially from liberal spokespeople. More im-

Letter to the Editor, *A Misguided Protest by Blacks at Harvard*, N.Y. TIMES, Aug. 17, 1982, at A26 (responding to an article titled *Minority Students at Harvard Protest Course*, N.Y. TIMES, Aug. 9, 1982, Rustin called the objection that Jack Greenberg, a civil rights lawyer and visiting professor at Harvard, was "white nothing more than blatant racism.")

The full-scale denunciation, coming on the heels of Dean Vorenberg's decision to release all correspondence between BLSA President Muhammad Kenyatta, Dean Vorenberg, Julius Chambers, and Greenberg to second- and third-year students over the summer, caught the coalition and the BLSA off guard. Dean Vorenberg's decision to go public with the threatened boycott introduced the issue in a manner that stressed the points of least agreement within the coalition while obscuring the deeper issue of the school's abysmal hiring record and its resistance to students' demands for a course taught by a full-time instructor. Reporters for the *Washington Post* and the *N.Y. Times* quickly seized on the dog-bites-man aspect of Kenyatta's letter, in which he criticized Greenberg for his leadership of the NAACP Legal Defense Fund. *See, e.g.*, Rustin, *supra* ("[Students] are calling for a boycott of a course on race and legal issues because it will, in part, be taught by a white civil rights lawyer . . . ."); Editorial, *supra* ("[B]lack law students at Harvard are calling for a boycott of a course in race and legal issues because one of its teachers, Jack Greenberg, is white."); *Minority Students at Harvard Protest Boycott*, *supra* ("Black students at Harvard Law School are calling for a boycott of a course on race and legal issues that is to be taught in part by a white civil rights lawyer.").

Because students involved in the boycott were away for the summer, Dean Vorenberg's spin on the issue went largely uncontested. The broader issue regarding the school's unwillingness to offer "Constitutional Law and Minority Issues" and the inadequate response to the Coalition's affirmative-action demands were entirely lost in the media fracas over the boycott as the debate became reduced to one of "reverse discrimination." Lost too in the media's coverage of the controversy was the multiracial makeup of the Coalition. Despite many efforts to clarify what the boycott was and was not about, the media persisted in framing the controversy as a contest between Dean Vorenberg and BLSA President Muhammad Kenyatta. *See* Donald Christopher Tyler & Cynthia Muldrow, Letter to the Editor, *Goal of a Boycott at Harvard Law*, N.Y. TIMES, Aug. 20, 1982, at A26. This distortion was only heightened by Kenyatta's letter to the Dean citing Greenburg's leadership of the NAACP-LDF as an additional reason for boycotting the course, and Dean Vorenberg's decision to release that correspondence to support the claim of "reverse racism." While the letter neither represented the Coalition's position nor reflected the substance of the negotiations between the Coalition and the law school administration, it became the lightening rod that drew the wrath of many in the civil rights community.

Although the issue was tragically distorted in the media, there was a question about whether it was legitimate to assume that race would in any significant way shape the content of a course or should be considered as a factor in making academic appointments. Many of the most vocal critics of the boycott in fact supported affirmative action. When faced with what they viewed as racial discrimination against a man who had devoted his entire career to fighting for civil rights, however, these critics embraced a colorblind rhetoric that framed the students' demand for a full-time minority law professor to teach Bell's course as patently absurd. An interesting version of the tension viewing this matter as reverse racism instead of affirmative action is embodied in two op-ed pieces by Carl Rowan. In the first, Rowan excoriated BLSA for racist, anti-intellectual, anti-civil rights behavior. *See* Rowan, *supra*. "Many black people of my generation have faced death in defense of the idea that people are to be judged on their own merits." *Id.* In a subsequent op-ed, Rowan continued to criticize BLSA, this time for "letting Harvard off the hook by causing the press to focus on extraneous issues." The real issue had become the "surprisingly pathetic list of excuses as to why so few minority professors are appointed." Rowan went on to criticize Harvard President Derek Bok for not valuing the intrinsic educational value that diversity provides. For a thoughtful and balanced insider's view of the events leading up to the boycott and a pedagogical defense of race as a factor in hiring decisions, see Christopher Edley, Jr., *The Boycott at Harvard: Should Teaching be Color-Blind?*, WASH. POST, Aug. 18, 1982, at A23:

portant, we each found support in our rejection of discursive conventions that typically forced us to think and talk about racial injustice in ways that distanced us from our own experiences.[11]

That there were others—dozens of others—who believed one could think meaningfully and legitimately as a legal "scholar" while remaining committed to progressive racial transformation gave us the liberty to think creatively and to write boldly. Perhaps as a consequence of this inception, CRT has been able to eschew and transcend racial convention. For many of us who later became Critical Race Theorists, the Alternative Course made possible a sustained interaction with one another while foregrounding a text and an interpretive framework on civil rights law that was as different from the norm in legal education as was Smith's and Carlos's symbolic salute at the 1968 Olympics.

Although we scattered after the course, the momentum continued. Some participants in the Alternative Course—including its instructors, organizers, students, and sponsors—would come together in various venues over the next few years, many at CLS conferences and summer camps. Students at Stanford, Berkeley, Columbia, and other law schools took up the demands to desegregate the faculty and curriculum, some drawing inspiration from the events at Harvard.[12] Lawrence, Gotanda, Delgado, and others

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> Race remains a useful proxy for a whole collection of experiences, aspirations and sensitivities, in at least as strong a way as anyone's ethnic heritage or professional experiences shape the way he understands and explains life. It's not just a matter of having a particular slant on things; it's a question of what kind of glasses you've been wearing as the years roll by.

Id. Edley also reveals that negotiations were under way with several minority candidates, but several were still mulling over their offers. *See id.* As was tradition, this information was not shared with the students. Despite the dean's public defense of Harvard's poor hiring record as reflective of the dearth of qualified minority candidates, Dean Vorenberg apparently targeted select candidates to recruit, some of whom were eventually hired by the law school. This duality—the public rhetoric declaring the pool of qualified minorities to be virtually nonexistent and the tremendous support he gave to some minority candidates—no doubt accounts for his simultaneous legacy as a pioneer in integrating select people of color into law teaching as well as the embodiment of institutional resistance to broadening the law school's hiring criteria to more fairly assess the potential of scores of other minority law candidates. Whether this limited hiring effort would have occurred in the absence of sustained student struggle is anyone's guess, but some think not. *See generally* DERRICK BELL, CONTESTING AUTHORITY (1994).

11. For a critique of the racial self-denial involved in learning to "think like a lawyer," see generally Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989).

12. *See, e.g.*, Ruth Marcus, *Black Law Group Supports Boycott of Harvard Course*, WASH. POST, Aug. 18, 1982, at A3. The National Association of Black Law Students passed a resolution supporting the actions of the Third World Coalition and calling for broad measures to increase the presence of professors of color at Harvard and at all American law schools. *See* Tyler & Muldrow, *supra* note 10; *see also Stanford Rights Class Dropped After Black Protest*, N.Y. TIMES, Mar. 20 1983, at 27. The National Board of BLSA also convened a special taskforce on affirmative action to which I was appointed co-chair. The taskforce was charged with the responsibility of examining affirmative action policies in various law schools and formulating strategies to effect change. In

continued to expand the parameters of race scholarship, and, by so doing, opened the terrain to subsequent scholars, some of whom included students exposed to these openings through these very desegregation struggles. Mari Matsuda, for example, returned to Hawaii to become the first Asian American woman to teach at the University of Hawaii Law School and there began to shape a path-breaking career in legal education. Several other participants in the course wound up in legal education, including the late Muhammad Kenyatta (SUNY Buffalo), Tony Thompson (New York University), George Bisharat (U.C. Hastings), Glenn Morris (University of Colorado), Ibrahim Gassama (University of Oregon), and W. Burlette Carter (George Washington University Law School).

For me, the Alternative Course confirmed that there was an answer to the question the dean had put before us. There was indeed substantive content and pedagogical value to be derived from a focused study on the relationship between race and law. Neither could be appreciated by any course on constitutional law, any placement with legal aid, or even a three-week seminar on civil rights litigation. This much was clear. What was not clear, however, was the sometimes contentious relationship between the emerging perspectives of scholars of color and those of our progressive allies in CLS. The limitations of traditional liberal discourses on race that we encountered at Harvard had firmly convinced me that we weren't fish, but it also seemed to me from some of the emerging rhetoric on race within CLS that perhaps we weren't fowl, either. I left Harvard and headed for the University of Wisconsin—some would say the "official" birthplace of CLS—with a goal of thinking more about this double marginality.

II. THE CLS CONFERENCES OF THE MID-1980S

The events described in the previous part constituted one dialectical engagement: the critical intervention in conventional institutional rhetorics of race. CRT, however, also reflects a simultaneous encounter of people of color with CLS. Since the inception of CLS, a few people of color have always been present to varying degrees. Some have maintained a sustained presence. Neil Gotanda, for example, participated in the founding meeting of CLS at Madison, Wisconsin, in 1977. Others cycled through at various points, attending meetings and retreats during some of the more dynamic moments of CLS's early formation. Some were professors, such as Regina Austin, Denise Carty-Bennia, Chuck Lawrence, Gerry Spann, Patricia Williams, Linda Greene, and Gerald Torres. Others first visited CLS as stu-

this capacity, I prepared a report detailing the events leading up to the course, offering a critique of exclusionary hiring policies, and providing a guide on how to mount such an undertaking. The report was made available to all chapters at BLSA's 1983 annual convention.

dents, including Mari Matsuda, Stephanie Phillips, Teri Miller, and me. Regardless of our status as professor or student, newcomer or veteran, at each meeting or retreat we usually found ourselves off in someone's room, engaged in animated discussion about the racial politics of CLS. These "off-stage" meetings gave us an important opportunity to talk about what attracted us to CLS and what held us at bay.

Our meetings had a furtive quality about them, crowded as we were in those little hotel rooms like revelers at a Depression-era speakeasy. Yet for some of us, those all-too-quick conversations were the highlight of whatever conference we were attending, and we began to look forward to them. These adjuvant meetings created substantive connections that helped to ground our gradual emergence as a loosely organized caucus in CLS. A pivotal event during this time that signaled the beginning of the "race turn" in CLS occurred at the 1985 CLS conference organized by the feminist wing of CLS, more popularly known as the FemCrits. Prompted by Regina Austin's call to women of color to discuss how we might want to participate in the conference, several of us began discussing how to facilitate a discussion about race at this FemCrit conference. We ultimately decided to organize a workshop on racism in which the conference attendees, divided into several break-out groups to facilitate greater discussion. There, participants would be invited to turn CLS's critical lens inward.

The provocative question that launched the workshop—"What is it about the whiteness of CLS that keeps people of color at bay?"—foreshadowed the eventual recognition that interrogating whiteness is an important dimension of any critical discourse on race. Unfortunately, this cutting-edge intervention was not well received, particularly by some of the white male heavies of CLS. Amid the vocal resistance was the charge that we were "mau-mauing" CLS and that the framework we had introduced certainly would tear the organization apart.[13]

13. Some would say that this dire prediction was accurate in that many of the white male heavies did eventually pull away from CLS after the FemCrit and RaceCrit turn. I must confess that although I expected some degree of resistance from the old guard, I remained mystified by the visceral nature of the reaction. I had witnessed some amazingly confrontational interventions by white feminists in CLS, yet none prompted the emotional intensity that our workshop elicited. I was struck not simply by the apparent contradiction between the CLS rhetoric extolling local contestation and its own resistance to the interrogation we were demanding, but also by the dismissive rejection of the discourse as something they had already done and were not going to do any more. As some folks explained it, this "been there, done that" attitude was a contemporary response to various offenses suffered by white radicals at the hands of African American activists in the 1960s. However accurate this account of lingering white angst from the 1960s may have been, the extent to which this claim reflected real lived experiences of our CLS colleagues remained unclear. So, too, the question of whether the narrative was appropriated as a parable about the hazards of racial contestations on the left. A provocative take on the dynamics of the 1960s racial encounters on the left can be found in Gary Peller, *Crime, Race and Radical Lawyering*, TIKKUN, Nov.–Dec. 1997, at 68 (reviewing PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW (1997)),

As the dust was settling from the 1985 conference, plans were under way to shift the CLS stage to California. A contingent from the UCLA, USC, and Loyola law schools began planning the 1987 conference, with the goal of focusing on race. By 1986, I was also headed west to join the faculty at UCLA. There I joined the ongoing dialogue about the focus of the upcoming conference.

Although this 1987 conference promised to move the discussion of race to the center of CLS, a number of factors tempered the enthusiasm of many people of color associated with CLS. Many harbored serious reservations about the value of such a conference in light of the maelstrom prompted by the 1985 race workshop. Those of us who had experienced such resistance to the internal dialogue about race in CLS were concerned that the upcoming conference would side-step the more controversial discourse and focus instead on developing a CLS critique of race in legal institutions "out there." Neil Gotanda, for example, had participated in the initial discussions of the conference planning committee and perceived early on a reluctance to build on the previous workshop and other work related to race and racism that already had occurred within CLS.[14] Indeed, the initial orientation of the conference was to examine race within legal institutions and even more broadly—race within the larger society. The goal of examining race within CLS was noticeably absent as a conference objective.

Deep ambivalence about the promise of further engagement with CLS was fueled by other high-profile events that had heightened the frustration level among people of color associated with CLS. A stunning controversy involving Derrick Bell's visit at Stanford Law School deepened the recognition among many minority scholars that we would remain vulnerable to patterns of unconscious racism from students and colleagues despite our achievements in the profession: In short, the administration at Stanford, heeding complaints of white students unhappy with Professor Bell's approach to constitutional law, arranged a series of supplemental lectures to be given by other faculty members. Bell was invited to participate as well, but the fuller story behind the creation of the supplemental lectures was revealed

available at http://tikkun.best.vwh.net/bkrage.html, which argues that the rhetorical politics of Black Power constituted a psychosexual threat that continues to cast a shadow over the white left, suppressing any meaningful critique of race from its quarters. For an argument that links the disintegration of the left to the destructive emergence of identity politics, see TODD GITLIN, THE TWILIGHT OF COMMON DREAMS (1995). The debate continues in various forms today. *See, e.g.*, Vanessa Daniel, *Ralph Nader's Racial Blindspot*, COLORLINES, (Fall 2000), http://www.arc.org/C_Lines/CLArchive/story_web00_01.html.

14. *See* Memorandum from Neil Gotanda to Carrie Menkel-Meadow, Reflections on CLS Conference Planning Committed (CPC) (July 24, 1986) (on file with author) (critiquing the planning committee for its "[u]nwillingness to build from previous panels and work[,] . . . [its u]nwilligness to deal with Black women[,] . . . [and its] inability to talk about race within [the organizing committee]").

only when BLSA students prepared a written statement of protest. Minority law professors across the country were aghast that Stanford would subject a path-breaking scholar such as Bell to this type of disrespectful treatment. Those of us closer to CLS were particularly disappointed that such a debacle would happen at Stanford, thought to be a CLS stronghold, with a dean and prominent faculty members who long had been associated with CLS.

In struggling to understand why students' complaints against Bell possibly could have persuaded the administration to pursue such an insulting, institutionally embarrassing strategy, there were, of course, the obvious possibilities that many professors of color report confronting on a daily basis. An additional factor was found in the possibility that there was sympathy for at least one allegation apparently made by students—that Bell's approach to constitutional law, grounded as it is in the breathtaking contradiction between the constitutional rhetoric of freedom and the reality of slavery, illegitimately foregrounded race. This interference dovetailed with criticisms that were beginning to emerge from Stanford quarters in the form of a counter-critique to our early work, characterizing it as essentialist. Whether intended or not, in that critique some of us heard a crude characterization of our work as theoretically unsophisticated and politically backward.

If these events were not enough to cloud the horizon, yet another piece of evidence emerged to suggest that behind CLS's hip irreverence lurked an element of racial condescension. In the CLS newsletter, *The Lizard*, an account of a conference in Bremen, West Germany included a remark that deployed a racial stereotype of Mexicans.[15] The remark—"don't you realize that telling a German he has no theory is like telling a Mexican he has no gun?"—was apparently thrown in to add "color" to the conference report. As Jose Bracamonte, Richard Delgado, and Gerald Torres would later write, what was telling about the inclusion of the remark was that no one in the editorial process apparently deemed the remark to be inappropriate for publication.

All of this made the reactions of those resistant to the internal racial gaze in CLS even more indefensible: Racial power was exerting itself within CLS, just as it had in other legal institutions. The question remained whether anything could be gained by participating fully in the conference and contesting the terms of the group's racial discourse.

15. The remark, "don't you realize that telling a German he has no theory is like telling a Mexican he has no gun?" prompted Jose Bracamonte, Richard Delgado, and Gerald Torres to write an open letter to CLS, unpacking the messages conveyed in the cartoon-like stereotype and suggesting that the unfortunate event suggests the possibility that Crits "focus so closely on the hegemonic tactics of liberals that [they] fail to notice [their] own." Jose Bracamonte, Richard Delgado & Gerald Torres, Minority Critique Panel, at the CLS Annual Meeting, Los Angeles (Jan. 1987) (on file with author).

Troubled by these events, a small group of us teleconferenced to discuss "how those of us who struggled through the racism workshop (in 1985) [might] share that experience with the others . . . and what, if anything, that experience suggest[ed] regarding our participation in the upcoming conference."[16]

We had before us textbook illustrations on how to "read" race, and the spirit of contestation was part of our own civil rights history as well as that of CLS. Coming on the heels of the annual meeting of the American Association of Law Schools (AALS), the 1987 conference also presented us with an excellent opportunity to gather together scholars of color to talk about race scholarship and politics not only within CLS but also in the nation's law schools more generally. The 1987 CLS conference in Los Angeles indeed provided us with a crucial staging ground to push our presence and projects further.

The final format of the 1987 conference reflected a negotiation among various objectives, providing us with the opportunity to meet as a caucus, to air and respond to the minority critique of CLS, and to discuss and develop critical approaches to articulating race within substantive legal topics. The 1987 conference became the site of the first formal meeting of the minority caucus within CLS, which necessitated, in turn, an all-white caucus held concurrently. Whiteness was again on the agenda, but this time the discussion would not be facilitated by us.

Dozens of professors of color attended the minority caucus, most of them eager to discuss the climate, our scholarship, and the need to create a more sustained interaction. Cornel West, bell hooks, and Rodolfo Acuña were invited as plenary speakers to provide an interdisciplinary perspective on race. Some of us hoped that our invited guests would help grease the wheels of the "race turn" in CLS by effectively speaking to the various constituencies within CLS, challenging pockets of resistance to race-conscious scholarship in the very language that was sometimes used against us. But we didn't leave all the heavy lifting to our guests.

In a panel entitled "The Minority Critique of CLS Scholarship (and Silence) on Race," Denise Carty-Bennia, Harlon Dalton, Richard Delgado, Mari Matsuda, Gerald Torres, and Pat Williams spoke out from the inside on the racial politics of CLS. Their comments focused on the racially specific culture of CLS, the critique of rights, and on the silencing of voices of color in the legal academy more broadly. Attendees at that conference found the session memorable for any number of reasons, not the least of which was the airing of Randall Kennedy's very public challenge to the embryonic move-

16. Letter from Kim Crenshaw to Regina Austin (Aug. 3, 1986).

ment, a challenge that would find its way onto the pages of the *Harvard Law Review* a few short years later.[17]

Looking back at the "Sounds of Silence" conference crystallizes for me that this 1987 gathering was a watershed moment for CRT. Within the space of a few years, we had progressed from a loose group of colored folk at the margins of CLS to an experienced group of insurgents who occupied center stage at a national CLS conference. Clearly, there were disappointments—there was little resolution to some of the central points of contention between CLS and its minority critics, and there is reason to believe that some of the negative reaction to the "race turn" continued well into the next decade. Some white male heavies never returned—whether because of the coincidental appeal of other interests or an organizational "tipping" problem remains unclear. What was clear by the end of that conference was that we had exercised some institutional muscle: We had staked out an intellectual project by giving voice to a range of our institutional experiences living in a post-apartheid legal culture.

It was also clear, however, that the anterooms of CLS would no longer be sufficient to build on this momentum. To consolidate this race turn, we would have to find a way to institutionalize ourselves. That opportunity would come the following year.

III. The Birth of the Critical Race Theory Workshop

In 1988, while on research leave from UCLA, I returned to the University of Wisconsin as a visiting fellow. Stephanie Phillips was also at Wisconsin as a Hastie Fellow, and together we began discussing ways to convene the usual suspects in a manner that went beyond hotel room caucusing. We were both veterans of CLS summer camps—smallish meetings that drew together a core group of Crits to explore a range of topics—and we thought it might serve as a useful model to facilitate the more sustained intellectual interaction we sought. Richard Delgado was by that time on the Wisconsin faculty, and together we approached David Trubek, director of the Institute of Legal Studies, seeking financial support for a workshop tentatively entitled "New Developments in Race and Legal Theory." The purpose of this workshop was to gather together our motley crew of marginal types—people

17. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989). That was not the only surprising challenge in store for conference attendees. While some of the conference organizers imagined hooks making a race intervention within feminist discourse in CLS, and West making a parallel intervention within the ranks of the critical theory wing, all bets were off when hooks critiqued West for speaking a language that was inaccessible and mystifying. Needless to say, the moment was electric: Its complexity and surprise represented precisely the kind of charge that kept many of us coming back to CLS events, despite some of the more predictable problems.

of color who were attracted to and frustrated by CLS—to a several-day summer camp.

Although there were undoubtedly many objectives to be served by such a retreat, foremost in my mind was determining whether something substantive held the group together, something that constituted a distinctive contribution to the discourse on race and the law. More specifically, I wondered whether it could be said that there was a "there" somewhere in the interstices of conventional civil rights discourse and conventional Critical Legal Studies. We had launched simultaneous critiques—of CLS, on the one hand, and of liberal race theory on the other; in doing so, were we actually setting forth something that could be fashioned into a theory in its own right? Could some common threads be found in our collective work that might be woven together to form an intellectual whole?

It was clear that we were inviting folks to something formative, but the "New Developments" tag that appeared in the initial call for papers didn't fully capture the aim. Somewhere in the process, we made what essentially amounts to a marketing decision: We jettisoned the generic title and sought something more provocatively substantive. Stephanie and I, now joined by the summer camp veterans Neil Gotanda and Teri Miller, wanted to attract a specific audience of other misfits who were looking both for a critical space in which race was foregrounded and a race space where critical themes were central. We wanted the conversation to start at a point beyond questioning critical theory, on the one hand, or race on the other. We wanted to play with folks who would not be dissuaded from the association with a leftist project, who were interested in defining and elaborating on the lived reality of race, and who were open to the aspiration of developing theory.

Having participated in the FemCrits' West Coast meetings, I had been thinking about how useful it had been to organize our work around the framework of "feminist legal theory" rather than the considerably narrower category of "sex-discrimination law." Feminist legal theory laid claim to a broader undertaking than a mere study of rules governing sex discrimination: Contained within the broader feminist concept was the project of unpacking law's relationship to gender. What would be the parallel concept for critical scholars of color seeking to lay claim to the broader study of law's relationship to race? What was to civil rights what feminist legal theory was to sex discrimination law?

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."

But the work wasn't quite done yet. Was this an independent thing or merely a descriptive or generic term? Should we capitalize it or leave it as two modifiers and a noun? We decided to go for broke. If we were going to give this inchoate thing a name, let it be a proper sign on the intellectual landscape: *Critical Race Theory*. (I had this preoccupation at the time about the politics of proper nouns, having just won a battle with the *Harvard Law Review* about capitalizing "Black" when used as a racial identifier.)[18] So the name Critical Race Theory, now used as interchangeably for race scholarship as Kleenex is used for tissue, was basically made up, fused together to mark a possibility.

It was far from clear at the time whether the name would stick, and there were discussions at the first workshop about what, if anything, the name actually meant. In fact, participants at the first workshop kicked around several other possibilities, including the idea of calling our project "Reconstruction Theory." It so happened, however, that a new periodical edited by Randall Kennedy was called *Reconstruction*, and concerns about the potential confusion generated by two similarly named projects with very different ideological premises may have contributed to the somewhat greater appeal of the name "Critical Race Theory." In any case, the name stuck. The task remained to define it.

After naming the project, we set out to gather souls to join us in Madison. Aside from the usual suspects, we had no idea who else would be attracted to a "Critical Race Theory" workshop. What exactly was the "profile" of the scholar who would be interested in our project? We began to generate a list of people whom we had met, read, or heard about—folks whose work was similarly situated at the margins of traditional race scholarship. We wrote letters, solicited recommendations, and cold-called people, often with the awkward inquiry of whether they would like to apply to a workshop of which they had never heard. Oddly enough, dozens of people did agree to apply, and on July 8, 1989, the twenty-four participants of the first Critical Race Theory Workshop gathered in Madison, Wisconsin.[19]

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

19. Answering the call to Madison were Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Kimberlé Crenshaw, Harlon Dalton, Richard Delgado,

The first couple of workshops were designed to get at the question of what constituted CRT, and we structured the program with this goal in mind.[20] Borrowing models derived from both Martha Fineman's "Feminism and Legal Theory" workshops and a CLS-German workshop on critical theory in Bremen, we gathered a blend of paper writers, presenters, and commentators. Although the production and presentation of written work was, of course, the focal point of our meeting, our sense was that we would benefit more as a potential movement if someone other than the author presented the key themes of each paper and yet another person was responsible for weaving those key themes together with the themes from all of the other papers.

This scheme played out with varying degrees of success. Some common themes did emerge, and we honed them further in the next workshop. Yet we remained fundamentally eclectic in many respects. We eventually achieved some degree of intellectual coherence down the road, but the notion of CRT as a fully unified school of thought remains a fantasy of our critics. Many participants yearned for a space apart from law faculties, conferences and the like where we could explore ideas and express ourselves in ways that were not constrained by the expectations of our colleagues or the established parameters of race discourse in our respective institutions.

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

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Neil Gotanda, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Stephanie Phillips, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams.

20. In the letter announcing the first Annual Workshop, a provisional definition of CRT suggests that

> critical race scholarship generally challenges the legitimacy of dominant approaches to race and racism by positing values and norms that have traditionally been subordinated in the law. Critical race theorists thus seek to validate minority experiences as an appropriate grounding for thinking about law and racial subordination . . . . Many approach antidiscrimination law as ideological discourse which does not so much remedy racial subordination as provide continuing rationalizations for it. Traditional notions of civil rights are simply conceptual starting points to explore the limitations of civil rights reforms and the possibilities of developing a more deeply grounded transformative practice. Others are interested in examining implicit racial assumptions that exist beneath the surface of dominant discourse and in revealing how language conveys meanings beyond its ordinary legal sense. Included also in critical race scholarship are critiques of the political sociology of our profession and its embedded racial implications

Invitational Letter, Apr. 19, 1989 (on file with author).

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.[21] 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.[22]

While safe space clearly was a value that developed out of the first workshop, we were not bereft of specific themes that captured in some way the group's interest. Critiques of neutrality, objectivity, colorblindness, meritocracy, and formal equality constituted the most common themes that linked our work. Because these critiques were informed in part by critical theory and other intellectual traditions, organizers decided to devote the second workshop to developing a clear theoretical grounding for CRT. Thus, in the next workshop, hosted by Stephanie Phillips at Buffalo Law School, we shifted to a format that mixed paper presentations with substantive seminars. With the able assistance of Kendall Thomas, who had joined the organizing committee along with Linda Greene and Mari Matsuda, we organized four critical theory seminars. Topics included "Liberalism and Its

21. This policy was not without some controversy. Indeed, some faculty members at the University of Wisconsin were uncomfortable with the "all minority" make-up of the group and sought a review of David Trubek's decision to fund it. The decision would not be easily replicated in today's environment.

22. The issue is somewhat academic at this point in light of the growing body of critical articles on race written by white colleagues. Alan Freeman, Gary Peller, Barbara Flagg, and Duncan Kennedy are just a few Anglo scholars whose articles are key texts within CRT.

Critics," "Post-Structuralism and the Concept of Race," "Race and Political Economy," and "Intellectuals, Race and Power."

With this foundation, CRT was off to a running start. Of course, in the intervening years, the format, focus and personnel would continue to be debated along with efforts to establish the substantive parameters of the work. Questions about the role of identity and the inclusiveness of the tent remain ripe, particularly in light of the emergence of Asian American Jurisprudence and LatCrit Theory. Yet to be fully fleshed out is the question of how wide is the space between a race-conscious intellectual project informed by experiential particularities and a project grounded in successive turns of identity politics? If the legacy of CRT has in fact crystallized into identity formations, then questions as to whether it was so at its inception, or whether it became so at particular moments for particular reasons, remain ripe for discussion. Surely these are vexing questions around which there is ample room for debate. But true to their genealogy, all these contemporary questions bear a striking resemblance to the debates and struggles that shaped the early years of CRT.

This narrative of the early years of CRT would not be complete without a word about our sponsors. Although the development of CRT has been framed as emerging out of the overlapping of various oppositions with liberal race theory and CLS, it is also quite clear that without the specific support of individuals within each of those spheres, CRT would not have developed in that time and space. David Trubek, a founding member of CLS, funded the first workshop, despite, as I mentioned earlier, some faculty opposition and some of his own reservations about the minority critique of CLS that was developing at the time.[23] Buffalo Law School, the host of the second annual CRT workshop, also boasted several CLS adherents among its faculty who supported the project. And Jim Jones, a true civil rights visionary, supported the CRT workshop despite his deep reservations about CLS. I think this type of support suggests that many non-CRT scholars saw CRT as continuous in important ways with their own projects. Perhaps CRT had a different focus and endorsed approaches to solving equality issues that may have made some in the traditional civil rights community uncomfortable. However, in the broad scheme of things traditional civil rights adherents saw CRT as being fundamentally "on the same side" as they were.

23. David Trubek's support was notable, as he was at the time fully aware of the emerging critique of CLS, having been an adviser on my graduate thesis and a colleague of Patricia Williams and Richard Delgado. All three of us were critics of CLS, and our critiques were eventually published. *See* Crenshaw, *supra* note 18, at 1331; Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

IV. Critical Race Theory Then and Now: From Birth to Backlash

On the basis of this brief overview, I will note some points of comparison between CRT at its birth and CRT now. I think the overarching point of comparison is the fundamental difference in the historical and institutional context. CRT came into existence at the twilight of what had been a transformative social period. The grassroots movement for civil rights was, by most accounts, a distant memory by the mid-1980s, and although we believed we were in a full-scale retrenchment by that point, we were really just seeing its prologue. Nevertheless, there were still vestiges of the movement (preserved perhaps by the rarefied air of the academy), vestiges of the old insurgency that constituted a loosely defined sensibility about the imperative of social change. Sociologists might describe this in terms of expectations that were still rising throughout the academy and within civil rights practice. On the books, there were still favorable precedents, cases we might call remnants of Alan Freeman's "victim perspective" that remained good law.[24] Affirmative action was still hotly contested, and most people had not heard yet of Clarence Thomas.

There was also a sense that there was something to a left-liberal reform discourse, something worth struggling for. Students thus fought to expand these vague commitments into specific curricular and hiring objectives: Constitutional scholars such as Charles Lawrence fought to extend the liberal opprobrium toward race-dependent decisions to include unconscious racism; civil rights lawyers fought to include race-neutral exclusionary practices within the liberal rejection of white supremacy. On the left angle, CLS was alive and vibrant, and many of us struggled to expand its critique of social power and illegitimate social hierarchy to address the social power and illegitimate hierarchy of race as well. In sum, there were live contestations, both within the mainstream and in the margins, that contributed to the generation and incorporation of new ideas.

Today, by contrast, we are in the throes of a powerful, tightly organized, almost evangelical movement. It is well-organized and highly visible, and it boasts a string of impressive victories to call its own. It has friends in high places: the media, Congress, the White House, and the Supreme Court. It has a political strategy, a research agenda, and a grassroots and propaganda campaign that are among the most sophisticated and efficient in today's cyberbolic society. It has no known rival, and its resources seem to be endless. Unfortunately, this movement is not ours.

24. *See* Freeman, *supra* note 7, at 1053 & n.16.

In fact, to the extent that we are in the picture, it is only as cannon fodder. As a result, the interests we champion have been under attack for some time. We managed to survive the first round of crude "P.C." hysteria, yet the ideas with which we are associated have made us subject to more sophisticated modes of censure. In short, we have been race-baited.

Although it has been in the making for some time, this moment constitutes a significant shift in the intellectual and political terrain. Now, the very effort to expand doctrinal categories or to argue about the broader scope of what constitutes racial discrimination presumptively disqualifies able candidates from holding positions of responsibility, whether in government or elsewhere.[25] The vestiges and remnants of the 1960s grassroots movements, already anachronistic in the 1980s, are now repackaged alternatively as the source of all contemporary social ills or as noble movements for an equality that has already been won. The left is itself demobilized, demoralized, and disorganized.

This moment obviously presents a challenge of a different magnitude for CRT scholars. Our story has always been one of a struggle to survive, but while the earlier struggle was one of coming *into* existence, the question then being whether this motley crew could last long enough to become viable, the question now is whether the movement can survive in the face of a more complex and better-organized counter-resistance. While people once puzzled over whether we were fish or fowl, now they brand us easily; indeed, they can draw on a veritable casebook of racially inflected insults. Moreover, as Patricia Williams has noted, as in the case of the man who is asked, "why did you beat your wife," there is no response that doesn't confirm the charge.[26]

Our critics' re-construction of who we are and what we do is so complete that we can barely recognize ourselves in the mass media. Indeed, if we were to read more about ourselves in the media, we would find out that we are a pretty amazing bunch. We'll learn from the *New Republic*, for example,

25. See, for example, Clint Bolick, *Clinton's Quota Queens*, WALL. ST. J., Apr. 30, 1993, at A12, for descriptions of President Clinton's efforts to distance himself from Lani Guinier, his one-time nominee for the head of the Civil Rights Division of the Justice Department. *See* Ruth Marcus & Michael Isikoff, *Administration Leaves Guinier in Limbo*, WASH. POST, June 3, 1993, at A1; Michael Putzel, *Rights Nominee Digs in as Clinton Backs Off*, BOSTON GLOBE, June 3 1993, at 1. *See generally* LANI GUINIER, LIFT EVERY VOICE (1998) (describing her nomination and nomination-revocation processes). Guinier quotes Yale professor Harlon Dalton as saying, "[h]er Senate hearing would have been a conversation about what democracy looks like in a multicultural society in the 1990s, and I think that's a conversation we need to have. Instead, the Senate and the president ran away from it." *Id.* at 130. Though less publicized than Guinier's nomination, the planned nomination of Gerald Torres to head the Justice Department's Environment and Natural Resources Division was also criticized because of his association with the CLS movement. *See* Michael Isikoff, *2 Withdraw Justice Dept. Candidacies*, WASH. POST, Dec. 18, 1993, at A1.

26. Patricia J. Williams, *De Jure, De Facto, De Media*, THE NATION, June 2, 1997, at 10.

that CRT is part of the "lunatic fringe" of the academy.[27] (Duncan Kennedy and Catharine MacKinnon will be relieved to know that they are exempted from this exclusive category; they represent the rational fringe.) Richard Delgado might be amused to know that Judge Richard Posner has passed to him the hand of fellowship to the white race, remarking that Delgado

> claims to be a member of, and a spokesman for, a group that he calls "people of color." The group seems to be more a state of mind than a race. I have met Professor Delgado. He is as pale as I am, has sharply etched features in a long face, speaks unaccented English, and, for all that appears upon casual acquaintance, could be a direct descendant of Ferdinand and Isabella. He lives and teaches, contentedly so far as I know, in an "Enlightenment-based democracy," namely the United States. Delgado's whiteness lends an Evelyn Waugh touch to critical race theory.[28]

Similarly, we learn from Jeffrey Rosen, writing also for the *New Republic*, that we apparently have connections in Hollywood—that artists from rappers to movie executives have bowed to our influence.[29] And it will come as a surprise to those of us who took strong positions against the Million Man March and Louis Farrakhan that the "logical conclusion" of our work "leads to Farrakhan."[30]

Indeed, we learn from Daniel Farber and Suzanna Sherry that we are anti-Semitic because our support of disparate impact theory and our critique of exclusion from colleges and universities, taken to its logical conclusion, implicitly suggests that the overrepresentation of Jews in American law schools is the work of a conspiracy.[31] This last item is curious for a number of reasons, not the least of which is that our apparent interest in wresting a greater share of law school slots from privileged whites is at odds with Neil Lewis's claim that "critical race theory is providing an intellectual foundation for . . . black separateness."[32]

Despite what we may have thought we have written, our critics now inform us that we do not support the civil rights movement, that we believe that nothing is better today than it was thirty years ago, and that we think

27. Richard A. Posner, *The Skin Trade: Beyond All Reason: The Radical Assault on Truth in American Law*, NEW REPUBLIC, Oct. 13, 1997, at 40 (book review).

28. *Id.*

29. *See* Jeffrey Rosen, *O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America: The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27.

30. Heather Mallick, *Danger: Critical Race Theory Approaching from the South*, TORONTO SUN, Feb. 16, 1997, at C10 (book review).

31. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 52–71 (1997).

32. Neil A. Lewis, *Race Theory Challenges Goal of a Colorblind Society*, AUSTIN AM.-STATESMAN, June 8, 1997, at J1.

law is utterly useless as a means of social reform. Puzzlingly, despite all this apparent madness, CRT has enormous influence. Our jurisprudence in law reviews "reigns supreme" (take that you impressionable student editors!), and even judges have been "taken in" by us. The flurry of bias studies in the court system across the country was actually "prodded by feminist and critical race theorists."[33]

Although we have spent so much time mesmerizing lawyers, deans, producers, students, and judges, surprisingly our new-found influence seems to have done little to soften our rough edges. We are "loud and militant," and we "wage open warfare over appointments and tenure."[34] Although we are a minority, we apparently can kick up quite a fuss in law schools. Indeed, Daniel Farber and Suzanna Sherry are sympathetically presented as anguished members of the great majority of white liberals in legal academe. Our critics, it seems, have adapted racial profiling to the ivory tower. Apparently, these "two traditional liberals . . . have been mugged by their radical colleagues in the ivory tower,"[35] and we intellectual gang-bangers are presumptively guilty.

Critical Race Theorists, we are told, are not only rude; our work is beyond all reason. To readers of the *Toronto Sun*, we represent "[t]he most embarrassing trend in American publishing."[36] We offer no analysis, we just tell stories—bad ones, at that—and we don't do law. Because our movement "has achieved a position of influence and even dominance within any number of the country's most prestigious universities,"[37] we have to be dealt with severely. We replicate like a virus. Says one authority on problems like us: "Unless you challenge them at their source, you will always be fighting a rear-guard action when their influence spreads into broader American society."[38]

Make no mistake about it: We are in a full-scale race-baiting campaign. It is well-organized, and it could be effective if we fail to mine the lessons of Crit-bashing in the 1980s and Red-baiting in the 1950s. Indeed, the structure of the assault is virtually identical: The baiters identify some threat to our cherished institutions or way of life, tie it to some "pointy-headed intellectuals," and then claim that ruthless suppression is the only way to be sure the threat has been contained.

33. Heather Mac Donald, *Law School Humbug*, CITY J. Autumn 1995, at 46.

34. Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997, at 46 (book review).

35. *Id.*

36. Mallick, *supra* note 30.

37. Heather Mac Donald, *Storytellers*, COMMENTARY, Oct. 1997, at 64, (reviewing FARBER & SHERRY, *supra* note 31).

38. Andrew Sullivan, *Truth and Lies in the Language Class*, SUNDAY TIMES (London), Jan. 12, 1997, § 4 (News Reuters), at 8.

Consider the classic baiting technique used by Jeffrey Rosen. Rosen is fully aware that many whites were apoplectic about O.J. Simpson's acquittal. "There's anger there, a sense that something cherished has been lost." Rosen points this anger at CRT. What seems to scare him is that Critical Race Theorists are theorizing relations that many Americans do not want to think about yet must encounter occasionally when they want something very badly and have to engage the sensibilities of people of color to get it. Take, for example, his portrayal of the acquittal of O.J. Simpson. Here Rosen's message goes: If you didn't like the verdict, then you really won't like these CRT folks—they gave members of the jury the idea; the Simpson verdict is nothing but Critical Race Theory *applied*.[39]

Of course, we really are not alone in being targeted in all this hysteria. This reaction has the contours of all other baiting campaigns, including its implicit disciplining of liberals for having allowed us into the legal academy in the first place—evidence of their lack of resolve. It's all of a piece, a new line in an old chorus: "Liberals are soft on communism, soft on crime, soft on Crits, soft on RaceCrits." Ultimately, it may not matter that in some ways we may be in the trenches with liberals as targets of a conservative assault. First, some liberals have joined the fray, as evidenced by *Beyond All Reason*.[40] And the jury truly is out on the question of whether we can count on our colleagues more broadly for support as the heat turns up. If the institutional reaction to resegregating policies in California, Texas and Washington is any indication, the road ahead may be bumpy indeed.[41]

V. WHERE WE'VE BEEN, WHERE WE'RE GOING

So what should we Critical Race Theorists do now, facing the second decade? I think we need to take up a war of maneuver against racial entrenchment, on the public and on the private front. As to the public front, I think we need more organized intervention. Patricia Williams and Richard Delgado have responded courageously, yet they can't go this alone.[42] Conventional wisdom about the nature of ideological attack says that there is little we can do—"take the high road; don't give them the satisfaction of a response." I have some sympathy for this view. If we were to respond to all of our detractors, we would probably do little else. But the truth is more complicated than that.

39. *See* Rosen, *supra* note 29, at 27.

40. *See* FARBER & SHERRY, *supra* note 31, at 52–71.

41. Proposition 209 is a 1996 amendment to the California Constitution banning racial and gender preferences in public hiring, contracting, and education. *See* Larry D. Hatfield, *High Court: 209 Stands*, S.F. EXAMINER, Nov. 3, 1997, at A1. For a more comprehensive analysis of the proposition, see Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997).

42. *See* Delgado, *supra* note 26; Williams, *supra* note 26.

I learned this the hard way from a call I received from a government service worker in St. Louis. It was somewhat of an apology, actually. The caller had simply assumed from various media reports that CRT truly is the backward, racist, unsophisticated assortment of half-baked scholarship that he had heard about. Luckily, he said as much to someone who knew better and began to read us for himself. I realized while listening to his "discovery" that the days when we could expect people from our very own communities to read between the lines of an attack were long gone. To paraphrase an old saying, "a distortion travels around the world before the Truth puts its boots on."

These developments have reminded us that the days when different communities are exposed to fundamentally different information sources are dwindling. To speak to a mass community often means speaking in mass media. We need to determine how to translate our work better, to intervene in ways that help model interventions at the local level, to show people what a difference critical race thinking makes in their own workplaces and communities. And we need to learn how to demand popular space and make good use of it when we get it.

At the local level, back in the academy, I think we have to remember the basic lessons of indeterminacy and put energy into fighting battles in the trenches of interpretation. Unlike some colleagues I respect, I see nothing immoral or amoral about pressing the malleability of legal interpretation into service to defend affirmative action and other equity policies against assault. For example, the battle over the elimination of "preferences" presumes an agreed-upon baseline from which to measure. But what is a "preference," and what is "discrimination"? There is much work to be done in our own institutions to rethink and challenge this baseline, and fundamentally to rethink how legal education should be distributed. We may have some time to stem the tide, but not much.

Finally, I think the times require a re-engagement with our colleagues. What seems to be lacking among both our liberal and Crit colleagues is a spirit of confronting exclusionary policies, a familiarity with our own basic texts, and contemporary critique of the standard operating procedures in our institutions. In this sense, perhaps we've come full circle. As I place the genesis of CRT in a confrontation within institutions of higher learning over curricular and hiring matters, it seems that the lessons we learned from a course of study focusing on race, racism, and American law continue to resonate throughout a new decade.

Yet these lessons have not penetrated the outer periphery of institutional consciousness within American law schools. We have been afforded pluralistic (tokenistic?) inclusion within the academy, but one wonders whether this, too, will go the way of "diversity" in the face of wholesale

external assault. If our colleagues cannot defend a set of programs against competing institutional constraints that pit the edict against "preferences" with the prohibition against "discrimination," do we think they (or we) will fare better when and if the organized cabal that has attempted to discredit us in the media manages to turn up the heat on our own institutions? What can and should we do to recapture our sense of identity, struggle, and empowerment? These are the questions I think we must put to ourselves as we think about the future.

Conclusion: In Search of a Caption

In assessing the first decade of Critical Race Theory I asked myself: If I were to gather it all up into a snapshot, what caption would I inscribe beneath? I thought of several, ranging from the mundane ("A Good Start," "Against All Odds") to the noble ("Keeper of the Flame," "Bridge from the Past"). I settled on one that is far less poignant but descriptively apt: "A Foot in the Closing Door." I truly believe that what separates this period of retrenchment and counter-assault from that which transpired in the nineteenth century is the wealth of resources—institutional, organizational, intellectual, and the like—represented by the people who do Critical Race Theory. We have managed to keep alive a spirit, diffuse though it may be, that resists all attempts to declare the project of ending white supremacy a done deal.

Now, if I were to gather up all my hopes for our future into a snapshot, what would its caption say? Again, my thoughts ranged from the truly trite ("New and Improved," "Bigger and Better," "Smarter and Wiser") to the buzzword of today's mega-trend ("Critical Race Theory Turns Global!"). In the end, I settled on a retrieval from the past, brought back to the future.

Ten years ago, I wondered: Where do we take our sit-ins when the white only signs come down, when Kresge closes its lunch counters and moves out of town, when power doesn't live where it used to anymore? What happens when the contemporary configuration of power doesn't have an address; when dogs and water hoses are traded in for numbers and tests; when gatekeepers are automated, and exclusion is formulaic; when ideas are red-lined, and people are warehoused? These days, colorblind discourse is the virtual lunch counter, the rationalization for racial power in which few are served and many are denied. Thus, in my fantasy, ten years from now, the caption reads: "Discursive Disobedience: Critical Race Theory Stages a Virtual Sit-in in American Consciousness."

The task ahead is to pull up a seat and stake out our positions in large and small ways, as individuals and as groups, as discrete formations and as broad coalitions. Frederick Douglass said something about the ways of power

that holds true even a century after it was first uttered: "If there is no struggle, there is no progress . . . . Power concedes nothing without a demand. It never did, and it never will."[43] In this spirit, and in light of the daunting tasks we face and the remarkable resources we bring to bear, I hope our journey onward in the coming decades is provocative, productive, and proactive.

43. FREDERICK DOUGLASS, *West India Emancipation* (speech delivered at Canandaigua, New York August 4, 1857), *in* THE LIFE AND WRITINGS OF FREDERICK DOUGLAS: PRE–CIVIL DECADE 426, 437 (Philip S. Foner ed., 1950).