

# *Critical Race Theory*

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## THE KEY WRITINGS *That Formed the Movement*

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*Edited by*

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KENDALL THOMAS



*The New Press · New York*

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Published in the United States by The New Press, New York, 1996  
Distributed by Two Rivers Distribution

ISBN 978-1-56584-270-0 (hc.)  
ISBN 978-1-56584-271-7 (pbk.)  
CIP data available.

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*Book design by Charles Nix*

Printed in the United States of America

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the justificatory framework  
practices that continue to  
Race Theory is a gasp of  
that law can serve liberation  
tion.

Cornel West  
Harvard University

## INTRODUCTION

THIS volume offers a representative, though by no means exhaustive, compilation of the growing body of legal scholarship known as Critical Race Theory (CRT). As we conceive it, Critical Race Theory embraces a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole. In assembling and editing these essays, we have tried both to provide a sense of the intellectual genesis of this project and to map the main methodological directions that Critical Race Theory has taken since its inception. Toward these ends, the essays in the first few parts are arranged roughly in the chronological order of their publication. The remaining parts, however, are devoted to the most important methodological strands of Critical Race Theory today. We have chosen to present the substance of the original essays rather than small portions of a greater number of works, in the interest of providing the reader with texts that retain as much of their complexity, context, and nuance as possible.

As these writings demonstrate, there is no canonical set of doctrines or methodologies to which we all subscribe. Although Critical Race scholarship differs in object, argument, accent, and emphasis, it is nevertheless unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as "the rule of law" and "equal protection." The second is a

desire not merely to understand the vexed bond between law and racial power but to *change* it. The essays gathered here thus share an ethical commitment to human liberation—even if we reject conventional notions of what such a conception means, and though we often disagree, even among ourselves, over its specific direction.

This ethical aspiration finds its most obvious concrete expression in the pursuit of engaged, even adversarial, scholarship. The writings in this collaboration may be read as contributions to what Edward Said has called "antithetical knowledge," the development of counter-accounts of social reality by subversive and subaltern elements of the reigning order. Critical Race Theory—like the Critical Legal Studies movement with which we are often allied—rejects the prevailing orthodoxy that scholarship should be or could be "neutral" and "objective." We believe that legal scholarship about race in America can never be written from a distance of detachment or with an attitude of objectivity. To the extent that racial power is exercised legally and ideologically, legal scholarship about race is an important site for the construction of that power, and thus is always a factor, if "only" ideologically, in the economy of racial power itself. To use a phrase from the existentialist tradition, there is "no exit"—no scholarly perch outside the social dynamics of racial power from which merely to observe and analyze. Scholarship—the formal production, identification, and organization of what will be called "knowledge"—is inevitably political. Each of the texts in this volume seeks in its own way not simply to explicate but also to intervene in the ideological contestation of race in America, and to create new, oppositionist accounts of race.

The aspect of our work which most markedly distinguishes it from conventional liberal and conservative legal scholarship about race and inequality is a deep dissatisfaction with traditional civil rights discourse. As several of the authors in this collection demonstrate, the reigning contemporary American ideologies about race were built in the sixties and seventies around an implicit social compact. This compact held that racial power and racial justice would be understood in very particular ways. Racial justice was embraced in the American mainstream in terms that excluded radical or fundamental challenges to status quo institutional practices in American society by treating the exercise of racial power as rare and aberrational rather than as systemic and ingrained. The construction of "racism" from what Alan Freeman terms the "perpetrator perspective" restrictively conceived racism as an intentional, albeit irrational, deviation by a conscious wrongdoer from otherwise neutral, rational, and just ways of distributing jobs, power, prestige, and wealth. The adoption of this perspective allowed a broad cultural mainstream both explicitly to acknowledge the fact of racism and, simultaneously, to insist on its irregular occurrence and limited significance. As Freeman concludes, liberal race reform thus served to legitimize the basic myths of American meritocracy.

In Gary Peller's depiction, this mainstream civil rights discourse on "race relations" was constructed in this way partly as a defense against the more radical ideologies of racial liberation presented by the Black Nationalist and Black Consciousness movements of the sixties and early seventies, and their less visible but intellectually subversive scholarly presentations by people such as James Turner, now a teacher in black studies at Cornell. In the construction of "racism" as the irrational and backward bias of believing that someone's race is important, the American cultural mainstream neatly linked the black left to the white racist right: according to this quickly coalesced consensus, because race-consciousness characterized both white supremacists and black nationalists, it followed that both were racists. The resulting "center" of cultural common sense thus

rested on the exclusion of virtually the entire domain of progressive thinking about race within colored communities. With its explicit embrace of race-consciousness, Critical Race Theory aims to reexamine the terms by which race and racism have been negotiated in American consciousness, and to recover and revitalize the radical tradition of race-consciousness among African-Americans and other peoples of color—a tradition that was discarded when integration, assimilation and the ideal of color-blindness became the official norms of racial enlightenment.

The image of a "traditional civil rights discourse" refers to the constellation of ideas about racial power and social transformation that were constructed partly by, and partly as a defense against, the mass mobilization of social energy and popular imagination in the civil rights movements of the late fifties and sixties. To those who participated in the civil rights movements firsthand—say, as part of the street and body politics engaged in by Reverend Martin Luther King, Jr.'s cadres in town after town across the South—the fact that they were part of a deeply subversive movement of mass resistance and social transformation was obvious. Our opposition to traditional civil rights discourse is neither a criticism of the civil rights movement nor an attempt to diminish its significance. On the contrary, as Anthony Cook's radical reading of King's theology and social theory makes explicit, we draw much of our inspiration and sense of direction from that courageous, brilliantly conceived, spiritually inspired, and ultimately transformative mass action.

Of course, colored people made important social gains through civil rights reform, as did American society generally: in fact, but for the civil rights movements' victories against racial exclusion, this volume and the Critical Race Theory movement generally could not have been taught at mainstream law schools. The law's incorporation of what several authors here call "formal equality" (the prohibition against explicit racial exclusion, like "whites only" signs) marks a decidedly progressive moment in U.S. political and social history. However, the fact

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that civil rights advocates met with some success  
in the nation's courts and legislatures ought not  
obscure the central role the American legal  
order played in the deradicalization of racial  
liberation movements. Along with the suppression  
of explicit white racism (the widely cele-  
brated aim of civil rights reform), the dominant  
legal conception of racism as a discrete and  
identifiable act of "prejudice based on skin  
color" placed virtually the entire range of every-  
day social practices in America—social practices  
developed and maintained throughout the pe-  
riod of formal American apartheid—beyond the  
scope of critical examination or legal remedia-  
tion.

The affirmative action debate, which is dis-  
cussed in several essays in this volume, provides  
a vivid example of what we mean. From its  
inception, mainstream legal thinking in the  
U.S. has been characterized by a curiously con-  
stricted understanding of race and power.  
Within this cramped conception of racial domi-  
nation, the evil of racism exists when—and only  
when—one can point to specific, discrete acts of  
racial discrimination, which is in turn narrowly  
defined as decision-making based on the irratio-  
nal and irrelevant attribute of race. Given this  
essentially negative, indeed, dismissive view of  
racial identity and its social meanings, it was  
not surprising that mainstream legal thought  
came to embrace the ideal of "color-blindness"  
as the dominant moral compass of social en-  
lightenment about race. Mainstream legal argu-  
ment regarding "race relations" typically de-  
fended its position by appropriating Dr. King's  
injunction that a person should be judged "by  
the content of his character rather than the  
color of his skin" and wedding it to the regnant  
ideologies of equal opportunity and American  
meritocracy. Faced with this state of affairs,  
liberal proponents of affirmative action in legal  
and policy arenas—who had just successfully  
won the formal adoption of basic antidiscrimi-  
nation norms—soon found themselves in a  
completely defensive ideological posture. Af-  
firmative action requires the use of race as a  
socially significant category of perception and  
representation, but the deepest elements of  
mainstream civil rights ideology had come to

identify such race-consciousness as racism itself.  
Indeed, the problem here was not simply politi-  
cal and strategic: the predominant legal repre-  
sentation of racism as the mere recognition of  
race matched the "personal" views of many  
liberals themselves, creating for them a contra-  
diction in their hearts as well as their words.

Liberal antidiscrimination proponents pro-  
posed various ways to reconcile this contradic-  
tion: they characterized affirmative action as a  
merely "exceptional" remedy for past injustice,  
a temporary tool to be used only until equal  
opportunity is achieved or a default mechanism  
for reaching discrimination that could not be  
proved directly. Separate but related liberal  
defenses of affirmative action hold that its ben-  
eficiaries have suffered from "deprived"  
backgrounds that require limited special consid-  
eration in the otherwise fully rational and unbi-  
ased competition for social goods, or that af-  
firmative action promotes social "diversity," a  
value which in the liberal vision is independent  
of, perhaps even at odds with, equality of oppor-  
tunity or meritocracy.

The poverty of the liberal imagination is  
belied by the very fact that liberal theories of  
affirmative action are framed in such defensive  
terms, and so clearly shaped by the felt need to  
justify this perceived departure from purport-  
edly objective findings of "merit" (or the lack  
thereof). These apologetic strategies testify to  
the deeper ways civil rights reformism has  
helped to legitimize the very social practices—in  
employment offices and admissions depart-  
ments—that were originally targeted for reform.  
By constructing "discrimination" as a deviation  
from otherwise legitimate selection processes,  
liberal race rhetoric affirms the underlying ide-  
ology of just desserts, even as it reluctantly  
tolerates limited exceptions to meritocratic my-  
thology. Despite their disagreements about af-  
firmative action, liberals and conservatives who  
embrace dominant civil rights discourse treat  
the category of merit itself as neutral and im-  
personal, outside of social power and unconnected  
to systems of racial privilege. Rather than engag-  
ing in a broad-scale inquiry into why jobs,  
wealth, education, and power are distributed  
as they are, mainstream civil rights discourse

suggests that once the irrational biases of race-consciousness are eradicated, everyone will be treated fairly, as equal competitors in a regime of equal opportunity.

What we find most amazing about this ideological structure in retrospect is how very little actual social change was imagined to be required by "the civil rights revolution." One might have expected a huge controversy over the dramatic social transformation necessary to eradicate the regime of American apartheid. By and large, however, the very same whites who administered explicit policies of segregation and racial domination kept their jobs as decision makers in employment offices of companies, admissions offices of schools, lending offices of banks, and so on. In institution after institution, progressive reformers found themselves struggling over the implementation of integrationist policy with the former administrators of segregation who soon regrouped as an old guard "concerned" over the deterioration of "standards."

The continuity of institutional authority between the segregationist and civil rights regimes is only part of the story. Even more dramatic, the same criteria for defining "qualifications" and "merit" used during the period of explicit racial exclusion continued to be used, so long as they were not directly "racial." Racism was identified only with the outright formal exclusion of people of color; it was simply assumed that the whole rest of the culture, and the de facto segregation of schools, work places, and neighborhoods, would remain the same. The sheer taken-for-grantedness of this way of thinking would pose a formidable and practically insurmountable obstacle. Having rejected race-consciousness in toto, there was no conceptual basis from which to identify the cultural and ethnic character of mainstream American institutions; they were thus deemed to be racially and culturally neutral. As a consequence, the deeply transformative potential of the civil rights movement's interrogation of racial power was successfully aborted as a piece of mainstream American ideology.

Within the predominantly white law school culture where most of the authors represented

in this volume spend professional time, the law's "embrace" of civil rights in the Warren Court era is proclaimed as the very hallmark of justice under the rule of law. In our view, the "legislation" of the civil rights movement and its "integration" into the mainstream commonsense assumptions in the late sixties and early seventies were premised on a tragically narrow and conservative picture of the goals of racial justice and the domains of racial power. In the balance of this introduction, we describe as matters both of institutional politics and intellectual inquiry how we have come to these kinds of conclusions.

In his essay on the Angelo Herndon case, Kendall Thomas describes and pursues a central project of Critical Race scholarship: the use of critical historical method to show that the contemporary structure of civil rights rhetoric is not the natural or inevitable meaning of racial justice but, instead, a collection of strategies and discourses born of and deployed in particular political, cultural, and institutional conflicts and negotiations. Our goal here is similar. We hope to situate the strategies and discourses of Critical Race Theory within the broader intellectual and social currents from which we write, as well as within the specific work place and institutional positions where we are located and from which we struggle.

The emergence of Critical Race Theory in the eighties, we believe, marks an important point in the history of racial politics in the legal academy and, we hope, in the broader conversation about race and racism in the nation as a whole. As we experienced it, mostly as law students or beginning law professors, the boundaries of "acceptable" race discourse had become suddenly narrowed, in the years from the late sixties to the late seventies and early eighties, both in legal institutions and in American culture more generally. In the law schools we attended, there were definite liberal and conservative camps of scholars and students. While the debate in which these camps engaged were clearly important—for example, how the law should define and identify illegal racial

professional time, the law's rights in the Warren Court were the very hallmark of justice *v.* In our view, the "legislative movement and its "internist mainstream commonsense assumption in the sixties and early seventies was tragically narrow and consonant with the goals of racial justice and racial power. In the balance we describe as matters both political and intellectual inquiry lead to these kinds of conclusions."

In the Angelo Herndon case, Kenneth has pursued a central theme of Race scholarship: the use of method to show that the language of civil rights rhetoric is the inevitable meaning of racial collection of strategies and deployed in particular institutional conflicts and here is similar. We hope to see and discourses of Critical Race Theory in the broader intellectual context from which we write, as well as work place and institutions we are located and from

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power—the reigning discourse seemed, at least to us, ideologically impoverished and technocratic.

In constitutional law, for example, it was well settled that government-sanctioned racial discrimination was prohibited, and that legally enforced segregation constituted such discrimination. That victory was secured in *Brown v. Board of Education* and its progeny. In the language of the Fourteenth Amendment, race is a "suspect classification" which demands judicial strict scrutiny. "Race relations" thus represent an exception to the general deference that mainstream constitutional theory accords democratically elected institutions. Racial classifications violate the equal protection clause unless they both serve a compelling governmental interest and further, are no broader than necessary to achieve that goal. Within the conceptual boundaries of these legal doctrines, mainstream scholars debated whether discrimination should be defined only as intentional government action . . . or whether the tort-like "de facto" test should be used when government actions had predictable, racially skewed results . . . or whether the racial categories implicit in affirmative action policy should be legally equivalent to those used to burden people of color and therefore also be subject to strict scrutiny . . . and then whether remedying past social discrimination was a sufficiently compelling and determinate goal to survive strict scrutiny . . . and so on.

In all these debates we identified, of course, with the liberals against the intent requirement established in *Washington v. Davis*, the affirmative action limitations of *Bakke* (and later *Croson*), the curtailment of the "state action" doctrine resulting in the limitation of sites where constitutional antidiscrimination norms would apply, and so on. Yet the whole discourse seemed to assume away the fundamental problem of racial subordination whose examination was at the center of the work so many of us had spent our college years pursuing in Afro-American studies departments, community mobilizations, student activism, and the like.

The fact that affirmative action was seen as

such a "dilemma" or a "necessary evil" was one symptom of the ultimately conservative character of even "liberal" mainstream race discourse. More generally, though, liberals and conservatives seemed to see the issues of race and law from within the same structure of analysis—namely, a policy that legal rationality could identify and eradicate the biases of race-consciousness in social decision-making. Liberals and conservatives as a general matter differed over the degree to which racial bias was a fact of American life: liberals argued that bias was widespread where conservatives insisted it was not; liberals supported a disparate effects test for identifying discrimination, where conservatives advocated a more restricted intent requirement; liberals wanted an expanded state action requirement, whereas conservatives wanted a narrow one. The respective visions of the two factions differed only in scope: they defined and constructed "racism" the same way, as the opposite of color-blindness.

In any event, however compelling the liberal vision of achieving racial justice through legal reform overseen by a sympathetic judiciary may have been in the sixties and early seventies, the breakdown of the national consensus for the use of law as an instrument for racial redistribution rendered the vision far less capable of appearing even merely pragmatic. By the late seventies, traditional civil rights lawyers found themselves fighting, and losing, rearguard attacks on the limited victories they had only just achieved in the prior decade, particularly with respect to affirmative action and legal requirements for the kinds of evidence required to prove illicit discrimination. An increasingly conservative judiciary made it clear that the age of ever expanding progressive law reform was over.

At the same time that these events were unfolding, a predominantly white left emerged on the law school scene in the late seventies, a development which played a central role in the genesis of Critical Race Theory. Organized by a collection of neo-Marxist intellectuals, former New Left activists, ex-counter-culturalists, and other varieties of oppositionists in law schools, the Conference on Critical Legal Studies estab-

lished itself as a network of openly leftist law teachers, students, and practitioners committed to exposing and challenging the ways American law served to legitimize an oppressive social order. Like the later experience of Critical Race writers vis-à-vis race scholarship, "crits" found themselves frustrated with the presuppositions of the conventional scholarly legal discourse: they opposed not only conservative legal work but also the dominant liberal varieties. Crits contended that liberal and conservative legal scholarship operated in the narrow ideological channel within which law was understood as qualitatively different from politics. The faith of liberal lawyers in the gradual reform of American law through the victory of the superior rationality of progressive ideas depended on a belief in the central ideological myth of the law/politics distinction, namely, that legal institutions employ a rational, apolitical, and neutral discourse with which to mediate the exercise of social power. This, in essence, is the role of law as understood by liberal political theory. Yet politics was embedded in the very doctrinal categories with which law organized and represented social reality. Thus the deeply political character of law was obscured in one way by the obsession of mainstream legal scholarship with technical discussions about standing, jurisdiction and procedure; and the political character of judicial decision-making was denied in another way through the reigning assumptions that legal decision-making was—or could be—determined by preexisting legal rules, standards, and policies, all of which were applied according to professional craft standards encapsulated in the idea of "reasoned elaboration." Law was, in the conventional wisdom, distinguished from politics because politics was open-ended, subjective, discretionary, and ideological, whereas law was determinate, objective, bounded, and neutral.

This conception of law as rational, apolitical, and technical operated as an institutional regulative principle, defining what was legitimate and illegitimate to pursue in legal scholarship, and symbolically defining the professional, businesslike culture of day-to-day life in mainstream law schools. This generally centrist legal culture

characterized the entire post-war period in legal education, with virtually no organized dissent. Its intellectual and ideological premises had not been seriously challenged since the Legal Realist movement of the twenties and thirties—a body of scholarship that mainstream scholars ritually honored for the critique of the "formalism" of turn-of-the-century legal discourse but marginalized as having "gone too far" in its critique of the very possibility of a rule of law. Writing during the so-called liberty of contract period (characterized by the Supreme Court's invalidation of labor reform legislation on the grounds that it violated the "liberty" of workers and owners to contract with each other over terms of employment) the legal realists set out to show that the purportedly neutral and objective legal interpretation of the period was really based on politics, on what Oliver Wendell Holmes called the "hidden and often inarticulate judgments of social policy."

The crits unearthed much of the Legal Realist work that mainstream legal scholars had ignored for decades, and they found the intellectual and theoretical basis for launching a full-scale critique of the role of law in helping to rationalize an unjust social order. While the Realist critique of American law's pretensions to neutrality and rationality was geared to ward the right-wing libertarianism of an "Old Order" of jurists, crits redirected it at the depoliticized and technocratic assumptions of legal education and scholarship in the seventies. Moreover, in the sixties tradition from which many of them had come, they extended the intellectual and ideological conflict they engendered to the law school culture to which it was linked.

By the late seventies, Critical Legal Studies existed in a swirl of formative energy, cultural insurgency, and organizing momentum: It had established itself as a politically, philosophically, and methodologically eclectic but intellectually sophisticated and ideologically left movement in legal academia, and its conferences had begun to attract hundreds of progressive law teachers, students, and lawyers; even mainstream law reviews were featuring critical work that reinterpreted whole doctrinal areas of law from an explicitly ideological motivation. Moreover, in

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viewing law schools as work-places, and thus  
as organizing sites for political resistance,  
“CLSers” actively recruited students and left-  
leaning law teachers from around the country  
to engage in the construction of left legal schol-  
arship and law school transformation. CLS  
quickly became the organizing hub for a huge  
burst of left legal scholarly production and for  
various oppositional political challenges in law  
school institutional life. Several left scholars of  
color identified with the movement, and, most  
important for the eventual genesis of Critical  
Race Theory a few years later, CLS succeeded  
in at least one aspect of its frontal assault on the  
depoliticized character of legal education. By  
the late seventies, explicitly right-wing legal  
scholarship had developed its own critique of  
the conventional assumptions, just as the na-  
tional mood turned to the right with the elec-  
tion of Ronald Reagan. The law school as an  
institution was, by then, an obvious site for  
ideological contestation as the apolitical preten-  
sions of the “nonideological” center began to  
disintegrate.

Critical Race Theory emerged in the inter-  
stices of this political and institutional dynamic.  
Critical Race Theory thus represents an attempt  
to inhabit and expand the space between two  
very different intellectual and ideological forma-  
tions. Critical Race Theory sought to stage a  
simultaneous encounter with the exhausted vi-  
sion of reformist civil rights scholarship, on the  
one hand, and the emergent critique of left legal  
scholarship on the other. Critical Race Theory’s  
engagement with the discourse of civil rights  
reform stemmed directly from our lived experi-  
ence as students and teachers in the nation’s law  
schools. We both saw and suffered the concrete  
consequences that followed from liberal legal  
thinkers’ failure to address the constrictive role  
that racial ideology plays in the composition  
and culture of American institutions, including  
the American law school. Our engagement with  
progressive-left legal academics stemmed from  
our sense that their focus on legal ideology, legal  
scholarship and the politics of the American law  
school provided a language and a practice for  
viewing the institutions in which we studied  
and worked both as sites of and targets for our

developing critique of law, racism, and social  
power.

In identifying the liberal civil rights tradition  
and the Critical Legal Studies movement as  
key factors in the emergence of Critical Race  
Theory, we do not mean to offer an oversimpli-  
fied genealogy in which Critical Race Theory  
appears as a simple hybrid of the two. We view  
liberal civil rights scholarship and the work  
of the critical legal theorists not so much as  
rudimentary components of Critical Race The-  
ory, but as elements in the conditions of its  
possibility. In short, we intend to evoke a partic-  
ular atmosphere in which progressive scholars of  
color struggled to piece together an intellectual  
identity and a political practice that would take  
the form both of a left intervention into race  
discourse and a race intervention into left dis-  
course. To better capture the dynamics of these  
trajectories, we now turn to two key institu-  
tional events in the development of Critical  
Race Theory as a movement. The first is the  
student protest, boycott, and organization of an  
alternative course on race and law at Harvard  
Law School in 1981—an event that highlights  
the significance of Derrick Bell and the Critical  
Legal Studies movement to the ultimate devel-  
opment of Critical Race Theory, and symbolizes  
Critical Race Theory’s oppositional posture  
vis-à-vis the liberal mainstream. The second is  
the 1987 Critical Legal Studies National Con-  
ference on silence and race, which marked the  
genesis of an intellectually distinctive critical  
account of race on terms set forth by race-  
conscious scholars of color, and the terms of  
contestation and coalition with CLS.

As Richard Delgado states in “The Imperial  
Scholar,” quite bluntly, the study of civil rights  
and antidiscrimination law in the mainstream  
law schools in which we found ourselves in the  
eighties was dominated by a group consisting  
almost entirely of white male constitutional law  
professors. Derrick Bell was one of the few  
exceptions; he went to Harvard after a distin-  
guished record as a litigator in the civil rights  
movement, becoming one of only two African-  
American professors on the large Harvard fac-  
ulty. In his course and book *Race, and Racism*

*and American Law*, Bell developed and taught legal doctrine from a race-conscious viewpoint. Implicitly repudiating the reigning idea of the color-blindness of law, pedagogy, and scholarship, he used racial politics rather than the formal structure of legal doctrine as the organizing concept for scholarly study.

It is important to understand the centrality of Bell's coursebook and his opposition to the traditional liberal approach to racism for the eventual development of the Critical Race Theory movement. A symbol of his influence is his inclusion as the first page of his book of a photograph of Thomas Smith and John Carlos accepting their Olympic trophies at the 1968 Mexico City Summer Games. In the foreground are balding white men in suits, apparently Olympic officials of some kind; rising behind them are Smith and Carlos, standing on the raised platforms in sleek warmup suits, at the height of their competitive achievement. In one hand, the victorious athletes hold their gold and silver medals; Smith and Carlos defiantly hold their other hand over their heads in the clinched fist of the Black Power salute. This symbolic action, staged during the playing of the National Anthem, spawned an enormous controversy in the United States; patriots charged that Smith and Carlos embarrassed the country and privileged their racial identity over their more important identity as Americans.

To those of us who were then law students and beginning law teachers, Bell's inclusion of the Smith-Carlos photograph as a visual introduction to his law school casebook suggested a link between his work and the Black Power movements that most of us "really" identified with, whose political insights and aspirations went far beyond what could be articulated in the reigning language of the legal profession and the legal studies we were pursuing. Although we could not then fully articulate the nature and basis of this connection, we were able to recognize that Derrick Bell's position within legal study bore a family resemblance to the oppositional stance that Smith and Carlos had taken in Mexico City. Just as Carlos and Smith participated on behalf of their nation in the Olympic competition, Bell had chosen to

enter the arena of American legal scholarship instead of eschewing it and taking the path of total separation. Similarly, just as Carlos and Smith refused to allow American nationalism to subsume their racial identity, Bell insisted on placing race at the center of his intellectual inquiry rather than marginalizing it as a sub-classification under the formal rubric of this or that legal doctrine. In a subtle way, Bell's position within the legal academy—an arena that defined itself within the conventional legal discourse as neutral to race—was akin to putting up his fist in the black power salute.

As his articles in the first part of this volume demonstrate, Bell provided some of the earliest theoretical alternatives to the dominant civil rights vision we have described. In the face of the hegemony of racial integration as the ideal of reform in the seventies, he argued in "Serving Two Masters," the essay that opens this collection, that the exclusive focus on the goal of school integration responded to the ideals of elite liberal public interest lawyers rather than to the actual interests of black communities and children. In "The Interest-Convergence Dilemma," Bell sketched a full-scale structural theory to account for the ebb and flow of civil rights reform in America, according to the political machinations of whites themselves.

In 1980, Bell left Harvard to become dean of the University of Oregon Law School and one of the first African-Americans to head a mainstream American law school. Student activists, particularly students of color, demanded that Harvard hire a teacher of color to replace him and to teach his courses in constitutional law and minority issues. The liberal white Harvard administration responded to student protests, demonstrations, rallies and sit-ins—including a takeover of the Dean's office—by asserting that there were no qualified black scholars who merited Harvard's interest. Harvard's response was structured around two points produced from within liberal race discourse which Critical Race Theory would ultimately contest. First, they asked why the students wouldn't prefer an excellent white professor over a mediocre black one—that is, at a conceptual level, they posited the particular liberal epistemology that associ-

of American legal scholarship by it and taking the path of racial identity. Similarly, just as Carlos and Bell insisted on the center of his intellectual project, Bell marginalized it as a subtext in the formal rubric of this or any other law school. In a subtle way, Bell's position in the conventional legal academy—an arena that remained distant from the conventional legal discourse on race—was akin to putting up a black power salute.

In the first part of this volume I provided some of the earliest alternatives to the dominant civil rights narrative that I have described. In the face of the racial integration as the ideal of the civil rights movement, he argued in "Serving Justice" the essay that opens this collection, that the focus on civil rights had responded to the ideals of public interest lawyers rather than the needs of black communities and the Interest-Convergence Dilemma. He outlined a full-scale structural argument for the ebb and flow of racial power in America, according to the calculations of whites themselves. He left Harvard to become dean of the Oregon Law School and one of the first non-Americans to head a mainstream law school. Student activists, mostly of color, demanded that he resign as teacher of color to replace him in courses in constitutional law. The liberal white Harvard administration responded to student protests, with allies and sit-ins—including a Black Power protest in the dean's office—by asserting that Harvard had not discriminated against black scholars who merited admission. Harvard's response was that two points produced from the discourse which Critical Race Theory ultimately contest. First, they students wouldn't prefer an experienced professor over a mediocre black professor. On a conceptual level, they posited a general epistemology that associated color-blindness with intellectual merit.

Second, the Harvard administration, skeptical about the pedagogical value of a course devoted to racial topics, asserted that no special course was needed when "those issues" were already covered in classes devoted to constitutional law and employment discrimination thus, to our minds, failing to comprehend the significance of Bell's projects. Instead, Jack Greenberg and Julius Chambers, both important and distinguished civil rights litigators, were hired to teach a three-week mini-course on civil rights litigation.

It was in the midst of this kind of institutional struggle, played out in one form or another at mainstream law schools around the country, that many of us now writing in the Critical Race Theory genre began to elaborate what we took to be the limitations of traditional race analysis and argument. After all, in a context such as Harvard, administrators saw themselves as racially enlightened: they were liberals who were against racial discrimination—indeed, Harvard wanted to honor a heroic litigator of the school desegregation era with a visiting professorship. Clearly, the cool, technocratic and business-like culture of mainstream law schools was hostile at all points to raw "prejudice"—these were not institutions in which a hardcore, "Bull Conner" type racist would receive a warm welcome. Although those of us who were agitating for hiring teachers of color knew we didn't accept the kinds of justifications the Harvard administrators offered, we also knew that we lacked an adequate critical vocabulary for articulating exactly what we found wrong in their arguments. It was out of this intellectual void that the impetus for a new conceptual approach to race and law was based. Our critique of ideas like "color-blindness," "formal legal equality," and "integrationism" are linked to their institutional manifestations as a rhetoric of power in the schools we attended and the work-places we now occupy.

In the local Harvard confrontation, student organizers decided to boycott the mini-course offered by the administration and organized instead "The Alternative Course," a student-led continuation of Bell's course which focused on

American law through the prism of race. Taught by scholars of color from other schools who were each asked to speak about topics loosely organized to trace the chapters of Bell's *Race, Racism and American Law* book, the course simultaneously provided the means to develop a framework to understand law and racial power and to contest Harvard's deployment of meritocratic mythology as an instance of that very power.

The Alternative Course was in many ways the first institutionalized expression of Critical Race Theory. With the aid of outside funding and sympathetic Harvard teachers (many of them white crits who provided encouragement, strategic advice, and independent study credit to enable students to attend the classes) the course brought together a critical mass of scholars and students, and focused on the need to develop an alternative account of racial power and its relation to law and antidiscrimination reform. Among the guest speakers were Charles Lawrence, Linda Greene, Neil Gotanda, and Richard Delgado, all of whom were already in law teaching. Mari Matsuda, then a graduate law student, was a participant in the Alternative Course, and Kimberlé Crenshaw one of its main organizers.

The Alternative Course is a useful point to mark the genesis of Critical Race Theory for many reasons. First, it was one of the earliest attempts to bring scholars of color together to address the law's treatment of race from a self-consciously critical perspective. There had been some race-conscious organizing in law schools in the preceding years. For example, within the Association of American Law Schools (AALS) the professional association of law teachers, a minority section had been established which Ralph Smith of the University of Pennsylvania and Denise Carty-Bennia of Northeastern University used as a vehicle for intellectual development. However, the AALS group neither provided a basis for sustained dialogue, nor openly identified itself within the profession as intellectually oppositional and politically left-progressive. Recognizing these inherent institutional limitations, legal academics of color created an informal network of support for law students

and teachers of color, whose existence was enormously important in developing a critical mass of law teachers of color. These were efforts, though, that carried no direct implications for scholarship and theory.

Second, the Alternative Course exemplified another important feature of the Critical Race Theory movement, namely, the view—shared with the Critical Legal Studies movement—that it is politically meaningful to contest the terrain and terms of dominant legal discourse. In one sense, the importance of mainstream law school discourse to Critical Race Theorists flows from the view that power is implicated in, say, the privileging of certain topics and viewpoints as worthy of being curricular entries at mainstream law schools. The idea here, in essence, is that knowledge and politics are inevitably intertwined. As an influential site for indoctrination and propagation, the ideology of law schools helps in turn to shape and give substance to the broader legal and social ideologies about race and legitimacy. In another sense, the focus on the law school and legal scholarship as a terrain worth contesting is based on a view of law schools in left terms as work-places in which we find ourselves as part of a productive enterprise, the “production of knowledge.” This perspective helps to explain an important difference with earlier conceptions of race reform, which looked to law schools and other legal institutions as places to gather tools to deploy in political struggles that occurred “out there” in the South, the ghetto, or some other place besides law schools or courtrooms themselves. Against this view, we take racial power to be at stake across the social plane—not merely in the places where people of color are concentrated but also in the institutions where their position is normalized and given legitimization. The Alternative Course reflected—as well as helped to create—the sense that it was meaningful to build an oppositional community of left scholars of color within the mainstream legal academy.

Finally, the Alternative Course embodied one of the key markers of Critical Race Theory—the way in which our intellectual trajectories are rooted in a dissatisfaction with and opposition to liberal mainstream discourses about race such

as those presented by the Harvard administration.

We turn now to the Critical Legal Studies conferences of the mid-eighties and the general engagement with the white left in and outside of the legal academy both of which were crucial in the development of the Critical Race Theory project. If the Alternative Course symbolizes the trajectory of Critical Race Theory as a left intervention in conventional race discourse, then the Critical Legal Studies Conferences during the mid-eighties can be equally useful in situating Critical Race Theory as a race-conscious intervention on the left.

At its inception in the late 70s, Critical Legal Studies (CLS) was basically a white and largely male academic organization. By the mid-eighties, there was a small cadre of scholars of color who frequented CLS conferences and summer camps. Most were generally conversant with Critical Legal Theory and sympathetic to the progressive sensibilities of Critical Legal Studies as a whole. Unlike the law school mainstream, this cadre was far from deterred by CLS critique of liberal legalism. While many in the legal community were, to put it mildly, deeply disturbed by the CLS assault against such ideological mainstays as the rule of the law, to scholars of color who drew on a history of colored communities’ struggle against formal and institutional racism, the crits’ contention that law was neither apolitical, neutral, nor determinate hardly seemed controversial. Indeed, we believed that this critical perspective formed the basic building blocks of any serious attempt to understand the relationship between law and white supremacy. However, while the emerging “race crits” shared this starting position with CLS, significant differences between us became increasingly apparent during a series of conferences in the mid-eighties.

Our discussions during the conferences revealed that while we shared with crits the belief that legal consciousness functioned to legitimize social power in the United States, race crits also understood that race and racism likewise functioned as central pillars of hegemonic power. Because CLS scholars had not, by and large, developed and incorporated a critique of

by the Harvard administra-

the Critical Legal Studies mid-eighties and the general white left in and outside both of which were crucial of the Critical Race Theory alternative Course symbolizes Critical Race Theory as a conventional race discourse, Legal Studies Conferences eighties can be equally useful Race Theory as a race-on on the left.

In the late 70s, Critical Legal basically a white and largely organization. By the mid-eighties all cadre of scholars of color CLS conferences and summer generally conversant with theory and sympathetic to the principles of Critical Legal Studies the law school mainstream, from deterred by CLS critique While many in the legal put it mildly, deeply dissident assault against such ideologically rule of the law, to scholars on a history of colored people against formal and institutional crits' contention that law is not, neutral, nor determinate controversial. Indeed, we legal perspective formed the basis of any serious attempt to relationship between law and however, while the emerging this starting position with differences between us became clear during a series of conferences.

During the conferences re-shared with crits the belief less functioned to legitimize United States, race crits race and racism likewise central pillars of hegemonic scholars had not, by and incorporated a critique of

racial power into their analysis, their practices, politics and theories regarding race tended to be unsatisfying and sometimes indistinguishable from those of the dominant institutions they were otherwise contesting. As race moved from the margins to the center of discourse within Critical Legal Studies—or, as some would say, Critical Legal Studies took the race turn—institutional and theoretical disjunctions between critical legal studies and the emerging scholarship on race eventually manifested themselves as central themes within Critical Race Theory.

One of the most significant institutional manifestations of CLS's underdeveloped critique of racial power occurred during the 1986 CLS conference. The 1986 conference, organized by a group of women who worked in feminist legal theory, marked the zenith of the feminist turn within CLS. Having placed feminism and its critique of patriarchy squarely within the discourse of and about CLS, the "fem-crit" conference organizers asked scholars of color to facilitate several concurrently held discussions about race. Drawing on a central CLS tenet that power is not, ultimately, "out there," but in the very institutions and relationships that shape our lives, the handful of scholars of color attending this conference designed the workshop to uncover and discuss various dimensions of racial power as manifested within Critical Legal Studies. Though the practice of uncovering and contesting power within law school institutions was a standard feature of CLS politics, the attempt to situate this practice within CLS as a "white" institution drew a surprisingly defensive response. The pitched and heated exchange that erupted in response to our query, "what is it about the whiteness of CLS that discourages participation by people of color?" revealed that CLS's hip, cutting edge irreverence toward establishment practices could easily disintegrate into handwringing hysteria when brought back "home." Of course, not all crits were resistant to this dialogue and it is only fair to point out that those who did find the query to be unnecessarily adversarial probably held a good faith belief that CLS marked a sphere of activity completely distinct from both

law schools and society at large. Since "we" were joined as allies rather than adversaries within the law school arena, crits troubled by our workshop no doubt believed that critical energies would be best directed at tearing down institutional practices at our workplace rather than bringing these disruptive interventions "home." But feminists had already problematized the conceptualization of "home" that seemed to ground this view, revealing such spaces to be a site of hierarchy and power as well. Moreover, as the race crits experienced it, despite some points of convergence, some of the racial dynamics of CLS as an institution were not entirely distinct from the law school cultures "we" had set out to transform.

Another point of conflict and difference between white crits and scholars of color revolved around the widely debated critique of rights. According to other scholars of color at the 1987 conference, another dimension of the failure of CLS to reflect the lived experience of people of color could be glimpsed in the CLS critique of rights. Crits tended to view the idea of legal "rights" as one of the ways that law helps to legitimize the social world by representing it as rationally mediated by the rule of law. Crits also saw legal rights—like those against racial discrimination—as indeterminate and capable of contradictory meanings, and as embodying an alienated way of thinking about social relations.

Crits of color agreed to varying degrees with some dimensions of the critique—for instance, that rights discourse was indeterminate. Yet we sharply differed with critics over the normative implications of this observation. To the emerging race crits, rights discourse held a social and transformative value in the context of racial subordination that transcended the narrower question of whether reliance on rights could alone bring about any determinate results. Race crits realized that the very notion of a subordinate people exercising rights was an important dimension of Black empowerment during the civil rights movement, significant not simply because of the occasional legal victories that were garnered, but because of the transformative dimension of African-Americans re-imag-

ining themselves as full, rights-bearing citizens within the American political imagination. We wanted to acknowledge the centrality of rights discourse even as we recognized that the use of rights language was not without risks. The debate that ensued in light of this different orientation engendered an important CRT theme: the absolute centrality of history and context in any attempt to theorize the relationship between race and legal discourse.

A third ideological difference emerged in a series of critiques of early attempts by scholars of color to articulate how law reflects and produces racial power. Most of these critiques were articulated at the next 1987 CLS conference, "The Sounds of Silence," sponsored by Los Angeles area law schools. Although the terms of the debate were not fully clear, and at the time, there were few key words or concepts on which our analysis could then focus, we have come to articulate the central criticism by crits to be that of "racialism". By racialism, we refer to theoretical accounts of racial power that explain legal and political decisions which are adverse to people of color as mere reflections of underlying white interest. To phrase this critical model in more contemporary terms, we might say that racialism is to power what essentialism is to identity—a narrow, and frequently unsatisfying theory in which complex phenomena are reduced to and presented as a simple reflection of some underlying "facts." Specifically, the "sin" of racialism is that it presumes that racial interests or racial identity exists somewhere outside of or prior to law and is merely reflected in subsequent legal decisions adverse to nonwhites.

Such an approach struck crits as far too instrumental to be a useful account of race and power. During the eighties, crits had been debating the issue of "instrumentalist" and "irrationalist" accounts of law; most agreed with the problematic character of what came to be called "vulgar Marxism." Briefly stated, in traditional Marxist analysis, law appears as merely an instrument of class interests that are rooted outside of law in some "concrete social reality." In sum, law is merely an "ideological reflection" of some class interest rooted elsewhere. Many critics—echoing the late sixties New Left—

sought to distinguish themselves from these "instrumentalist" accounts on the grounds that they embodied a constricted view of the range and sites of the production of social power, and hence of politics. By defining class in terms of one's position in the material production process, and viewing law and all other "superstructural" phenomena as merely reflections of interests rooted in social class identification, vulgar Marxism, crits argued, ignored the ways that law and other merely "superstructural" arenas helped to constitute the very interests that law was supposed merely to reflect. Crits such as Freeman, Duncan Kennedy, and Karl Klare (to name a few) developed non-instrumentalist accounts of law and its relationship to power that focused on legal discourse as a crucial site for the production of ideology and the perpetuation of social power. First, Critical Legal theorists developed a genealogical account of the relationship between law and social interests. Noting the degree, for example, to which political struggles in the U.S. are conducted in the language and logic of the law, crits argued that social interests, and the weight they are accorded, do not exist in advance of or outside the law, but depend on legal institutions and ideology for both their content and form. Second, the crits provided a detailed inventory of the ideological practices by which the legal order actively seeks to persuade those who are subject to it that the law's uneven distribution of social power is nonetheless "just." Third, in their account of legal consciousness, critical legal theorists demonstrated the precise mechanisms by which legal institutions and ideology obscure and thus legitimize their productive, constitutive social role. The crits argued that the law does not passively adjudicate questions of social power; rather, the law is an active instance of the very power politics it purports to avoid and stand above. In brief, the crits revealed in often dizzying detail the cunning complexity of legal texts which traditional Marxists simply dismissed as "capitalist ideology."

One consequence of this particular intellectual genealogy is that in their engagement with orthodox and scientific forms of Marxist

ish themselves from these accounts on the grounds that constricted view of the range of social power, and by defining class in terms of the material production process and all other "superstructures" as merely reflections of internal class identification, vulgar Marxists, ignored the ways that these "superstructural" arenas were the very interests that law sought to reflect. Crits such as Kennedy, and Karl Klare developed non-instrumentalist models and its relationship to power in legal discourse as a crucial function of ideology and the racial power. First, Critical Legal Studies developed a genealogical account between law and social inequality, for example, to which in the U.S. are conducted in the logic of the law, crits argued that, and the weight they are cast in advance of or outside of legal institutions and their content and form. Second, a detailed inventory of practices by which the legal system tries to persuade those who are in the law's uneven distribution of power that it is nonetheless "just." Third, in legal consciousness, critical legal scholars demonstrated the precise means by which legal institutions and ideologies legitimize their productive role. The crits argued that the law does not passively adjudicate racial power; rather, the law is an active part of the very power politics it stands above. In brief, the crits often dizzying detail the ways of legal texts which traditionally dismissed as "capitalist" of this particular intellectual in their engagement with Marxist forms of

thought on the left, CLS scholars had already developed a critique of the kinds of instrumentalist analyses that were presented in the language of race. To critics of racialism, prevailing theorizations of race and law seemed to represent law as an instrumental reflection of racial interests in much the same way that vulgar Marxists saw the legal arena as reflecting class interests. Just as the white left had learned, by the eighties, that a one-dimensional class account was too simplistic for legal analysis, they interpreted racialist accounts as analogous to class reductionism.

To be sure, some of the foundational essays of CRT could be vulnerable to such a critique, particularly when read apart from the context and conditions of their production. Yet, when read as interventions against a liberal legal tradition that viewed law as an apolitical mediator of racial conflict, it becomes clear that by articulating a structural relationship between law and white supremacy, these essays dislodged an entrenched pattern of viewing racial outcomes as merely the random consequences of racial legal processes. These early essays thus constituted a critical first step in identifying the operation of racial power within discursive traditions that had been widely accepted as neutral and apolitical. By legitimizing the use of race as a theoretical fulcrum and focus in legal scholarship, so-called racialist accounts of racism and the law grounded the subsequent development of Critical Race Theory in much the same way that Marxism's introduction of class structure and struggle into classical political economy grounded subsequent critiques of social hierarchy and power.

At the same time, the critique of racialism did help clarify what was "critical" about our race project. As we noted earlier, their dissatisfaction with the narrow instrumentalist view of law had moved CLS scholars to elaborate a theory of the constitutive form of legal ideology. The crits challenged the understanding of social and political interests that instrumentalist portrayals of law had viewed as simply given. The crits' more dynamic and dialectical model revealed the constitutive force of law, the ways legal institutions constructed the very social

interests and relations that cruder instrumentalist accounts of law thought it merely regulated and ratified. For our purposes, the chief theoretical advantage of this anatomy of the constitutive dimensions of law was that it made it possible to argue that the legal system is not simply or mainly a biased referee of social and political conflict whose origins and effects occur elsewhere. On this account, the law is shown to be thoroughly involved in constructing the rules of the game, in selecting the eligible players, and in choosing the field on which the game must be played.

Drawing on these premises, we began to think of our project as uncovering how law was a constitutive element of race itself: in other words, how law *constructed* race. Racial power, in our view, was not simply—or even primarily—a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which law shapes and is shaped by "'race relations" across the social plane. Laws produced racial power not simply through narrowing the scope of, say, of anti-discrimination remedies, nor through racially-biased decision-making, but instead, through myriad legal rules, many of them having nothing to do with rules against discrimination, that continued to reproduce the structures and practices of racial domination. In short, we accepted the crit emphasis on how law produces and is the product of social power and we cross-cut this theme with an effort to understand this dynamic in the context of race and racism. With such an analysis in hand, critical race theory allows us to better understand how racial power can be produced even from within a liberal discourse that is relatively autonomous from organized vectors of racial power.

If the foregoing critique clarified at least one dimension of our project that grew from a shared theoretical investment with CLS, it also revealed subtle, but crucial theoretical divergences between CLS and CRT. Despite the sophistication of the crits' understanding of how law constituted social interests and legal identity, they were, for the most part, unable to transpose these insights into an analysis of racial power and law. Our point here is not that the

crits committed the typical Marxist error of subsuming race under class. Rather, 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. For some, their lack of critical thinking about race was a reflection of intellectual interest. With respect to other crits, however, our divergence produced a much sharper conflict. While we were straining to strengthen our understanding of racial power, it appeared to us that some crits were deploying racialist critiques from a position on race that was close if not identical to the liberalism we were otherwise joined in opposing. To be sure, these crits positioned themselves in a discourse far removed from liberalism—a certain postmodern critique of identity. Yet the upshot of their position seemed to be the same: an abiding skepticism, if not outright disdain, toward any theoretical or political project organized around the concept of race. Where classical liberalism argued that race was irrelevant to public policy, these crits argued that race simply didn't exist. The position is one that we have come to call "vulgar anti-essentialism." By this we seek to capture the claims made by some critical theorists that since racial categories are not "real" or "natural" but instead socially constructed, it is theoretical and politically absurd to center race as a category of analysis or as a basis for political action. This suggested to us that underlying at least some of the critiques from the left was not simply a question about the *way* we represented racial power, but instead, a more fundamental attack on the very possibility of our project. In short, this position constituted an attack on "color-consciousness" which differed from the conservative assault only in its rhetorical politics.

Many of us did, of course, accept the more complicated notions of power and identity implicated by both the anti-instrumentalist and anti-essentialist positions. Yet in our view, neither was inconsistent with the project of mapping the domain of law and racial power. It was obvious to many of us that although race was, to use the term, socially constructed (the idea of biological race is "false"), race was nonetheless

"real" in the sense that there is a material dimension and weight to the experience of being "raced" in American society, a materiality that in significant ways has been produced and sustained by law. Thus, we understood our project as an effort to construct a race-conscious and at the same time anti-essentialist account of the processes by which law participates in "race-ing" American society.

Perhaps prophetically, the conference was also occasioned by a prototype of an assault launched against critical race theory from a position firmly situated within the very paradigm we sought to criticize. The highlight of the 1987 conference was a plenary in which numerous scholars of color articulated how institutional practices and intellectual paradigms functioned to silence insurgent voices of people of color. Responding to the critique, another scholar of color shared with the audience his impression that the absence of much of minority scholarship was attributable to its poor quality, and to the lack of productivity of minority scholars. Scholars of color were urged to stop complaining and simply to write. Of course, the discussion that followed was animated. But more important than what was said was what was assumed—namely, that the arena of academic discourse was functionally open to any scholar of merit who sought to enter it. Yet the very point that the speakers were trying to reveal (perhaps too subtly, in retrospect) was that the notions of merit that were so glibly employed to determine access and status within the intellectual arena were themselves repositories of racial power. This exchange, and the subsequent incarnation of this conflict in the pages of the *Harvard Law Review*—provides one of the clearest points of demarcation between critical and liberal race discourses.

The 1986 and 1987 CLS conferences thus marked significant points of alignment and departure, and should be considered the final step in the preliminary development of CRT as a distinctively progressive critique of legal discourse on race. As a political and intellectual matter, the upshot of this engagement with CLS can best be characterized as "coalition." We see CLS and CRT as aligned—in radical

left opposition to mainstream legal discourse. But CRT is also different from CLS—our focus on race means that we have addressed quite different concerns, with distinct methodologies and traditions that we honor.

We have argued that the institutional and ideological antecedents of CRT can be usefully grounded in two historical sites: the Harvard boycott, and the CLS conferences of the mid-eighties. These roughly parallel the duality of CRT as both a progressive intervention in race discourse and a race intervention on the left. Yet, while we have identified these moments and will trace the trajectory of these themes into the writings that appear in this volume, it would be remiss for us to leave the impression that CRT subsequently developed as a disembodied, abstracted, and autonomous intellectual formation. In the first place, we believe that this image of scholarship is simply false—intellectual work is always situated, reflective to varying degrees of the cultural, historical, and institutional conditions of its production. Second and most importantly, this view of scholarship obscures the shared difficulties that insurgent scholars must negotiate and the importance of developing collective strategies to write about racial power from within the institutions central to its reproduction. A thorough mapping of Critical Race Theory, then, must include a discussion of the role of community-building among the intellectuals who are associated with it, particularly in light of the challenging conditions under which insurgent scholarship is produced.

During the mid-eighties, many of us met in smaller groups, before and after larger law school conferences and conventions, first at the fringes of and then as a caucus within Critical Legal Studies meetings, and so on. Shared experiences at the margins of liberal institutional policies and critical legal studies provided some basis for a collective identity. Yet the process of recognizing ourselves as a group with a distinct intellectual project was gradual. Our ad hoc meetings prior to and during various conferences provided an occasional opportunity to discuss our views; however, the key formative

event was the founding of the Critical Race Theory workshop. Principally organized by Kimberlé Crenshaw, Neil Gotanda, and Stephanie Phillips, the workshop drew together thirty five law scholars who responded to a call to synthesize a theory that, while grounded in critical theory, was responsive to the realities of racial politics in America. Indeed, the organizers coined the term “Critical Race Theory” to make it clear that our work locates itself in intersection of critical theory and race, racism and the law. To be sure, while we have emphasized throughout the liberal and critical poles against which Critical Race Theory developed, in experience, such dialectical relations produce less of a sharp break, and more of a creative and contestatory engagement with both traditions. This is true not only of the content of Critical Race Theory, but is true as well of the workshop’s participants. Indeed, both liberal race theorists and critical legal theorists have been deeply engaged in critical race discourse. For example, among the range of scholars who were attracted to the workshop and who contributed to the development of Critical Race Theory were scholars who had written squarely within the liberal paradigm. The workshop itself was underwritten by a grant provided by David Trubek, a founding member of the Critical Legal Studies Conference and a law professor at the University of Wisconsin, Madison. Finally, as this volume attests, we consider the work of members of CLS conference to represent a crucial contribution to the Critical Race Theory literature.

In the opening pages of this introduction, we argued that Critical Race Theory does not simply seek to understand the complex condominium of law, racial ideology, and political power. We believe that our work can provide a useful theoretical vocabulary for the practice of progressive racial politics in contemporary America. The need for an oppositional vision of racial justice becomes particularly acute in light of the Supreme Court’s radical movement toward a jurisprudence which not only accepts but affirms the current racial regime.

As this volume goes to press, the U.S. Su-

preme Court has issued a series of decisions which effectively repeal the ideological "settlement" struck during the civil rights era. In *Adarand Constructors v. Pena*, the Supreme Court extended its 1989 decision in *City of Richmond v. J.A. Croson* to categorically require strict judicial scrutiny whenever government, at any level, considers race in its decisionmaking process. In the last few years, the Supreme Court had all but foreclosed the adoption of race-conscious responses to racial inequity by state and local governments. In a cramped conception of the scope of national power under the Fourteenth Amendment, the *Adarand* Court has pressed further and formally forbidden even the federal government from taking race explicitly into account in addressing societal-wide discrimination. In *Missouri v. Jenkins*, the Supreme Court held that racially-concentrated public schools could no longer be deemed presumptively unconstitutional, even in the presence of a history of formal segregation. As to any continuing racial segregation in these schools, the *Jenkins* opinion concluded that the courts could not address the problem of racial concentration if it could plausibly be said that a public school district was making a "good faith" effort to achieve desegregation "to the extent practicable". The court has thus effectively mandated the withdrawal of the federal judiciary from continued involvement in the effort to achieve racial desegregation in the nation's public schools. Finally, in *Miller v. Johnson*, the Supreme Court retreated from its longstanding enforcement of the historic Voting Rights Act, erecting rigid new barriers to the federal government's effort to increase the participation and representation of racial minorities in the political process.

Reading these decisions, one cannot help but notice the degree to which they deploy traditional liberal racial principles. The current Court has effectively conscripted liberal theories of race and racism to wage a conservative attack on governmental efforts to address the persistence of societal-wide racial discrimination. This harsh reality confirms the need for a critical theory of racial power and an image of racial justice which reject classical liberal visions of

race as well as conservative visions of equal citizenship.

We believe that core concepts from Critical Race Theory can be productively used to expose the irreducibly political character of the current Court's general hostility toward policies which would take race into account in redressing historic and contemporary patterns of racial discrimination. We might, for example, draw on Critical Race Theory's deconstruction of color-blindness to show that the current Supreme Court's expressed hostility toward race-consciousness must be deemed a form of race-consciousness in and of itself. As Neil Gotanda has cogently argued, one cannot heed the newly installed constitutional rule that forbids race-conscious approaches to racial discrimination without always first taking race into account. Similarly, Critical Race Theory helps us understand how race-consciousness implicitly informs the current Court's paradoxical insistence that the norm of color-blindness requires a voting rights regime which effectively deprives racial minorities of political advantages that are accorded to other organized social interests.

Critical Race Theory indicates how and why the contemporary "jurisprudence of color-blindness" is not only the expression of a particular color-consciousness, but the product of a deeply politicized choice. The current Court would have us believe that these decisions are the product of an ineluctable legal logic. Critical Race Theory tells us rather that the Court's rulings with respect to race may more plausibly be deemed a result of a tactical political choice among competing doctrinal possibilities, any one of which could have been legally defensible. The appeal to color-blindness can thus be said to serve as part of an ideological strategy by which the current Court obscures its active role in sustaining hierarchies of racial power. We believe that Critical Race Theory offers a valuable conceptual compass for mapping the doctrinal mystifications which the current Court has developed to camouflage its conservative agenda.

The preceding discussion has focused on the possible uses to which Critical Race Theory might be put in understanding and intervening

conservative visions of equal

core concepts from Critical Race Theory have been productively used to expose the critical character of the current hostility toward policies which must take account in redressing historical patterns of racial discrimination. Night, for example, draw on theory's deconstruction of color-blindness to argue that the current Supreme Court's hostility toward race-consciousness is deemed a form of racism in and of itself. As Neil Gotanda notes, one cannot heed the newly established national rule that forbids race-consciousness to racial discrimination without taking race into account. Race Theory helps us understand that color-consciousness implicitly informs color-blindness.

Paradoxical insistence that color-blindness requires a voting system which effectively deprives racial minorities of political advantages that are actually in the interest of marginalized social interests. The theory indicates how and why the jurisprudence of color-blindness is the expression of a particular set of values, but the product of a deeply conservative political culture. The current Court would insist that these decisions are the predictable legal logic. Critical Race Theory argues rather that the Court's ambivalence toward race may more plausibly reflect a tactical political choice among doctrinal possibilities, any of which may have been legally defensible. Color-blindness can thus be said to be an ideological strategy by which the Court obscures its active role in the dynamics of racial power. We will see that Critical Race Theory offers a valuable pass for mapping the doctrinal choices which the current Court uses to camouflage its conservative

agenda. This discussion has focused on the ways in which Critical Race Theory can help us better understand and intervening

in the politics of racial jurisprudence. However, since discussions about race and rights in the U.S. have always overrun the narrow institutional confines of the law, we want to conclude this introduction to Critical Race Theory by suggesting some of the implications our work as legal scholars holds for broader national conversations about racial politics. In our history of the development of Critical Race Theory, we have highlighted the ways in which our work is a record of our engagement with what we saw as limitations of liberal, leftist and racialist accounts of racial power in law. The similar limitations of recent liberal defenses of affirmative action, left-liberal discourses on globalization, and racialist responses to post-civil rights retrenchment suggest that Critical Race Theory may provide new and much needed ways to think about (and challenge) the contemporary politics of racial domination.

We turn first to the vexed question of liberal discourse in the current national disputations regarding affirmative action. Earlier in this introduction we noted how the liberal defense of affirmative action has been stymied from its inception by a decidedly ambivalent attitude toward the matters of race and racial power. To be sure, liberals are generally willing to concede that racism continues to be an "obvious and boring fact" of American life (as the liberal pundit Michael Kinsley rather remarkably put it in a recent article). What liberal proponents of affirmative action seem unwilling to do is to move toward a direct critique of the hidden racial dimensions of the meritocratic mythology that their conservative opponents have so deftly used to control the terms of the current debate.

This ambivalence toward race-consciousness is best understood as a symptom of liberalism's continued investment in meritocratic ideology and its unacknowledged resistance to reaching any deep understanding of the myriad ways in which racism continues to limit the realization of goals such as equal opportunity. This liberal ambivalence is particularly manifested in today's debates, particularly about affirmative action. But it is also reflected in the lukewarm liberal defense of the Great Society programs of the 1960s and other policies which were adopted to

address contradictions between American ideals and historical realities. Like the Harvard Law School administration's response to the demand for a course focused on race and the law, the liberal position reflects an abiding uncertainty about the value of such projects, and a lingering, wistful sense that if we could just agree to abandon race-consciousness, racism and racial power would somehow recede from the American political imagination.

Critical Race Theory is instructive here in that it uncovers the ongoing dynamics of racialized power, and its embeddedness in practices and values which have been shorn of any explicit, formal manifestations of racism. Critical Race Theory thus provides a basis for understanding affirmative action as something other than "racial preference" (a notion whose implicit premise is that affirmative action represents a deviation from an otherwise non-racial neutrality). Critical Race Theory understands that, claims to the contrary notwithstanding, distributions of power and resources which were racially determined before the advent of affirmative action would continue to be so if affirmative action is abandoned. Our critiques of racial power reveal how certain conceptions of merit function not as a neutral basis for distributing resources and opportunity, but rather as a repository of hidden, race-specific preferences for those who have the power to determine the meaning and consequences of "merit." We have shown that the putatively neutral baseline from which affirmative action is said to represent a deviation is in fact a mechanism for perpetuating the distribution of rights, privileges, and opportunity established under a regime of uncontested white supremacy. Critical Race Theory recognizes accordingly that a return to that so-called neutral baseline would mean a return to an unjust system of racial power. Finally, Critical Race Theory fully comprehends that the aim of affirmative action is to create enough exceptions to white privilege to make the mythology of equal opportunity seem at least plausible. In fact, a defense of affirmative action premised upon CRT rather than liberal ambivalence would neither apologize for affirmative action nor assume it to be a fully adequate

political response to the persistence of white supremacy. Rather, Critical Race Theory supports affirmative action as a limited approach which has achieved a meaningful, if modest measure of racial justice.

A second discussion to which we believe Critical Race Theory might bring a useful perspective is liberal and left debate in the U.S. over the proliferation of economic, political, social relations across national borders which has come to be known as globalization. Like Critical Legal Studies in the mid-1980s, the left-liberal approach to globalization has yet to generate an adequate account of the connections between racial power and political economy in the New World Order. Instead, generalized references to the "North" and "South" figure as a metaphorical substitute for serious and sustained attention to the racial and ethnic character of the massive distributive transformations that globalization has set in motion. Abstract allusions to "rich" and "poor" nations simply fail to yield an adequate vocabulary for analyzing the precise processes that produce globalized racial stratification. As the Nigerian scholar Claude Ake has argued, globalization enacts a "hierarchization of the world" and the "crystallizing of a domination". While that domination may be essentially *constituted* by economic power, it is essentially *legitimized* by racial power or, to use Ake's term, by ideologies of "political ethnicity." Critical Race Theory would thus focus on the degree to which the effects of globalization in the (so-called) Third World demand analysis as an instance of what Arjun Makhijani calls "economic apartheid."

This general indifference to questions of racial ideology and power also informs liberal and left efforts to explain the political significance of global economic processes within the U.S. For the most part, liberal and left analysis of this question has focused on the impact of globalization on U.S. class structure and politics. To the extent these debates *do* consider the role of race in the age of globalization, they do so only in the context of conversations about the "cultural pathologies" of the "underclass" (in liberal circles), or (on the left) in terms of a "class" of subordinated racial groups whose

vulnerable economic position is the product of past, but not current, dynamics of racial power. The particularities of race and its persistent presence as an explicit rationalization of structural stratification in the current economy seem hardly to warrant discussion. One would think that the racial composition of the communities which have been chosen to bear the sharp edge of economic dislocation is altogether irrelevant. However, even a cursory review of current national discourses about public education, unemployment, education, immigration and welfare reform (to take a few examples) demonstrates the degree to which questions of race and racial ideology stand at the very center of today's debates. These developments defy explanation in terms of liberal accounts of poverty and social equality, on the one hand, or leftist formulations about the historical class relations between labor and capital, on the other.

A CRT-grounded response to these developments would intersect contemporary critical discourses concerning the domestic social transformations wrought by globalization and critical theories of race and power to better understand the "racial economy" of this transition. This CRT-informed investigation of the "South in the North" would examine the way a certain brand of racial politics has been mobilized to buffer the massive upward distribution of resources and opportunity within the United States, or explore the way racial ideologies have been used to justify relatively open border policies toward our Northern neighbors, even as we close off our borders to those from the South. Just as Critical Race Theory introduced racial ideology as a necessary component of hegemony in the wake of the Critical Legal Studies emphasis on legal consciousness, so too must contemporary social theory fully incorporate notions of racial power as a way of understanding (and contesting) changing economic relations.

A third and final aspect of contemporary politics on which Critical Race Theory might be brought to bear is the struggle within communities of color over the future direction of anti-racist politics. The difficulties critical race scholars faced in attempting to push the analysis of law and racial politics beyond the narrow

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A response to these developments contemporary critical discourse the domestic social transformation by globalization and critical power to better understand "other" of this transition. This investigation of the "South in examine the way a certain politics has been mobilized to upward distribution of opportunity within the United States. The way racial ideologies have relatively open border policies with southern neighbors, even as we look to those from the South. Critical Legal Studies emphasizes, so too must critical theory fully incorporate notions as a way of understanding changing economic relations. An aspect of contemporary critical Race Theory might be the struggle within to cover the future direction of The difficulties critical race theorists are prompting to push the analysis politics beyond the narrow

boundaries of racism may all be seen at work in contemporary political debates among people of color. The emergence of powerful voices of racism is particularly evident within the African American community, in which contemporary racial crisis is frequently represented as a reflection of unmediated white power. Although the message of racialist politics speaks to a broad range of disaffected African-Americans, it is also the source of debilitating contradictions within black political life. Indeed, as a mode of political analysis and action, racism has ironically facilitated ideological attacks on black America that are now simplistically represented as coming from "out there"—that is, from outside the African-American community.

To take one example, racialists rightly identify the right-wing decisions of the current Supreme Court as part of the panoply of assaults directed against black Americans. What they all too often fail to note is that this same racialist politics helped secure the radical right's crucial fifth vote on the Supreme Court, in the person of Clarence Thomas. At the time of his nomination, Thomas had left little doubt about his political commitments. Despite a clearly manifested ideological agenda from which one could fully predict his role in consolidating the conservative wing of the Supreme Court, Thomas was nonetheless able to garner crucial support across the spectrum of African-American political formations. Narrow notions of racial solidarity led African-Americans to rally behind a figure who, though black, had been and would continue to be an eager participant in the evisceration of the post-civil rights coalition.

Another dimension of the racism that led black Americans to support the Thomas nomination was deeply gendered in its determination. The erroneous view that racial interests would be advanced by the appointment of *any African-American to the Supreme Court* was compounded by a misguided racialist belief that questions of gender power were irrelevant (if not antagonistic) to the interests of the "larger" black American community. During our earlier discussion of racism, we argued that one of the chief problems with the racialist account of

social power and struggle lies in the tendency to "essentialize" the racial communities with which it represents the social world. In black racialist circles, the felt necessity to articulate a stable vision of group identity and interest has underwritten a "representational politics" in which the experience of one segment of black America is taken to be representative of black experience *tout court*. As a result, black racialism yields a flat, fixed image of racial identity, experience and interest, which fails to capture the complex, constantly changing realities of racial domination in the contemporary U.S.

The concrete implications of this crude essentialism became painfully apparent in the subordinating gender politics to which black racialist support for the Thomas nomination gave rise. As Kimberlé Crenshaw has argued, the black racialist account proffers a vision of racism which portrays racial power primarily through its impact on African-American males. Because it is unwilling or unable to apprehend the ways in which racial identities are lived within and through gendered identities, racial essentialism renders the particular experiences of black females invisible. Black racialist politics thus effectively denies the struggle against racialized gender oppression a place on its anti-racist agenda. A final recent example will suffice to show how black America continues to be held hostage to racism's essentialist politics. Although much of the rhetoric supporting a proposed "Million Man March" is grounded in the need for a black American response to Supreme Court decisions, the March's proponents not only fail to problematize the racialist politics that installed Clarence Thomas, but effectively reproduce those politics by promoting gender exclusivity, with its concomitant subordination of the irreducibly gendered dimensions of black women's racial oppression.

Because there is no currently viable alternative to an ambivalent liberal vision of race, on the one hand, and an inadequate vision of racism, on the other, many progressive voices in the black community tend to gravitate toward the racialist view. For all its faults, racialism at least acknowledges the persistence of racism (albeit in an essentialist and exclusionary way).

Without a counter vision of race that does not fall into the nebulous world of liberal ambivalence and apology, the dangers of racialist politics for communities of color will continue to go unheeded, even in light of the deep contradictions that such politics produces.

Historians of American racial politics may rightly remember the final years of the twentieth century as the “Age of Repudiation.” All the evidence suggests that the 1990s mark the rejection of the always fragile civil rights consensus and the renunciation by federal, state and city authorities (indeed, of the American people themselves) that government not only can but must play an active role in identifying and eradicating racial injustice. The ideological offensive against civil rights reform (not to mention deeper social change) has consolidated what we have called a new common sense regarding race and racism in the United States. Although the new racial common sense defies both reason and contemporary reality, this fact has not deterred makers of public policy and public opinion in the post-reform era from using it to justify their indifference or outright hostility toward those who continue to struggle for racial justice and multicultural democracy in the United States. In the 1980s, the architects of the new racial common sense provided an ideological foundation for dismantling many of the key reforms and programs adopted during the civil rights period. In the 1990s, the apologists for racial reaction have deepened and extended their attack to include the very principle of racial antidiscrimination. Emboldened by the successes of the 1980s, right-wing legal academics such as Richard A. Epstein now openly

decry laws forbidding racial discrimination on the grounds that they are economically inefficient and morally indefensible. And in a deliberate distortion of the 1954 *Brown* decision, Supreme Court Justice Clarence Thomas has cynically described the *Brown* court’s historically-based claim that racial segregation was “inherently” unequal as itself an example of white racism. The power of new racial common sense may be seen, too, in the felt necessity of Democratic President Bill Clinton to qualify his already compromised defense of affirmative action with a neo-liberal nod toward the “angry white males” who, against all the evidence, have positioned themselves as the chief “victims” of contemporary racial politics.

The task of *Critical Race Theory* is to remind its readers how deeply issues of racial ideology and power continue to matter in American life. Questioning regnant visions of racial meaning and racial power, critical race theorists seek to fashion a set of tools for thinking about race that avoids the traps of racial thinking. Critical Race Theory understands that racial power is produced by and experienced within numerous vectors of social life. Critical Race Theory recognizes, too, that political interventions which overlook the multiple ways in which people of color are situated (and resituated) as communities, subcommunities, and individuals will do little to promote effective resistance to, and counter-mobilization against, today’s newly empowered right. It is our hope that the writings collected here will prove to be a useful critical compass for negotiating the treacherous terrain of American racial politics in the coming century.

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## *Part One*

### INTELLECTUAL PRECURSORS: EARLY CRITICISM OF CONVENTIONAL CIVIL RIGHTS DISCOURSE

il," King responded to an open letter by "liberal" white clergymen which chastised the widely publicized "direct campaign" rather than relying exclusively on legal courts. [...]

from Birmingham City Jail" (1963), reprinted in *Hope, supra* note 1, at 295.

ological assumption that inspired the movement was that "salvation had a social and spiritual dimension, and that social institutions had to be changed. The Church had to concern itself, not only with spirituality, but also with social justice and so-

Barth, *The Epistle to the Romans*, 167, (1933). Barth argues that the reality of "the law" of the temporal world, and that "the world of death" are necessarily "men defined." He argues that "[s]in is that by which man is defined, for we know nothing of sinless sovereign power. By it men are confirmed in their sins." For a summary of how Barth fits into larger religious thought, see F. Baumer, *Modern Continuity and Change in Ideas 1600-1800*

(James Version).

gyman admonished King for his "undemocratic" demonstrations by pointing out that "now that the colored people will receive their due, but it is possible that you are in too much hurry. It has taken Christianity almost two thousand years to accomplish what it has. The teachings have come to earth."

from Birmingham City Jail" (1963), reprinted in *Hope, supra* note 1, at 292 (emphasis added).

Zepp, *Search for the Beloved Community*; Martin Luther King, Jr. (1986) at 127. King, "Nobel Prize Acceptance Speech," *Natl. Bull.*, May 1968, at 21. [...]

"Time for Freedom Has Come" (1961), reprinted in *Hope, supra* note 1 at 160, 165.

"Ethical Demands for Integration" (*Testament of Hope, supra* note 1, at 117), "The American Dream" (1961), reprinted in *Hope, supra* note 1, at 208, 213 ("It's hard to make a man love me, but it can't make me love him, and I think that's pretty important to me, and I think that's pretty important to me").

## RACE, REFORM, AND RETRENCHMENT: TRANSFORMATION AND LEGITIMATION IN ANTIDISCRIMINATION LAW

Kimberlé Williams Crenshaw

### I. INTRODUCTION

**I**N 1984, President Ronald Reagan signed a bill that created the Martin Luther King, Jr. Federal Holiday Commission.<sup>1</sup> The commission was charged with the responsibility of issuing guidelines for states and localities to follow in preparing their observances of King's birthday. The commission's task would not be easy. Although King's birthday had come to symbolize the massive social movement that grew out of African-Americans' efforts to end the long history of racial oppression in America,<sup>2</sup> the first official observance of the holiday would take place in the face of at least two disturbing obstacles: first, a constant, if not increasing, socioeconomic disparity between the races,<sup>3</sup> and second, a hostile administration devoted to changing the path of civil rights reforms which many believe responsible for most of the movement's progress.<sup>4</sup>

The commission, though, was presented with a more essential difficulty: a focus on the continuing disparities between blacks and whites might call not for celebration but for strident criticism of America's failure to make good on its promise of racial equality. Yet such criticism would overlook the progress that has been made, progress that the holiday itself represents. The commission apparently resolved this dilemma by calling for a celebration of progress toward racial equality while urging continued commitment to this ideal. This effort to reconcile the celebration of an ideal with conditions that bespeak its continuing denial was given the ironic, but altogether appropriate title "Living the Dream."<sup>5</sup> The "Living the Dream" directive aptly illustrates Derrick Bell's observation that "[m]ost Americans, black and white, view the civil rights crusade as a long, slow, but always upward pull that must, given the basic precepts of the country and the commitment of its people to equality and liberty, eventually end in the full enjoyment by blacks of all rights

and privileges of citizenship enjoyed by whites."<sup>6</sup>

Commentators on both the right and the left, however, have begun to cast doubt upon the continuing vitality of this shopworn theme. The position of the New Right, articulated by members of the Reagan administration and by neo-conservative scholars such as Thomas Sowell, is that the goal of the civil rights movement—the extension of formal equality to all Americans regardless of color—has already been achieved, hence the vision of a continuing struggle under the banner of civil rights is inappropriate. The position of the new left, presented in the work of scholars associated with the conference on Critical Legal Studies, also challenges the perception that the civil rights struggle represents a long, steady march toward social transformation. CLS scholars do not significantly disagree with the goal of racial equality, but assert only the basic counterproductivity of seeking that objective through the use of legal rights. Indeed, CLS scholars claim that even engaging in rights discourse is incompatible with a broader strategy of social change. They view the extension of rights, although perhaps energizing political struggle or producing apparent victories in the short run, as ultimately legitimating the very racial inequality and oppression that such extension purports to remedy. This article challenges both the New Left and New Right critiques of the civil rights movement....

### II. THE NEW RIGHT ATTACKS: CIVIL RIGHTS AS "POLITICS"

#### A. The Neoconservative Offensive

The Reagan administration arrived in Washington in 1981 with an agenda that was profoundly hostile to the civil rights policies of the previous two decades. The principal basis of its hostility was a formalistic, color-blind view of civil rights that had developed in the neoconservative "think tanks" during the seventies. Neoconservative doctrine singles out race-specific civil rights policies as one of the most significant threats to the democratic political system. Emphasizing the need for strictly color-blind policies, this view calls for the repeal of affirmative action and other race-specific remedial

policies, urges an end to class-based remedies, and calls for the administration to limit remedies to what it calls "actual victims" of discrimination.

A number of early episodes sent a clear message that the Reagan administration would be inhospitable to the civil rights policies adopted by earlier administrations. For example, the Civil Rights Division of the Justice Department, under Deputy Attorney General William Bradford Reynolds, abruptly changed sides in several cases.<sup>7</sup> Other serious attacks on the civil rights constituency included Reagan's attempt to fire members of the U.S. Commission on Civil Rights, the administration's opposition to the 1982 amendment of the Voting Rights Act, and Reagan's veto of the Civil Rights Restoration Act.

These fervent attempts to change the direction of civil rights law generated speculation that the Reagan administration was antiblack and ideologically opposed to civil rights. Yet the administration denied that any racial animus motivated its campaign. Far from viewing themselves as opponents of civil rights, Reagan, Reynolds, and others in the administration apparently saw themselves as "true" civil rights advocates seeking to restore the original meaning of civil rights.

Neoconservative scholar Thomas Sowell perhaps best articulates the philosophy underlying the New Right policies on race and law. Sowell presents the neoconservative struggle against prevailing civil rights policies as nothing less than an attempt to restore law to its rightful place and to prevent the descent of American society into fascism.<sup>8</sup> Sowell suggests that the growing popularity of white hate groups is evidence of the instability wrought by improvident civil rights policies. To Sowell, the growth of antiblack sentiment is an understandable reaction to a vision that has threatened to undermine democratic institutions, delegitimize the court system, and demoralize the American people.

The culprit in this epic struggle is a political view that Sowell has dubbed "the civil rights vision"; according to him, this view developed as the leaders of the civil rights movement

shifted the movement's original focus on equal treatment under the law to a demand for equal results notwithstanding genuine differences in ability, thereby delegitimizing the movement's claim in a democratic society. The civil rights vision has nothing to do with the achievement of civil rights today, according to Sowell, because in reality "the battle for civil rights was fought and won—at great cost—many years ago."<sup>9</sup> Sowell's central criticism is that the visionaries have attempted to infuse the law with their own political interpretation, which Sowell characterizes as separate from and alien to the true meaning of civil rights. He argues that although these visionaries have struggled and sacrificed in the name of civil rights, they nonetheless merit censure for undermining the stability of American society through their politicization of the law.

Sowell singles out the judiciary for especially harsh criticism. Judges, according to Sowell, have ignored the original understanding of Title VII of the Civil Rights Act of 1964 and imposed their own political views instead: "The perversions of the law by federal judges . . . have been especially brazen."<sup>10</sup> Judges, he asserts, have participated in a process by which "law, plain honesty and democracy itself [have been] sacrificed on the altar of missionary self-righteousness."<sup>11</sup> Sowell cautions that when judges allow law to be overridden by politics, the threat of fascism looms ever large: if judges reduce the law to a question of who has the power and whose ox is gored, they can hardly disclaim responsibility or be morally superior when others respond in kind.<sup>12</sup> . . .

#### B. A Critique of the Critique: The Indeterminacy of Civil Rights Discourse

Given the seriousness of his accusations, particularly those against the judiciary, one would expect Sowell's proof of subversion to be substantial. His repeated accusations that the true law has been subverted raise expectations that he will eventually identify some determinate, clearly discernible version of that law. Sowell's true law would presumably stand apart from the politics of race, yet control it, without being influenced by inappropriate political factors. So-

ement's original focus on equal the law to a demand for equal standing genuine differences in delegitimizing the movement's democratic society. The civil rights thing to do with the achievement today, according to Sowell, because "the battle for civil rights was at great cost—many years central criticism is that the vi- tempted to infuse the law with al interpretation, which Sowell separate from and alien to the of civil rights. He argues that visionaries have struggled and name of civil rights, they none- ensure for undermining the sta- in society through their politici-

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*The Critique: The Indeterminacy of Civil Rights Discourse*

In the first place, the truthfulness of his accusations, particularly against the judiciary, one would expect proof of subversion to be substantiated. Subverted accusations that the true subverters have created raise expectations that they identify some determinate, true version of that law. Sowell's accusations presumably stand apart from the true subverters, yet control it, without being appropriate political factors. So-

well's only "proof" that the law has been subverted, however, rests on his assumption that such subversion is self-evident. In the context of voting, for example, Sowell declares simply: "the right to vote is a civil right. The right to win is not. Equal treatment does not mean equal results."<sup>13</sup>

Sowell fails to substantiate his accusations because he cannot tell us what the real law is or whether it ever existed as he claims. He simply embraces language from antidiscrimination texts, imports his own meaning of its purpose, and ignores contradictory purposes and interpretations. Here Sowell, apparently without realizing it, merely embraces one aspect of a tension that runs throughout antidiscrimination law—the tension between equality as a process and equality as a result.

This basic conflict has given rise to two distinct rhetorical visions in the body of antidiscrimination law: I term these the expansive view and the restrictive view. The expansive view stresses equality as a result, and it looks to real consequences for African-Americans. It interprets the objective of antidiscrimination law as the eradication of the substantive conditions of black subordination, and it attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression.

The restrictive vision, which exists side by side with this expansive view, treats equality as a process, downplaying the significance of actual outcomes. The primary objective of antidiscrimination law, according to this vision, is to prevent future wrongdoing rather than to redress present manifestations of past injustice. "Wrongdoing," moreover, is seen primarily as isolated actions against individuals rather than as a social policy against an entire group. Nor does the restrictive view contemplate the courts' playing a role in redressing harms from America's racist past, as opposed to merely policing society in order to eliminate a narrow set of proscribed discriminatory practices. Moreover, even when injustice is found, efforts to redress it must be balanced against and limited by competing interests of white workers—even when those interests were actually created by

the subordination of blacks. The innocence of whites weighs more heavily than do either the past wrongs committed upon blacks or the benefits that whites derived from those wrongs. In sum, the restrictive view seeks to proscribe only certain kinds of subordinating acts, and then only when other interests are not overly burdened.

Although the tension between the expansive and restrictive vision is present throughout antidiscrimination law, Sowell dismisses the full complexity of the problem by simply declaring that equal process is completely unrelated to equal results. Yet it is not nearly as clear as Sowell suggests that the right to vote, for instance, has nothing to do with winning; no measure of a process's effectiveness can be wholly separated from the purpose for which it was initiated. Sowell implicitly acknowledges that voting is related to some notion of actual representation; having done so, he cannot completely sever that process from its admitted purpose. Depending on how one views society, democracy, and the historic significance of racial disenfranchisement, the "appropriate" relationship between voting and representation can be defined to require anything from representation at large to full proportional representation. Sowell's attempt to sever voting from winning merely raises the question of process and results; it does not answer it.

As the expansive and restrictive views of antidiscrimination law reveal, there simply is no self-evident interpretation of civil rights inherent in the terms themselves. Instead, specific interpretations proceed largely from the worldview of the interpreter. For example, to believe, as Sowell does, that color-blind policies represent the only legitimate and effective means of ensuring a racially equitable society, one would have to assume not only that there is only one "proper role" for law but also that such a racially equitable society already exists. In this world, once law had performed its "proper" function of assuring equality of process, then differences in outcomes between groups would not reflect past discrimination but rather real differences between groups competing for social rewards. Unimpeded by irrational prejudices

against identifiable groups and unfettered by government-imposed preferences, competition would ensure that any group stratification would reflect only the cumulative effects of employers' rational decisions to hire the best workers for the least cost; the deprivations and oppression of the past would somehow be expunged from the present. Only in such a society, where all other social functions operate in a nondiscriminatory way, would equality of process constitute equality of opportunity.

This belief in color-blindness and equal process, however, would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present. If employers were thought to have been influenced by factors other than the actual performance of each job applicant, it would be absurd to rely on their decisions as evidence of true market valuations. Arguments that differences in economic status cannot be redressed, or that they are legitimate because they reflect cultural rather than racial inferiority, would have to be rejected; cultural disadvantages themselves would be seen as the consequence of historical discrimination. One could not look at outcomes as a fair measure of merit, since one would recognize that not everyone had been given an "equal" start. It would be apparent that institutions had embraced discriminatory policies in order to produce disparate results, so it would be necessary to rely on results to indicate whether these discriminatory policies have been successfully dismantled.

These two visions of society correspond closely to those held by Sowell and the civil rights visionaries. In each vision, all arguments about what the law is in fact are premised upon what the law should be, given a particular world-view. The conflict is not, as Sowell has suggested, between the true meaning of the law and a bastardized version, but rather between two different interpretations of society. Thus, though they attempt to lay claim to an apolitical perch from which to accuse civil rights visionaries of subverting the law to politics, the neo-conservatives as well rely on their own political interpretations to give meaning to their respective concepts of rights and oppression. Law

itself does not dictate which of various visions will be adopted as an interpretive base. The choice between various visions and the values that lie within them is not guided by any determinate organizing principle. Consequently, Sowell has no basis from which to argue that color-conscious, result-oriented remedies are political perversions of the law, but that his preference, color-blind, process-oriented remedies are not.

### C. The Constituency's Dilemma

The passage of civil rights legislation nurtured the impression that the United States had moved decisively to end the oppression of blacks. The fanfare surrounding the passage of these acts, however, created an expectation that the legislation would not and could not fulfill. The law accommodated and obscured contradictions that led to conflict, countervision, and the current vacuousness of antidiscrimination law.

Because antidiscrimination law contains both the expansive and the restrictive view, equality of opportunity can refer to either. This uncertainty means that the societal adoption of racial equality rhetoric does not itself entail a commitment to end racial inequality. Indeed, to the extent that antidiscrimination law is believed to embrace color-blindness, equal opportunity rhetoric constitutes a formidable obstacle to efforts to alleviate conditions of white supremacy. As Alfred Blumrosen observes, "it [is] clear that a 'color-blind' society built upon the subordination of persons of one color [is] a society which [cannot] correct that subordination because it [can] never recognize it."<sup>14</sup> In sum, the very terms used to proclaim victory contain within them the seeds of defeat. To demand "equality of opportunity" is to demand nothing specific because "equality of opportunity" has assimilated both the demand and the object against which the demand is made—it is to participate in an abstracted discourse that carries the moral force of the movement as well as the stability of the institutions and interests that the movement opposed.

Society's adoption of the ambivalent rhetoric of equal opportunity law has made it that much more difficult for black people to name their

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reality. There is no longer a perpetrator, a clearly identifiable discriminator. Company Z can be an equal opportunity employer even though Company Z has no blacks or any other minorities in its employ. Practically speaking, all companies can now be equal opportunity employers by proclamation alone. Society has embraced the rhetoric of equal opportunity without fulfilling its promise; creating a break with the past has formed the basis for the neoconservative claim that present inequities cannot be the result of discriminatory practices because this society no longer discriminates against blacks.

Equal opportunity law may have also under-  
mined the fragile consensus against white su-  
premacy. To the extent that the objective of  
racial equality was seen as lifting formal barriers  
imposed against participation by blacks, the  
reforms appear to have succeeded. Today, the  
claim that equal opportunity does not yet exist  
for black America may fall upon deaf ears—ears  
deafened by repeated declarations that equal  
opportunity exists. Even Alfred Blumrosen—  
himself a civil rights visionary—demonstrates  
how the rhetoric of formal racial equality, by  
bringing about the collapse of overt obstacles,  
convinced people that things have changed sig-  
nificantly:

The public sympathy for the plight of black  
Americans circa 1965 cannot be recreated, because  
the condition of black American[s] in 1985 is so  
much improved, as a result of the 1964 legislation.  
The success of the Civil Rights Act contained the  
seeds of its loss of public support. Racism alone  
simply will no longer do as an explanation for the  
current condition of depressed minorities. The  
rhetoric of the sixties sounds hollow to Americans  
of the eighties because it is hollow.<sup>15</sup>

Blumrosen and others may be correct in  
pointing out that many things have changed  
under the political, legal, and moral force of the  
civil rights movement. Formal barriers have  
constituted a major aspect of the historic subor-  
dination of African-Americans.... The elimi-  
nation of those barriers was meaningful. Indeed,  
equal opportunity rhetoric gains its power from  
the fact that people can point to real changes  
that accompanied its advent.... However,  
what at first appears an unambiguous commit-

ment to antidiscrimination conceals within it  
many conflicting and contradictory interests. In  
antidiscrimination law, the conflicting interests  
actually reinforce existing social arrangements,  
moderated to the extent necessary to balance  
the civil rights challenge with the many interests  
still privileged over it.

The recognition on the part of civil rights  
advocates that deeper institutional changes are  
required has come just as the formal changes  
have begun to convince people that enough has  
been done. Indeed, recent cases illustrate that  
the judiciary's commitment to racial equality  
has waned considerably. These doctrinal and  
procedural developments, taken along with the  
overall political climate, indicate that the policy  
of redressing discrimination no longer has the  
high priority it once had. . . .

The flagging commitment of the courts and  
of many whites to fighting discrimination may  
not be the only deleterious effect of the civil  
rights reforms. The lasting harm must be mea-  
sured by the extent to which limited gains  
hamper efforts of African-Americans to name  
their reality and to remain capable of engaging  
in collective action in the future. The danger of  
adopting equal opportunity rhetoric on its face  
is that the constituency incorporates legal and  
philosophical concepts that have an uneven his-  
tory and an unpredictable trajectory. If the civil  
rights constituency allows its own political con-  
sciousness to be completely replaced by the  
ambiguous discourse of antidiscrimination law,  
it will be difficult for this constituency to defend  
its genuine interests against those whose inter-  
ests are supported by opposing visions that also  
employ the same discourse. The struggle, it  
seems, is to maintain a contextualized, specified  
worldview that reflects the experience of blacks.  
The question remains whether engaging in legal  
reform precludes this possibility.

### III. THE NEW LEFT ATTACK: THE HEGEMONIC FUNCTION OF LEGAL RIGHTS DISCOURSE

**V**ARIOUS scholars connected with the  
CLS movement have offered critical analy-  
ses of law and legal reform which provide a  
broad framework for explaining how legal re-

forms help to mask and legitimate continuing racial inequality. The critics present law as a series of ideological constructs that operate to support existing social arrangements by convincing people that things are both inevitable and basically fair. Legal reform, therefore, cannot serve as a means for fundamentally restructuring society. This theory, however, is a general one, and its utility is limited in the context of civil rights by its insufficient attention to racial domination. Removed from the reality of oppression and its overwhelming constraints, the critics cannot fairly understand the choices that the civil rights movement confronted or, still less, recommend solutions to its current problems.

#### *A. The Critical Vision*

In broadest terms, CLS scholars have attempted to analyze legal ideology and discourse as . . . social artifacts that operate to recreate and legitimate American society. In order to discover the contingent character of the law, CLS scholars unpack legal doctrine to reveal both its internal inconsistencies (generally by exposing the incoherence of legal arguments) and its external inconsistencies (often by laying bare the inherently paradoxical and political worldviews embedded within legal doctrine). Having thus exposed the inadequacies of legal doctrine, CLS scholars go on to examine the political character of the choices that were made in the doctrine's name. This inquiry exposes the ways in which legal ideology has helped to create, support, and legitimate America's present class structure.

#### I. THE ROLE OF LEGAL IDEOLOGY

Critical scholars derive their vision of legal ideology in part from the work of Antonio Gramsci, an Italian neo-Marxist theorist who developed an approach to understanding domination which transcends some of the limitations of traditional Marxist accounts. In examining domination as a combination of physical coercion and ideological control, Gramsci articulated the concept of hegemony, the means by which a system of attitudes and beliefs, permeating both popular consciousness and the ideology of elites, reinforces existing social arrange-

ments and convinces the dominated classes that the existing order is inevitable. After observing the ability of the Italian system to withstand aggressive challenges in the years preceding the ascent of fascism, Gramsci concluded that "when the State trembled a sturdy structure of civil society was at once revealed. The State was only an outer ditch, behind which there stood a powerful system of fortresses and earthworks. . . ."<sup>16</sup>

Some CLS scholars place great emphasis on understanding the "fortifying earthworks" of American society. The concept of hegemony allows these scholars to explain the continued legitimacy of American society by revealing how legal consciousness induces people to accept or consent to their own oppression. Legal historian Robert Gordon, for example, declares that one should look

not only at the undeniably numerous, specific ways in which the legal system functions to screw poor people . . . but rather at all the ways in which the system seems at first glance basically uncontroversial, neutral, acceptable. This is Antonio Gramsci's notion of "hegemony," i.e., that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.<sup>17</sup>

According to Gordon, Gramsci directs our attention to the many thoughts and beliefs that people have adopted which limit their ability "even to imagine that life could be different and better."<sup>18</sup>

Although society's structures of thought have been constructed by elites out of a universe of possibilities, people reify these structures and clothe them with the illusion of necessity. Law is an essential feature in the illusion of necessity because it embodies and reinforces ideological assumptions about human relations which people accept as natural or even immutable. People act out their lives, mediate conflicts, and even perceive themselves with reference to the law. By accepting the bounds of law and ordering their lives according to its categories and relations, people think that they are confirming

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The structures of thought have been created by elites out of a universe of possibilities. People reify these structures and live in the illusion of necessity. Law is used in the illusion of necessity to reinforce ideological structures and human relations which people consider natural or even immutable. People's thoughts mediate conflicts, and even conflicts with reference to the law. Law is the bounds of law and ordering according to its categories and relationships. People think that they are confirming

reality—the way things must be. Yet by accepting the worldview implicit in the law, people are also bound by its conceptual limitations. Thus, conflict and antagonism are contained: the legitimacy of the entire order is never seriously questioned.

Relating this idea to the limitations of anti-discrimination law, Alan Freeman argues that the legal reforms that grew out of the civil rights movement were severely limited by the ideological constraints embedded within the law and dictated by "needs basic to the preservation of the class structure."<sup>18</sup> These ideological pillars supporting the class structure were at once repositories of racial domination and obstacles to the fundamental reordering of society. For example, Freeman argues, formal equality, combined with the fact that American law does not formally recognize any difference based on wealth, precluded most remedies that would have required the redistribution of wealth. Yet economic exploitation and poverty have been central features of racial domination, and poverty is its long-term result. A legal strategy that does not include redistribution of wealth cannot remedy one of the most significant aspects of racial domination. Similarly, the myths of "vested rights" and "equality of opportunity" were necessary to protect the legitimacy of the dominant order, thus they constituted insuperable barriers to the quest for significant redistributive reform. Freeman's central argument is that the severe limitations of legal reform were dictated by the legitimating role of legal discourse. If law functions to reinforce a worldview holding that things should be the way they are, then law cannot provide an effective means to challenge the present order.

Some critics see the destructive role of rights rhetoric as another symptom of the law's legitimating function. Mark Tushnet has offered a four-tiered critique of rights:

- (1) Once one identifies what counts as a right in a specific setting, it invariably turns out that the right is unstable; significant but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated.
- (2) The claim that a right is implicated in some settings produces no determinate conse-

quences.

(3) The concept of rights falsely converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake.

(4) The use of rights in contemporary discourse impedes advances by progressive social forces. . . .<sup>20</sup>

Tushnet's first and second arguments crystallize the doctrinal dilemmas faced by the civil rights community. Antidiscrimination doctrine does not itself provide determinate results. To give rights meaning, people must specify the world; they must create a picture of "what is" that grounds their normative interpretation.

Tushnet's third and fourth arguments spell out pragmatic reasons to approach rights with caution. According to Tushnet, the language of rights undermines efforts to change things by absorbing real demands, experiences, and concerns into a vacuous and indeterminate discourse. The discourse abstracts real experiences and clouds the ability of those who invoke rights rhetoric to think concretely about real confrontations and real circumstances.

According to Tushnet, the danger that arises from being swept into legal rights discourse is that people lose sight of their real objectives. Their visions and thoughts of the possible become trapped within the ideological limitations of the law. . . . Peter Gabel suggests that the belief in rights and in the state serves a hegemonic function through willed delusion:

[B]elief in the state is a flight from the immediate alienation of concrete existence into a split-off sphere of people's minds in which they imagine themselves to be a part of an imaginary political community—"citizens of the United States of America." And it's this collective projection and internalization of an imaginary political authority that is the basis of the legitimization of hierarchy. It's the mass-psychological foundation of democratic consent. Hegemony is reinforced through this "state abstraction" because people believe in and react passively to a mere illusion of political consensus. [The critics] assert that these abstractions blind people to the contingent nature of human existence. When people act as if these illusions are real, they actually recreate their own oppressive world moment by moment.<sup>21</sup>

## 2. TRANSFORMATION IN THE CRITICAL VISION

The vision of change that CLS scholars express flows directly from their focus on ideology as

the major obstacle that separates the actual from the possible. Because it is ideology that prevents people from conceiving of—and hence from implementing—a freer social condition, these critics propose the exposure of ideology as the logical first step toward social transformation.

...

Viewing the structures of legal thought as central to the perception of the world as necessary and the status quo as legitimate, they believe it is crucial to demonstrate the contingency of legal ideology. Once false necessity or contingency is revealed, these critics suggest, people will be able to remake their world in a different way.

#### *B. A Critique of the Critique: The Problem of Context*

CLS scholars offer an analysis that is useful in understanding the limited transformative potential of antidiscrimination rhetoric. There are difficulties, however, in attempting to use CLS themes and ideas to understand the civil rights movement and to describe what alternatives the civil rights constituency could have pursued, or might now pursue. While these scholars claim that their project is concerned with domination, few have made more than a token effort to address racial domination specifically, and their work does not seem grounded in the reality of the racially oppressed.

This deficiency is especially apparent in critiques that relate to racial issues. CLS scholars have criticized mainstream legal ideology for its tendency to portray American society as basically fair, and thereby to legitimate the oppressive policies that have been directed toward racial minorities. Yet these scholars do not sufficiently account for the effects or the causes of the oppression that they routinely acknowledge. The result is that CLS literature exhibits the same proclivities that mainstream scholarship does—it seldom speaks to or about black people.

The failure of the CLS scholars to address racism in their analysis also renders their critique of rights and their overall analysis of law in America incomplete. Specifically, this failure leads to an inability to appreciate fully the

transformative significance of the civil rights movement in mobilizing black Americans and generating new demands. Further, the failure to consider the reality of those most oppressed by American institutions means that the CLS account of the hegemonic nature of legal thought overlooks a crucial dimension of American life—the ideological role of racism itself. Gordon, Freeman, Tushnet, and Gabel fail to analyze racism as an ideological pillar upholding American society, or as the principal basis for black oppression. These and other critics' failure to analyze the hegemonic role of racism also renders their prescriptive analysis unrealistic. ... CLS scholars often appear to view the trashing of legal ideology “as the only path that might lead to a liberated future.” Yet if trashing is the only path that might lead to a liberated future, black people are unlikely to make it to the CLS promised land.

The commitment of CLS scholars to trashing is premised on a notion that people are mystified by liberal legal ideology and consequently cannot remake their world until they see how contingent such ideology is. However, this version of domination by consent does not present a realistic picture of racial domination. Coercion explains much more about racial domination than does ideologically induced consent.<sup>22</sup> Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others; moreover, the ideological source of this coercion is not liberal legal consciousness but racism. If racism is just as important as (if not more important than) liberal legal ideology in explaining the persistence of white supremacy, then the CLS scholars’ single-minded effort to deconstruct liberal legal ideology will be futile.

Finally, in addition to exaggerating the role of liberal legal consciousness and underestimating that of coercion, CLS scholars also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to black demands; it may also perform an important function in combating the experience of being excluded and

ificance of the civil rights mobilizing black Americans and demands. Further, the failure to analyze those most oppressed institutions means that the CLS hegemonic nature of legal analysis is a crucial dimension of American legal role of racism itself.

Tushnet, and Gabel fail to see ideological pillar upholding it or as the principal basis for these and other critics' failure to recognize the hegemonic role of racism also makes descriptive analysis unrealistic. They often appear to view the ideology "as the only path that can lead to a liberated future." Yet if trashing legal discourse might lead to a liberated society, we are unlikely to make it to that land.

It of CLS scholars to trash legal discourse is a notion that people are still legal ideology and consequently make their world until they know what such ideology is. However, domination by consent does not provide a picture of racial domination.

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tion to exaggerating the role of consciousness and underestimating, CLS scholars also disregard the potential that liberalism of legal ideology may indeed remain receptive to some central to black demands; it is an important function in the experience of being excluded and

oppressed.<sup>23</sup> This receptivity to black aspirations is crucial, given the hostile social world that racism creates. The most troubling aspect of the critical program, therefore, is that trashing rights consciousness may have the unintended consequences of disempowering the racially oppressed while leaving white supremacy basically untouched. . . .

### *C. Questioning the Transformative View: Some Doubts about Trashing*

The critics product is of limited utility to blacks in its present form. The implications for blacks of trashing liberal legal ideology are troubling, even though it may be proper to assail belief structures that obscure liberating possibilities. Trashing legal ideology seems to tell us repeatedly what has already been established—that legal discourse is unstable and relatively indeterminate. Furthermore, trashing offers no idea of how to avoid the negative consequences of engaging in reformist discourse or how to work around such consequences. Even if we imagine the wrong world when we think in terms of legal discourse, we must nevertheless exist in a present world, where legal protection has at times been a blessing—albeit a mixed one. The fundamental problem is that although CLS scholars criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands in this area.

The CLS emphasis on deconstruction as the vehicle for liberation leads to the conclusion that engaging in legal discourse should be avoided because it reinforces not only the discourse itself but also the society and the world that it embodies. Yet CLS scholars offer little beyond this observation: their focus on delegitimizing rights rhetoric seems to suggest that once rights rhetoric has been discarded, there exists a more productive strategy for change, one that does not reinforce existing patterns of domination.

Unfortunately, no such strategy has yet been articulated, and it is difficult to imagine that racial minorities will ever be able to discover one. As Frances Fox Piven and Richard Clo-

ward point out in their excellent account of the civil rights movement, popular struggles are a reflection of institutionally determined logic and a challenge to that logic. People can demand change only in ways that reflect the logic of the institutions they are challenging.<sup>24</sup> Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective.

The possibility for ideological change is created through the very process of legitimization, which is triggered by crisis. Powerless people can sometimes trigger such a crisis by challenging an institution internally, that is, by using its own logic against it.<sup>25</sup> Such crisis occurs when powerless people force open and politicize a contradiction between the dominant ideology and their reality. The political consequences of maintaining the contradictions may sometimes force an adjustment—an attempt to close the gap or to make things appear fair. Yet, because the adjustment is triggered by the political consequences of the contradiction, circumstances will be adjusted only to the extent necessary to smooth the apparent contradiction.

This approach to understanding legitimization and change is applicable to the civil rights movement. Because blacks were challenging their exclusion from political society, the only claims that were likely to achieve recognition were those which reflected American society's institutional logic—legal rights ideology. Civil rights protestors, articulating their formal demands through legal rights ideology, exposed a series of contradictions, the most important being the promised privileges of American citizenship and the practice of absolute racial subordination. Rather than using the contradictions to suggest that American citizenship was itself illegitimate or false, civil rights protestors proceeded as if American citizenship were real and demanded to exercise the "rights" that citizenship entailed. By seeking to restructure reality to reflect American mythology, blacks relied upon and ultimately benefited from politically inspired efforts to resolve the contradictions by granting formal rights. Although it is the need to maintain legitimacy which presents powerless

groups with the opportunity to wrest concessions from the dominant order, it is the very accomplishment of legitimacy that forecloses greater possibilities. In sum, the potential for change is both created and limited by legitimization.

The central issue that CLS scholars fail to address, then, is how to avoid the "legitimizing" effects of reform if engaging in reformist discourse is the only effective way to challenge the legitimacy of the social order. Perhaps the only situation in which powerless people may receive any favorable response is where there is a political or ideological need to restore an image of fairness that has somehow been tarnished. Most efforts to change an oppressive situation are bound to adopt the dominant discourse to some degree. On the other hand, Peter Gabel may well be right in observing that the reforms which come from such demands are likely to transform a given situation only to the extent necessary to legitimate those elements of the situation that "must" remain unchanged. Thus, it might just be the case that oppression means "being between a rock and a hard place"—in other words, that there are risks and dangers involved both in engaging in the dominant discourse and in failing to do so. What subordinated people need is an analysis that can inform them about how the risks can be minimized and how the rocks and the very hard places can be negotiated.

#### IV. THE CONTEXT DEFINED: RACIST IDEOLOGY AND HEGEMONY

THE failure of the CLS scholars to consider race in their account of law and legitimacy is not a minor oversight: race-consciousness is central not only to the domination of blacks but also to whites' acceptance of the legitimacy of hierarchy and their identity with elite interest. Exposing the centrality of race-consciousness is crucial to identifying and delegitimizing beliefs that present hierarchy as inevitable and fair. Moreover, exposing the centrality of race-consciousness shows how the options of blacks in American society have been limited, and how the use of rights rhetoric has

emancipated blacks from some manifestations of racial domination.

A realignment of the CLS project to incorporate race-consciousness must begin with beliefs about blacks in American society, and how these beliefs legitimize racial coercion. My purpose here is to examine the deep-rooted problem of racist ideology—or white race-consciousness—and to suggest how this form of consciousness legitimates prevailing injustices and constrains the development of new solutions that would benefit black Americans. . . .

##### *A. The Hegemonic Role of Racism: Establishing the Other in American Ideology*

Throughout American history, the subordination of blacks was rationalized by a series of stereotypes and beliefs that made their conditions appear logical and natural. Historically, white supremacy has been premised upon various political, scientific, and religious theories, each of which relies on racial characterizations and stereotypes about blacks which have coalesced into an extensive legitimating ideology. Today, it is probably not controversial to say that these stereotypes were developed primarily to rationalize the oppression of blacks. What is overlooked, however, is the extent to which these stereotypes serve a hegemonic function by perpetuating a mythology about both blacks and whites even today, reinforcing an illusion of a white community that cuts across ethnic, gender, and class lines.

As presented by CLS scholars, hegemonic rule succeeds to the extent that the ruling class worldview establishes the appearance of a unity of interests between the dominant class and the dominated. Throughout American history, racism has identified the interests of subordinated whites with those of society's white elite. Racism does not support the dominant order simply because all whites want to maintain their privilege at the expense of blacks, or because blacks sometimes serve as convenient political scapegoats; rather, the very existence of a clearly subordinated Other group is contrasted with the norm in a way that reinforces identification with the dominant group. Racism helps to cre-

from some manifestations

the CLS project to incorporate must begin with beliefs American society, and how minimize racial coercion. My examines the deep-rooted ideology—or white race—to suggest how this formulates prevailing injustices development of new solutions benefit black Americans. . . .

### *Role of Racism: Establishing American Ideology*

In American history, the subordination rationalized by a series of beliefs that made their conditions natural. Historically, has been premised upon specific, and religious theories, based on racial characterizations of blacks which have coalesced into a comprehensive legitimating ideology. It is not controversial to say that whites were developed primarily to express the oppression of blacks. What is more, is the extent to which racism has served a hegemonic function by creating ideology about both blacks and whites, reinforcing an illusion of a social reality that cuts across ethnic, gender,

CLS scholars, hegemonic extent that the ruling class creates the appearance of a unity between the dominant class and the subordinated throughout American history, and the interests of subordinated to those of society's white elite. They support the dominant order because whites want to maintain their sense of blacks, or because blacks can serve as convenient political tools. The very existence of a clearly defined group is contrasted with what reinforces identification with that group. Racism helps to create

an illusion of unity through the oppositional force of a symbolic "other."<sup>26</sup> The establishment of an Other creates a bond, a burgeoning common identity of all nonstigmatized parties—whose identity and interests are defined in opposition to the other.

According to the philosophy of Jacques Derrida, a structure of polarized categories is characteristic of Western thought:

Western thought . . . has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error, identity vs. difference, mind vs. matter, man vs. woman, soul vs. body, life vs. death, nature vs. culture, speech vs. writing. These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it. . . . In other words, the two terms are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term priority. . . .<sup>27</sup>

Racist ideology replicates this pattern of arranging oppositional categories in a hierarchical order; historically, whites have represented the dominant element in the antinomy, while blacks came to be seen as separate and subordinate. This hierarchy is reflected in the list below; note how each traditional negative image of blacks correlates with a counterimage of whites:

Historical oppositional dualities

WHITE IMAGES	BLACK IMAGES
industrious	lazy
intelligent	unintelligent
moral	immoral
knowledgeable	ignorant
enabling culture	disabling culture
law-abiding	criminal
responsible	shiftless
virtuous/pious	lascivious

The oppositional dynamic exemplified in this list was created and maintained through an elaborate and systematic process. Laws and customs helped to create "races" out of a broad range of human traits. In the process of creating races, the categories came to be filled with meaning: whites were characterized one way and associated with normatively positive characteristics, whereas blacks were characterized another way and became associated with the subordinate, even aberrational characteristics. The operation of this dynamic, along with the important political role of racial oppositionalism, can be illustrated through a few brief historical references.

Edmund Morgan provides vivid illustration of how slaveholders from the seventeenth century onward created and politicized racial categories in order to maintain the support of nonslaveholding whites. Morgan recounts how the planters "lump[ed] Indians, mulattoes, and Negroes in a single slave class," and how these categories became "an essential, if unacknowledged, ingredient of the republican ideology that enabled Virginians to lead the nation."<sup>28</sup> Having accepted a common interest with slaveholders in keeping blacks subordinated, even those whites who had material reasons to object to the dominance of the slaveholding class could challenge the regime only so far. The power of race-consciousness convinced whites to support a system that was opposed to their own economic interests. As George Fredrickson put it, "racial privilege could and did serve as a compensation for class disadvantage."<sup>29</sup>

Domination through race-consciousness continued throughout the post-Reconstruction period. Historian C. Vann Woodward has argued that the ruling plantocracy was able to undermine the progressive accomplishments of the Populist movement by stirring up antiblack sentiment among poor white farmers; racism was articulated as the "broader ground for a new democracy."<sup>30</sup> As racism formed the new base for a broader notion of democracy, class differences were mediated through reference to a racial community of equality.<sup>31</sup> A tragic example of the success of such race-conscious political manipulation is the career of Tom Watson, the leader of the progressive Populist movement of the 1890s. Watson, in his attempts to educate the masses of poor farmers about the destructive role of race-based politics, repeatedly told black and white audiences: "You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and

blinded that you may not see how this race antagonism perpetuates a monetary system which beggars you both."<sup>32</sup> Yet by 1906, Watson had joined the movement to disenfranchise blacks; according to Woodward, Watson had "persuaded himself that only after the Negro was eliminated from politics could Populist principles gain a hearing. In other words, the white men would have to unite before they could divide."<sup>33</sup>

White race-consciousness also played a role in the nascent labor movement in the North. Labor historian Herbert Hill has demonstrated that unions of virtually all trades excluded black workers from their ranks and often entirely barred black employment in certain fields. Immigrant labor unions were particularly adamant about keeping out black workers; indeed, it was precisely in order to assimilate into the American mainstream that immigrant laborers adopted these exclusionary policies.<sup>34</sup>

The political and ideological role that race-consciousness continues to play is suggested by racial polarization in contemporary presidential politics. Several political commentators have suggested that many whites supported Ronald Reagan in the belief that he would correct a perceived policy imbalance that unjustly benefited blacks, and some argue further that Reagan made a direct racist appeal to white voters. . . . Reagan received nearly 70 percent of the white vote, whereas 90 percent of black voters cast their ballots for Mondale. Similarly, the vast majority of blacks—82 percent—disapproved of Reagan's performance, whereas only 32 percent of whites did.

Even the Democratic party, which has traditionally relied on blacks as its most loyal constituency, has responded to this apparent racial polarization by seeking to distance itself from black interests. Although some have argued that the racial polarization demonstrated in the 1984 election does not represent a trend of white defections from the Democratic party, it is significant that, whatever the cause of the party's inability to attract white votes, Democratic leaders have expressed a willingness to moderate the party's stand on key racial issues in an effort to recapture the white vote.<sup>35</sup>

#### *B. The Role of Race Consciousness in a System of Formal Equality*

The previous section has emphasized the continuity of white race-consciousness over the course of American history. This section, by contrast, focuses on the partial transformation of the functioning of race-consciousness which occurred with the transition from Jim Crow to formal equality in race law.

Prior to the civil rights reforms, blacks were formally subordinated by the state. Blacks experienced being the "other" in two aspects of oppression, which I shall designate as symbolic and material.<sup>36</sup> Symbolic subordination refers to the formal denial of social and political equality to all blacks, regardless of their accomplishments. Segregation and other forms of social exclusion—separate restrooms, drinking fountains, entrances, parks, cemeteries, and dining facilities—reinforced a racist ideology that blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.

Material subordination, on the other hand, refers to the ways that discrimination and exclusion economically subordinated blacks to whites and subordinated the life chances of blacks to those of whites on almost every level. This subordination occurs when blacks are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for blacks that is five to six years shorter than for whites.

Symbolic subordination often created material disadvantage by reinforcing race-consciousness in everything from employment to education. In fact, symbolic and material subordination were generally not thought of separately: separate facilities were usually inferior facilities, and limited job categorization almost invariably brought lower pay and harder work. Despite the pervasiveness of racism, however, there existed even before the civil rights movement a class of blacks who were educationally, economically, and professionally equal—if not superior—to many whites; yet even these blacks suffered social and political exclusion as well.

*Race Consciousness in a System of Formal Equality*

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It is also significant that not all separation resulted in inferior institutions. School segregation—although often presented as the epitome of symbolic and material subordination—did not always bring about inferior education. It is not separation per se that made segregation subordinating; rather, this result is more properly attributable to the fact that it was enforced and supported by state power, and accompanied by the explicit belief in African-American inferiority.<sup>37</sup>

The response to the civil rights movement was the removal of most formal barriers and symbolic manifestations of subordination. Thus, "whites only" notices and other obvious indicators of the social policy of racial subordination disappeared—at least in the public sphere. The disappearance of these symbols of subordination reflected the acceptance of the rhetoric of formal equality, signaling the demise of white supremacy rhetoric as expressing America's normative vision. In other words, it could no longer be said that blacks were not included as equals in the American political vision.

Removal of these public manifestations of subordination was a significant gain for all blacks, although some benefited more than others. The eradication of formal barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage. Yet despite these disparate results, it would be absurd to suggest that no benefits came from these formal reforms, especially in regard to racial policies, such as segregation, that were partly material but largely symbolic. Thus, to say that the reforms were "merely symbolic" is to say a great deal: these legal reforms and the formal extension of "citizenship" were large achievements precisely because much of what characterized black oppression was symbolic and formal.

Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of black people. White race-consciousness, in a new but nonetheless virulent form, plays an important, perhaps crucial, role in the new regime that has legitimated the

deteriorating day-to-day material conditions of the majority of blacks.

The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it. Nor have the negative stereotypes associated with blacks been eradicated. The rationalizations once used to legitimate black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of blacks through reference to an assumed cultural inferiority.

Thomas Sowell, for example, suggests that underclass blacks are economically depressed because they have not adopted the values of hard work and discipline. He further implies that blacks have not pursued the need to attain skills and marketable education, and have not learned to make the sacrifices necessary for success. Instead, he charges, blacks view demands for special treatment as a means for achieving what other groups have achieved through hard work and the abandonment of racial politics.

Sowell applies the same stereotypes to the mass of blacks that white supremacists had applied in the past, but bases these modern stereotypes on notions of "culture" rather than genetics. Sowell characterizes underclass blacks as victims of self-imposed ignorance, lack of direction, and poor work attitudes: culture, not race, now accounts for this Otherness. Except for vestigial pockets of historical racism, any possible connection between past racial subordination and the present situation has been severed by the formal repudiation of the old race-conscious policies. The same dualities that historically have been used to legitimate racial subordination in the name of genetic inferiority have now been adopted by Sowell as a means for explaining the subordinated status of blacks today in terms of cultural inferiority.<sup>37</sup>

Moreover, Sowell's explanation of blacks' subordinated status also illustrates the treatment of the now-unspoken white stereotypes as the

positive social norm. His assertion that the absence of certain attributes accounts for the continued subordination of blacks implies that it is the presence of these attributes that explains the continued advantage of whites. The only difference between this argument and the older oppositional dynamic is this: whereas the latter explained black subordination through reference to the ideology of white supremacy, the former explains black subordination through reference to an unspoken social norm. That norm—although no longer explicitly white supremacist—nevertheless, remains a white norm.

White race-consciousness, which includes the modern belief in cultural inferiority, furthers black subordination by justifying all the forms of unofficial racial discrimination, injury, and neglect that flourish in a society only formally dedicated to equality. Indeed, in ways more subtle, white race-consciousness reinforces and is reinforced by the myth of equal opportunity which explains and justifies broader class hierarchies.

Race-consciousness also reinforces whites' sense that American society truly is meritocratic, and thus it helps to prevent them from questioning the basic legitimacy of the free market. Believing both that blacks are inferior and that the economy impartially rewards the superior over the inferior, whites see that most blacks are indeed worse off than whites are, which reinforces their sense that the market is operating "fairly and impartially"; those who logically should be on the bottom are on the bottom. This strengthening of whites' belief in the system in turn reinforces their beliefs that blacks are indeed inferior. After all, equal opportunity is the rule, and the market is an impartial judge; if blacks are on the bottom, it must reflect their relative inferiority. Racist ideology thus operates in conjunction with the class components of legal ideology to reinforce the status quo, both in terms of class and race.

To bring a fundamental challenge to the way things are, whites would have to question not just their own subordinate status but also both the economic and the racial myths that justify the status quo. Racism, combined with equal opportunity mythology, provides a rationaliza-

tion for racial oppression, making it difficult for whites to see the black situation as illegitimate or unnecessary. If whites believe that blacks, because they are unambitious or inferior, get what they deserve, it becomes that much harder to convince whites that something is wrong with the entire system. Similarly, a challenge to the legitimacy of continued racial inequality would force whites to confront myths about equality of opportunity which justify for them whatever measure of economic success they may have attained.

Thus, although CLS scholars have suggested that legal consciousness plays a central role in legitimating hierarchy in America, the otherness dynamic enthroned within the maintenance and perpetuation of white race-consciousness seems to be at least as important as legal consciousness in supporting the dominant order. Like legal consciousness, race-consciousness makes it difficult—at least for whites—to imagine the world differently. It also creates the desire for identification with privileged elites. By focusing on a distinct, subordinate Other, whites include themselves in the dominant circle—an arena in which most hold not real power but only their privileged racial identity. Consider the case of a dirt-poor, southern white shown participating in a Ku Klux Klan rally in the movie *Resurgence*, who declared; "Every morning, I wake up and thank God I'm white."<sup>38</sup> For this person, and for others like him, race-consciousness—manifested by his refusal even to associate with blacks—provides a powerful explanation of why he fails to challenge the current social order.

### C. Rights Discourse as a Challenge to the Oppositional Dynamic

The oppositional dynamic, premised upon maintaining blacks as an excluded and subordinated Other, initially created an ideological and political structure of formal inequality against which rights rhetoric proved to be the most effective weapon. Although rights rhetoric may ultimately have absorbed the civil rights challenge and legitimated continued subordination, the otherness dynamic provides a fuller understanding of how the very transformation af-

sion, making it difficult for black situation as illegitimate whites believe that blacks, unambitious or inferior, get it becomes that much harder that something is wrong them. Similarly, a challenge to continued racial inequality is to confront myths about unity which justify for them of economic success they may

CLS scholars have suggested race-consciousness plays a central role in the hierarchy in America, the enthroned within the main perpetuation of white racism to be at least as important as class in supporting the dominant legal consciousness, makes it difficult—at least for people of color—to see the world differently. It is this desire for identification with others focusing on a distinct, subalternites include themselves in—an arena in which most other but only their privileged consider the case of a dirt-poor, own participating in a Ku Klux Klan rally in the movie *Resurgence*, who running, I wake up and thank For this person, and for race-consciousness—mainly even to associate with a powerful explanation of why the current social order.

#### *Race as a Challenge to the National Dynamic*

dynamic, premised upon as an excluded and subordinated group, created an ideological and formal inequality against blacks. This proved to be the most significant, though rights rhetoric may haveurbed the civil rights challenges and continued subordination, which provides a fuller understanding of the very transformation af-

firmed by legal reform itself has contributed to the ideological and political legitimization of the continuing subordination of blacks.

Rights discourse provided the ideological mechanisms through which the conflicts of federalism, the power of the presidency, and the legitimacy of the courts could be orchestrated against Jim Crow. Movement leaders used these tactics to force open a conflict between whites, which eventually benefited black people. Casting racial issues in the moral and legal rights rhetoric of the prevailing ideology helped to create the political controversy without which the state's coercive function would not have been enlisted to aid blacks.

Merely critiquing the ideology from without or making demands in language outside the rights discourse would have accomplished little. Rather, blacks gained by using a powerful combination of direct action, mass protest, and individual acts of resistance, along with appeals, both to public opinion and to the court, that were couched in the language of the prevailing legal consciousness. The result was a series of ideological and political crises in which civil rights activists and lawyers induced the federal government to aid blacks and triggered efforts to legitimate and reinforce the authority of the law in ways that benefited blacks. Merely insisting that blacks be integrated or speaking in the language of "needs" would have endangered the lives of those who were already taking risks—and with no reasonable chance of success. President Eisenhower, for example, would not have sent federal troops to Little Rock simply at the behest of protesters demanding that black schoolchildren receive an equal education. Instead, the successful manipulation of legal rhetoric led to a crisis of federal power that ultimately benefited blacks.

Some critics of legal reform movements seem to overlook the fact that state power has made a significant difference—sometimes between life and death—in the efforts of black people to transform their world. Attempts to harness the power of the state through the appropriate rhetorical and legal incantations should be appreciated as intensely powerful and calculated political acts. In the context of white supremacy,

engaging in rights discourse should be seen as an act of self-defense. This was particularly true once the movement had mobilized people to challenge the system of oppression, because the state could not assume a position of neutrality regarding black people; either the coercive mechanism of the state had to be used to support white supremacy, or it had to be used to dismantle it. We know now, with hindsight, that it did both.<sup>39</sup>

Blacks did use rights rhetoric to mobilize state power to their benefit against symbolic oppression through formal inequality and, to some extent, against material deprivation in the form of private, informal exclusion of the middle class from jobs and housing. Yet today the same legal reforms play a role in providing an ideological framework that makes the present conditions facing underclass blacks appear fair and reasonable. However, the eradication of barriers has created a new dilemma for those victims of racial oppression who are not in a position to benefit from the move to formal equality. The race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the black underclass; instead, as we have seen, class disparities appear to be the consequence of individual and group merit within a supposed system of equal opportunity. Moreover, the fact that some blacks are economically successful gives credence both to the assertion that opportunities exist and to the backlash attitude that blacks have "gotten too far." Psychologically, for blacks who have not made it, the lack of an explanation for their underclass status may result in self-blame and other self-destructive attitudes.

Another consequence of the formal reforms may be the loss of collectivity among blacks.<sup>40</sup> The removal of formal barriers created new opportunities for some blacks which were not shared by various other classes of African-Americans; as blacks moved into different spheres, the experience of being black in America became fragmented and multifaceted, and the different contexts presented opportunities to experience racism in different ways. The social, economic, and even residential distance

between the various classes may complicate efforts to unite behind issues as a racial group. Although "whites only" signs may have been crude and debilitating, they at least presented a readily discernible target around which to organize. Now, the targets are obscure and diffuse, and this difference may create doubt among some blacks as to whether there is enough similarity between their own life experiences and those of other blacks to warrant collective political action.

Formal equality significantly transformed the black experience in America. With society's embrace of formal equality came the eradication of symbolic domination and the suppression of white supremacy as the norm of society. Future generations of black Americans would no longer be explicitly regarded as America's second-class citizens. Yet the transformation of the oppositional dynamic—achieved through the suppression of racial norms and stereotypes, and the recasting of racial inferiority into assumptions of cultural inferiority—creates several difficulties for the civil rights constituency. The removal of formal barriers, although symbolically significant to all and materially significant to some, will do little to alter the hierarchical relationship between blacks and whites until the way in which white race-consciousness perpetuates norms that legitimate black subordination is revealed. This is not to say that white norms alone account for the conditions of the black underclass; it is, instead, an acknowledgment that until the distinct racial nature of class ideology is itself revealed and debunked, nothing can be done about the underlying structural problems that account for the disparities. The narrow focus of racial exclusion—that is, the belief that racial exclusion is illegitimate only where the "whites only" signs are explicit—coupled with strong assumptions about equal opportunity, makes it difficult to move the discussion of racism beyond the societal self-satisfaction engendered by the appearance of neutral norms and formal inclusion.

#### *D. Self-Conscious Ideological Struggle*

Rights have been important. They may have legitimated racial inequality, but they have also

been the means by which oppressed groups have secured both entry as formal equals into the dominant order and also the survival of their movement in the face of private and state repression. The dual role of legal change creates a dilemma for black reformers. As long as race-consciousness thrives, blacks will often have to rely on rights rhetoric when it is necessary to protect their interests; but the very reforms brought about by appeals to legal ideology seem to undermine the ability to move forward toward a broader vision of racial equality. In the quest for racial justice, winning and losing have been part of the same experience.

CLS scholars are correct in observing that engaging in rights discourse has helped to de-radicalize and co-opt the challenge. Yet they fail to acknowledge the limited range of options presented to blacks in a context where they were deemed Other and the unlikelihood that specific demands for inclusion and equality would be heard if articulated in other terms. This abbreviated list of options is itself contingent upon the ideological power of white race-consciousness and the continuing role of black Americans as Other. Future efforts to address racial domination and class hierarchy must consider the continuing ideology of white race-consciousness by uncovering the oppositional dynamic and by chipping away at its premises. Central to this project is the task of revealing the contingency of race and exploring the connection between white race-consciousness and the other myths that legitimate both class and race hierarchies. CLS scholars and others whose agendas include challenging hierarchy and legitimization must not overlook the importance of revealing the contingency of race.

Optimally, the deconstruction of white race-consciousness might lead to a liberated future for both black and whites. Yet until whites recognize the hegemonic function of racism and turn their efforts toward neutralizing it, African-American people must develop pragmatic political strategies—self-conscious ideological struggle—to minimize the costs of liberal reform while maximizing its utility. A primary step in engaging in self-conscious ideological struggle must be to transcend the oppo-

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reconstruction of white race must lead to a liberated future for whites. Yet until whites economic function of racism efforts toward neutralizing it, people must develop pragmatics—self-conscious ideologies to minimize the costs of liberalizing its utility. A engaging in self-conscious ideologies must be to transcend the oppo-

sitional dynamic in which blacks are cast simply and solely as whites' subordinate Other.

The dual role that rights have played makes strategizing a difficult task. Black people can afford neither to resign themselves to, nor to attack frontally, the legitimacy and incoherence of the dominant ideology. The subordinate position of blacks in this society makes it unlikely that African-Americans will realize gains through the kind of direct challenge to the legitimacy of American liberal ideology that is now being waged by CLS scholars. On the other hand, delegitimizing race-consciousness would be directly relevant to black needs, and this strategy will sometimes require the pragmatic use of liberal ideology.

This vision is consistent with the views forwarded by theoreticians such as Frances Fox Piven and Richard Cloward, Antonio Gramsci, and Roberto Unger. Piven and Cloward observe that oppressed people sometimes advance by creating ideological and political crisis, but that the form of the crisis-producing challenge must reflect the institutional logic of the system. The use of rights rhetoric during the civil rights movement created such a crisis by presenting and manipulating the dominant ideology in a new and transformative way. Challenges and demands made from outside the institutional logic would have accomplished little, because blacks, as the subordinate Other, were already perceived as being outside the mainstream. The struggle of blacks, like that of all subordinated groups, is a struggle for inclusion, an attempt to manipulate elements of the dominant ideology in order to transform the experience of domination. It is a struggle to create a new status quo through the ideological and political tools that are available.

Gramsci called this struggle a "war of position" and he regarded it as the most appropriate strategy for change in Western societies. According to Gramsci, direct challenges to the dominant class accomplish little if ideology plays such a central role in establishing authority that the legitimacy of the dominant regime is not challenged. Joseph Femia, interpreting Gramsci, writes: "the dominant ideology in modern capitalist societies is highly institution-

alized and widely internalized. It follows that a concentration on frontal attack, on direct assault against the bourgeois state ('war of movement' or 'war of manoeuvre') can result only in disappointment and defeat."<sup>41</sup> Consequently, the challenge in such societies is to create a counter-hegemony by maneuvering within and expanding the dominant ideology to embrace the potential for change. . . .

#### V. CONCLUSION

FOR blacks, the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating discourse. A clearer understanding of the space we occupy in the American political consciousness is a necessary prerequisite to the development of pragmatic strategies for political and economic survival. In this regard, the most serious challenge for blacks is to minimize the political and cultural cost of engaging in an inevitably co-optive process in order to secure material benefits. Because our present predicament gives us few options, we must create conditions for the maintenance of a distinct political thought that is informed by the actual conditions of black people. Unlike the civil rights vision, this new approach should not be defined and thereby limited by the possibilities of dominant political discourse; rather, it should maintain a distinctly progressive outlook that focuses on the needs of the African-American community.

#### NOTES

1. Act of Aug. 27, 1984, Pub. L. No. 98-399, 98 Stat. 1473. President Reagan's signing is reported in 20 *Weekly Comp. Pres. Doc.* 1192 (Sept. 3, 1984).

2. I shall use "African-American" and "black" interchangeably. . . . The naming of Americans of African descent has had political overtones throughout history. See W. E. B. Du Bois, 2 *The Seventh Son*, 12-13 (1971) (arguing that the "N" in Negro was always capitalized until, in defense of slavery, the use of the lower case "N" became the custom in "recognition" of Blacks' status as property; that the usage was defended as a "description of the color of a people"; and that the capitalization of other ethnic and national origin designations made the failure to capitalize "Negro" an insult). "African-American" is now preferred by some because it is both culturally more specific and histori-

cally more expansive than the traditional terms that narrowly categorize us as America's Other. . . .

3. Continuing disparities exist between African-Americans and whites in virtually every measurable category. In 1986, the African-American poverty rate stood at 31 percent, compared with 11 percent for whites; see Williams, "Urban League Says Blacks Suffered Loss over Decade," *New York Times*, Jan. 15, 1988, A10:1. "[B]lack median income is 57 percent that of whites, a decline of about four percentage points since the early 1970's"; Bernstein, "20 Years After the Kerner Report: Three Societies, All Separate," *New York Times*, Feb. 29, 1988, B8:2. Between 1981 and 1985, black unemployment averaged 17 percent, compared to 7.3 percent for whites; see National Urban League, *The State of Black America 1986*, 15 (1986). In 1986, approximately 44 percent of all black children lived in poverty; see Lauter and May, "A Saga of Triumph, a Return to Poverty: Black Middle Class Has Grown but Poor Multiply," *Los Angeles Times*, April 2, 1988, 1, 16:1. Blacks comprise 60 percent of the urban underclass in the United States; *id.* at 16:3.

The African-American socioeconomic position in American society has actually declined in the last two decades. Average annual family income for African-Americans dropped 9 percent from the seventies to the eighties, see Williams, *supra*, A10:1. Since 1969, the proportion of black men between 25 and 55 earning less than \$5000 a year rose from 8 to 20 percent; see Lauter and May, *supra*. African-American enrollment in universities and colleges is also on the decline; see Williams, *supra*, A10:2.

The decline in the African-American socioeconomic position has been paralleled by an increase in overt racial hostility. See generally U.S. Commission on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America* (1983). In addition to well-publicized incidents of racial violence like the Howard Beach attack . . . and the lynching of Michael Donald, . . . racial unrest has risen dramatically on university campuses; see Wilkerson, "Campus Blacks Feel Racism's Nuances," *New York Times*, April 17, 1988, 1:1:3.

For a comprehensive analysis of the conditions afflicting the black urban underclass, see W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (1987).

4. The principal civil rights reforms are the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. ss 2000(e)-2000(h)(6) (1982)); the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. ss 1971-1974 (1982)); U.S. CONST. amends. XIII-XV; 42 U.S.C. ss 1981, 1983, 1985 (1982); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 comp.); and the Equal Employment Opportunity Commission regulations, 29 C.F.R. ss 1600-1691 (1987).

See ACLU, *In Contempt of Congress and the Courts—The Reagan Civil Rights Record* (1984); Chambers, "Racial Justice in the 1980's," 8 *Campbell L. Rev.*, 29, 31-34 (1985); Devins, "Closing the Classroom Door to Civil Rights," 11 *Hum. Rts.*, 26 (1984); Selig, "The Reagan Justice Depart-

ment and Civil Rights: What Went Wrong," 1985 *U. Ill. L. Rev.*, 785; Wolfovitz and Lobel, "The Enforcement of Civil Rights Statutes: The Reagan Administration's Record," 9 *Black L. J.*, 252 (1986); see also Hernandez, Weiss, and Smith, "How Different Is the World of 1984 from the World of 1964?," 37 *Rutgers L. Rev.*, 755, 757-60 (1985).

Some scholars have been critical of the overall development of civil rights law over the past decade, positing that we have reached the end of the "Second Reconstruction"; see generally D. Bell, *And We Are Not Saved* (1987); Bell, "The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles," 99 *Harv. L. Rev.*, 4 (1985).

5. Martin Luther King, Jr., Federal Holiday Commission, *Living the Dream* (1986).

6. D. Bell, *Race, Racism and American Law* (2d ed. 1981).

7. The most notorious was *Bob Jones University v. United States*, 461 U.S. 574 (1983), in which the Reagan administration refused to argue a case, initiated by the Justice Department during the previous administration, that sought to maintain the Internal Revenue Service policy of denying tax-exempt status to schools that discriminated on the basis of race. The Supreme Court denied the Justice Department's request for a dismissal, and appointed a private attorney to argue the case. . . .

8. See T. Sowell, *Civil Rights: Rhetoric or Reality?*, 116 (1984).

9. *Id.* at 109.

10. See T. Sowell, *supra* note 8, at 120. This I also take to be the import of Walter Williams's misleading reference to Thurgood Marshall's remark, "You guys have been practicing discrimination for years. Now it is our turn"; Williams, "Discrimination in Public Policy," in I *Selected Affirmative Action Topics in Employment and Business Set Asides: A Consultation/Hearing of the United States Commission on Civil Rights* 10 (March 6-7, 1985) (quoting W. Douglas, *The Court Years 1939-1975: The Autobiography of William O. Douglas*, 149 (1980)).

11. T. Sowell, *supra* note 8, at 119.

12. *Id.*

13. *Id.* at 109.

14. A. Blumrosen, "Twenty Years of Title VII, An Overview," 16 (April 18, 1983), unpublished manuscript on file at the Harvard Law Library (emphasis added).

15. *Id.* at 13.

16. *Selections From the Prison Notebooks of Antonio Gramsci*, 238, Q. Hoare and G. Smith, trans. (1971).

17. Gordon, "New Developments in Legal Theory," in D. Kairys, ed., *The Politics of Law: A Progressive Critique*, 286 (1982).

18. *Id.* at 287 (emphasis in original).

19. See Freeman, "Antidiscrimination Law: A Critical Review," in *The Politics of Law*, *supra* note 17, at 96.

"What Went Wrong," 1985 *U. Ill. L.* 1; Lobel, "The Enforcement of Civil Rights by the Reagan Administration's Record," 9; see also Hernandez, Weiss, and Tugman, "Is the World of 1984 from the *1984*?" *J. L. Rev.*, 755, 757-60 (1985).

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ing, Jr., Federal Holiday Commis- (1986).

ism and American Law (2d ed. 1981).

us was *Bob Jones University v. United States*, in which the Reagan administration, case, initiated by the Justice Department, administration, that sought to Revenue Service policy of denying schools that discriminated on the basis Court denied the Justice Department's dismissal, and appointed a private se....

Civil Rights: Rhetoric or Reality?, 116

*supra* note 8, at 120. This I also take after Williams's misleading reference remark, "You guys have been practicing years. Now it is our turn"; William Public Policy," in *I Selected Affairs in Employment and Business Set* hearing of the United States Commission (March 6-7, 1985) (quoting W. 1939-1975: *The Autobiography of (1980)).*

ote 8, at 119.

Twenty Years of Title VII, An Over- unpublished manuscript on file at (emphasis added).

be Prison Notebooks of Antonio and G. Smith, trans. (1971).

Developments in Legal Theory," in *ics of Law: A Progressive Critique*,

s in original).

Antidiscrimination Law: A Critical *Law*, *supra* note 17, at 96.

20. Tushnet, "An Essay on Rights," 62 *Tex. L. Rev.*, 1363-64 (1984). For a different rendition of the critique of rights which is centered in psychoanalytic theory, see Gabel, "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves," 62 *Tex. L. Rev.*, 1563 (1984).

21. Gabel and Kennedy, "Roll Over Beethoven," 36 *Stan. L. Rev.*, 1, 29 (1984) (emphasis added). In this piece, the authors acknowledge that the critique of rights is itself in danger of becoming reified. See *id.* at 36-37. Elsewhere, Kennedy has advocated "working at the slow transformation of rights rhetoric, at dereifying it, rather than simply junking it"; Kennedy, "Critical Labor Law Theory: A Comment," 4 *Indus. Rel. L. J.*, 503, 506 (1981). "Embedded in the rights notion," Kennedy observes, "is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom"; *id.*

22. The term "coercion" is used here to describe all nonconsensual forms of domination—that is, all forces external to the individual or group that maintain that individual or group's position in society's hierarchy. As such, it refers to everything from baton-wielding police officers to court injunctions to "whites only" signs. More importantly, it also refers to more subtle forms of exterior domination, such as the institutionalized oppositional dynamic—the vision of "normative whiteness" that pervades current forms of race-consciousness.

23. The degree to which rights-consciousness has been receptive to black aspirations is probably the most overlooked aspect in the critique of rights. This may be attributed to critics' limited understanding of nonmaterial manifestations of racial domination. Although critics argue that rights-consciousness only creates an illusion of community which produces alienation..., this analysis tends to underestimate the extent to which blacks' exclusion from the illusion creates its own experience of alienation. Thus, although critics have acknowledged the pragmatic value of rights rhetoric, ... they have not recognized the legitimacy of black demands for inclusion in the social illusion and the consequent utility of rights discourse in articulating such demands.

24. Strikes, for example, are a reflection of the logic of the work institution. It only makes sense for employed workers to use strikes as a tactic. Unemployed workers, of course, cannot use the strike to press their grievances.

25. Conversely, groups that do not engage the institutional logic are unlikely to create such a crisis; indeed, they are routinely infiltrated, isolated, and destroyed. Compare, for example, the history of the NAACP with that of the Black Panthers. One should not infer from the fact that the Panthers have ceased to exist whereas the NAACP has not that insurgent groups are not essential to reform. Indeed, it is their insurgency that ultimately benefits more moderate groups. Both moderate and radical groups, however, face similar limitations: although they can create a crisis that

forces an institutional response, no oppressed group can control the response. Institutions can respond with either repression or conciliation; often they respond with both. Thus, even enlisting the dominant, legitimating ideology in struggle does not guarantee protection against violent repression.

Indeed, the degree of violence and repression that an oppressed group must endure to wrest even moderate reforms from the dominant class is a measure of its subordinate status in society. Consider, for example, how much real suffering people had to endure during the civil rights movement before even moderate concessions were made. The injustice of racial oppression is succinctly characterized by the fact that thousands of lives were risked, and some lost, to secure for blacks the most basic rights that whites were routinely granted....

26. The notion of blacks as a subordinated Other in Western culture has been a major theme in scholarship exploring the cultural and sociological structure of racism. See Trost, "Western Metaphysical Dualism as an Element in Racism," in J. Hodge, D. Struckmann, and L. Trost, eds., *Cultural Bases of Racism and Group Oppression* 49 (1975) (arguing that black and white are seen as paired antinomies, and that there is a hierarchy within the antinomies, with Caucasians and Western culture constituting the preferred or higher antinomy). Frantz Fanon has summarized the attitude of the West toward blackness as a projection of Western anxiety concerning the Other in terms of skin color: "In Europe, the black man is the symbol of Evil.... The torturer is the black man, Satan is black, one talks of shadow, when one is dirty one is black—whether one is thinking of physical dirtiness or moral dirtiness. It would be astonishing, if the trouble were taken to bring them all together, to see the vast number of expressions that make the black man the equivalent of sin. In Europe, whether concretely or symbolically, the black man stands for the bad side of the character. As long as one cannot understand this fact one is doomed to talk in circles about the 'black problem.' Blackness, darkness, shadow, shades, night, the labyrinths of the earth, abysmal depths, blacken someone's reputation; and on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light"; F. Fanon, *Black Skins, White Masks*, 188-89 (1967); see S. Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race, and Sadness*, 30 (1985) (arguing that the notion that "blacks are the antithesis of the mirage of whiteness, the ideal of European aesthetic values, strikes the reader as an extension of some 'real,' perceived difference to which the qualities of 'good' and 'bad' have been erroneously applied. But the very concept of color is a quality of Otherness, not of reality."); Isaacs, "Blackness and Whiteness," *Encounter*, 8 (Aug. 1963); see also W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1650-1712* (1968) (discussing how sixteenth- and seventeenth-century English writers used the concept that blacks were the Europeans' polar opposites in order to establish an elaborate hierarchy to classify other colored people in the world). Others who have used the concept of Otherness as a framework for

examining black/white relations include C. Degler, *Neither Black Nor White: Slavery and Race Relations in Brazil and The United States* (1971), and Copeland, "The Negro as a Contrast Conception," in E. Thompson, ed., *Race Relations and the Race Problem: A Definition and An Analysis*, 152-79 (1939). . . .

27. J. Derrida, *Dissemination*, viii, trans. B. Johnson (1981) (emphasis in original).

28. E. Morgan, *American Slavery—American Freedom*, 386 (1975).

29. G. Fredrickson, *White Supremacy: A Comparative Study in American and South African History*, (1981).

30. C. Vann Woodward, *The Strange Career of Jim Crow*, 76 (1958).

31. One might argue that the fact that many poor whites were simultaneously disenfranchised cuts against the idea that racist ideology was the glue that organized and held whites together across class lines. In reality, the ability to exclude lower-class whites was achieved politically, via racist rhetoric.

32. *Id.* at 44-45.

33. *Id.* at 73-74.

34. "The historical record reveals that the embrace of white supremacy as ideology and as practice was a strategy for assimilation by European working class immigrants, the white ethnics who were to constitute a major part of the membership and leadership of organized labor in the United States"; . . . Hill, "Race and Ethnicity in Organized Labor: The Historical Sources of Restrictions to Affirmative Action," *J. Intergroup Rel.*, 6 (winter 1984). Even today, unions that are supposed to represent the "consciousness of the working class" often still fail to represent the interests of the black American worker. For an account of the racist history of the AFL-CIO, see Hill, "The AFL-CIO and the Black Worker: Twenty-Five Years After the Merger," *J. Intergroup Rel.*, 5 (Sept. 1982).

35. This effort to minimize black influence reflects what Derrick Bell, Jr., has called the principle of "involuntary sacrifice"; see D. Bell, *Race, Racism, and American Law*, U 1.8, at 29-30. . . . Bell asserts that throughout American history, Black interests have been sacrificed when necessary to reestablish the bonds of the white community, "so that identifiably different groups of whites may settle a dispute and establish or reestablish their relationship"; *id.* at 30.

36. These two manifestations of racial subordination are not mutually exclusive. In fact, it only makes sense to separate various aspects of racial oppression in this post-civil rights era in order to understand how the movement changed some social norms and reinforced others. Most blacks probably did not experience or perceive their oppression as reflecting two separate structures.

37. Socially, many blacks lived in a society comparable in many ways to that of the white elites. Hardly strangers to

debutante balls, country clubs, and vacations abroad, these blacks lived lives of which many whites only dreamed. Nevertheless, despite their material wealth, upper-middle-class blacks were still members of a subordinated group. Where rights and privileges were distributed on the basis of race, even a distinguished African-American had to take a back seat to each white—no matter how poor, ignorant, or uneducated the white might be. . . .

38. Sowell exemplifies what may be the worst development of the civil rights movement—that some blacks who have benefited the most from the formal gestures of equality now identify with those who attempt to affirm the legitimacy of oppressing other blacks. Clearly, this legitimization and desertion by some blacks has been politically damaging and may undermine future efforts to organize.

39. *Resurgence* (Skylight Pictures, Emancipation Arts, Sept. 1981).

40. Consider, for example, the possible police responses to students who violated local ordinances by sitting in at segregated lunch counters and demanding service. Government officials could have ordered the students arrested, thereby upholding the segregation policy, or they could have ignored them, which would have incidentally supported the students' efforts. Both tactics were followed throughout the course of the movement. Because officials sometimes had a degree of choice in the matter, and courts had the ultimate power to review the legitimacy of the laws and the officials' actions, black protesters' use of rights rhetoric can be seen as an effort to defend themselves against arrest or conviction for violating the norms of white supremacy.

41. J. Ferai, *Gramsci's Political Thought: Hegemony, Consciousness, and the Revolutionary Process* 51 (1981).

## Part Six

### THE INTERSECTION OF RACE AND GENDER

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MAPPING THE MARGINS:  
INTERSECTIONALITY, IDENTITY  
POLITICS, AND VIOLENCE AGAINST  
WOMEN OF COLOR

*Kimberlé Williams Crenshaw*

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#### INTRODUCTION

**O**VER the last two decades, women have organized against the almost routine violence that shapes their lives.<sup>1</sup> Drawing from the strength of shared experience, women have recognized that the political demands of millions speak more powerfully than do the pleas of a few isolated voices. This politicization in turn has transformed the way we understand violence against women. For example, battering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class.<sup>2</sup> This process of recognizing as social and systemic what was formerly perceived as isolated and individual has also characterized the identity politics of African-Americans, other people of color, and gays and lesbians, among others. For all these groups, identity-based politics has been a source of strength, community, and intellectual development.

The embrace of identity politics, however, has been in tension with dominant conceptions of social justice. Race, gender, and other identity categories are most often treated in mainstream liberal discourse as vestiges of bias or domination—that is, as intrinsically negative frameworks in which social power works to exclude or marginalize those who are different.

According to this understanding, our liberatory objective should be to empty such categories of any social significance. Yet implicit in certain strands of feminist and racial liberation movements, for example, is the view that the social power in delineating difference need not be the power of domination; it can instead be the source of social empowerment and reconstruction.

The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite—that it frequently conflates or ignores intragroup differences. In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring difference *within* groups contributes to tension *among* groups, another problem of identity politics which bears on efforts to politicize violence against women. Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. Thus, when the practices expound identity as “woman” or “person of color” as an either/or proposition, they relegate the identity of women of color to a location that resists telling.

My objective in this article is to advance the telling of that location by exploring the race and gender dimensions of violence against women of color. Contemporary feminist and antiracist

discourses have failed to consider intersectional identities such as women of color.<sup>3</sup> Focusing on two dimensions of male violence against women—battering and rape—I consider how the experiences of women of color are frequently the product of intersecting patterns of racism and sexism,<sup>4</sup> and how these experiences tend not to be represented within the discourses either of feminism or of antiracism. Because of their intersectional identity as both women *and* of color within discourses shaped to respond to one *or* the other, women of color are marginalized within both.

In an earlier article, I used the concept of intersectionality to denote the various ways in which race and gender interact to shape the multiple dimensions of black women's employment experiences.<sup>5</sup> My objective there was to illustrate that many of the experiences black women face are not subsumed within the traditional boundaries of race or gender discrimination as these boundaries are currently understood, and that the intersection of racism and sexism factors into black women's lives in ways that cannot be captured wholly by looking separately at the race or gender dimensions of those experiences. I build on those observations here by exploring the various ways in which race and gender intersect in shaping structural, political, and representational aspects of violence against women of color.<sup>6</sup>

I should say at the outset that intersectionality is not being offered here as some new, totalizing theory of identity. Nor do I mean to suggest that violence against women of color can be explained only through the specific frameworks of race and gender considered here.<sup>7</sup> Indeed, factors I address only in part or not at all, such as class or sexuality, are often as critical in shaping the experiences of women of color. My focus on the intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed.

I have divided the issues presented in this article into three categories. In Part I, I discuss structural intersectionality, the ways in which the location of women of color at the intersection of race and gender makes our actual experi-

ence of domestic violence, rape, and remed reform qualitatively different from that of white women. I shift the focus in Part II to politic intersectionality, where I analyze how feminist and antiracist politics have both, paradoxically often helped to marginalize the issue of violence against women of color. Finally, I address the implications of the intersectional approach within the broader scope of contemporary identity politics.

## I. STRUCTURAL INTERSECTIONALITY

*A. Structural Intersectionality and Battering*  
I observed the dynamics of structural intersectionality during a brief field study of batter women's shelters located in minority communities in Los Angeles. In most cases, the physical assault that leads women to these shelters is merely the most immediate manifestation of the subordination they experience. Many women who seek protection are unemployed or underemployed, and a good number of them are poor. Shelters serving these women cannot afford to address only the violence inflicted by the batterer; they must also confront the other multilayered and routinized forms of domination that often converge in these women's lives hindering their ability to create alternatives to the abusive relationships that brought them to shelters in the first place. Many women of color, for example, are burdened by poverty, child care responsibilities, and the lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices often faced by women of color, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.

Where systems of race, gender, and class domination converge, as they do in the experiences of battered women of color, intervention strategies based solely on the experiences of women who do not share the same class or racial backgrounds will be of limited help to women who face different obstacles because of race and class. Such was the case in 1990 when Congress

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amended the marriage fraud provisions of the Immigration and Nationality Act to protect immigrant women who were battered or exposed to extreme cruelty by the U.S. citizens or permanent residents these women immigrated to the United States to marry. Under the marriage fraud provisions of the act, a person who immigrated to the United States in order to marry a U.S. citizen or permanent resident had to remain "properly" married for two years before even applying for permanent resident status,<sup>8</sup> at which time applications for the immigrant's permanent status were required of both spouses.<sup>9</sup> Predictably, under these circumstances, many immigrant women were reluctant to leave even the most abusive of partners for fear of being deported. When faced with the choice between protection from their batterers and protection against deportation, many immigrant women chose the latter. Reports of the tragic consequences of this double subordination put pressure on Congress to include in the Immigration Act of 1990 a provision amending the marriage fraud rules to allow for an explicit waiver for hardship caused by domestic violence.<sup>10</sup> Yet many immigrant women, particularly immigrant women of color, have remained vulnerable to battering because they are unable to meet the conditions established for a waiver. The evidence required to support a waiver "can include, but is not limited to, reports and affidavits from police, medical personnel, psychologists, school officials, and social service agencies."<sup>11</sup> For many immigrant women, limited access to these resources can make it difficult for them to obtain the evidence needed for a waiver. Cultural barriers, too, often further discourage immigrant women from reporting or escaping battering situations. Tina Shum, a family counselor at a social service agency, points out that "[t]his law sounds so easy to apply, but there are cultural complications in the Asian community that make even these requirements difficult. . . . Just to find the opportunity and courage to call us is an accomplishment for many."<sup>12</sup> The typical immigrant spouse, she suggests, may live "[i]n an extended family where several generations live together, there may be no privacy on the telephone, no

opportunity to leave the house and no understanding of public phones."<sup>13</sup> As a consequence, many immigrant women are wholly dependent on their husbands as their link to the world outside their homes.

Immigrant women are also vulnerable to spousal violence because so many of them depend on their husbands for information regarding their legal status. Many women who are now permanent residents continue to suffer abuse under threats of deportation by their husbands. Even if the threats are unfounded, women who have no independent access to information will still be intimidated by such threats. Further, even though the domestic violence waiver focuses on immigrant women whose husbands are U.S. citizens or permanent residents, there are countless women married to undocumented workers (or are themselves undocumented) who suffer in silence for fear that the security of their entire families will be jeopardized should they seek help or otherwise call attention to themselves.

Language barriers present another structural problem that often limits opportunities of non-English-speaking women to take advantage of existing support services. Such barriers limit access not only to information about shelters but also to the security that shelters provide. Some shelters turn non-English-speaking women away for lack of bilingual personnel and resources.

These examples illustrate how patterns of subordination intersect in women's experience of domestic violence. Intersectional subordination need not be intentionally produced; in fact, it is frequently the consequence of the imposition of one burden interacting with pre-existing vulnerabilities to create yet another dimension of disempowerment. In the case of the marriage fraud provisions of the Immigration and Nationality Act, the imposition of a policy specifically designed to burden one class—immigrant spouses seeking permanent resident status—exacerbated the disempowerment of those already subordinated by other structures of domination. By failing to take into account immigrant spouses' vulnerability to domestic violence, Congress positioned these

women to absorb the simultaneous impact of its anti-immigration policy and their spouses' abuse.

The enactment of the domestic violence waiver of the marriage fraud provisions similarly illustrates how modest attempts to respond to certain problems can be ineffective when the intersectional location of women of color is not considered in fashioning the remedy. Cultural identity and class both affect the likelihood that a battered spouse could take advantage of the waiver. Although the waiver is formally available to all women, the terms of the waiver make it inaccessible to some. Immigrant women who are socially, culturally, or economically privileged are more likely to be able to marshall the resources needed to satisfy the waiver requirements. Those immigrant women who are least able to take advantage of the waiver—women who are socially or economically the most marginal—are the ones most likely to be women of color.

## II. POLITICAL INTERSECTIONALITY

THE concept of political intersectionality highlights the fact that women of color are situated within at least two subordinated groups that frequently pursue conflicting political agendas. The need to split one's political energies between two sometimes-opposing groups is a dimension of intersectional disempowerment which men of color and white women seldom confront. Indeed, their specific raced and gendered experiences, although intersectional, often define as well as confine the interests of the entire group. For example, racism as experienced by people of color who are of a particular gender—male—tends to determine the parameters of antiracist strategies, just as sexism as experienced by women who are of a particular race—white—tends to ground the women's movement. The problem is not simply that both discourses fail women of color by not acknowledging the "additional" issue of race or of patriarchy but, rather, that the discourses are often inadequate even to the discrete tasks of articulating the full dimensions of racism and sexism. Because women of color experience racism in ways not always the same as those experi-

enced by men of color and sexism in ways not always parallel to experiences of white women, antiracism and feminism are limited, even on their own terms.

Among the most troubling political consequences of the failure of antiracist and feminist discourses to address the intersections of race and gender is the fact that, to the extent that they can forward the interest of "people of color" and "women," respectively, one analysis often implicitly denies the validity of the other. The failure of feminism to interrogate racism means that feminism's resistance strategies will often replicate and reinforce the subordination of people of color; likewise, the failure of antiracism to interrogate patriarchy means that a racism will frequently reproduce the subordination of women. These mutual elisions present a particularly difficult political dilemma for women of color. Adopting either analysis constitutes a denial of a fundamental dimension of our subordination and precludes the development of a political discourse that more fully empowers women of color.

*A. The Politicization of Domestic Violence*  
That the political interests of women of color are obscured and sometimes jeopardized by political strategies that ignore or suppress intersectional issues is illustrated by my experience gathering information for this article. I attempted to review Los Angeles Police Department statistics reflecting the rate of domestic violence interventions by precinct, because statistics can provide a rough picture of domestic violence by racial group, given the degree of racial segregation in Los Angeles.<sup>14</sup> The LAPD, however, would not release the statistics. A representative explained that the statistics were not reliable in part, because domestic violence activism both within and outside the LAPD—particularly that statistics reflecting the extent of domestic violence in minority communities might be selectively interpreted and publicized in ways that would undermine long-term efforts to encourage the LAPD to address domestic violence as a serious problem. Activists were worried that statistics might permit opponents to frame domestic violence as a minority problem, therefore, not deserving of aggressive ac-

color and sexism in ways not experienced by white women, feminism is limited, even on its most troubling political consequence of antiracist and feminist analysis. The intersections of race and gender fact that, to the extent that the interest of "people of color," respectively, one analysis denies the validity of the other. Feminism to interrogate racism and sexism's resistance strategies will reinforce the subordination of women. Likewise, the failure of anti-patriarchy means that it cannot fully reproduce the subordination of color. These mutual elisions present a difficult political dilemma for activists. Adopting either analysis constitutes a fundamental dimension of analysis and precludes the developmental discourse that more fully integrates race and gender.

*Intersection of Domestic Violence*  
The interests of women of color are sometimes jeopardized by political silence or suppression of intersectionality. I illustrate this by my experiences in Los Angeles Police Department. In reflecting the rate of domestic violence by precinct, because such statistics provide a rough picture of arrests even the degree of racial segregation. The LAPD, however, does not release these statistics. A representative set of statistics were not released, so domestic violence activists—outside the LAPD—feared that the extent of domestic violence in communities might be seen and publicized in ways that would undermine long-term efforts to address domestic violence as a priority. Activists were worried that the opposition could dismiss domestic violence as a minority problem and, therefore, avoid taking aggressive action.

The informant also claimed that representatives from various minority communities opposed the release of these statistics. They were concerned, apparently, that the data would unfairly represent black and brown communities as unusually violent, potentially reinforcing stereotypes that might be used in attempts to justify oppressive police tactics and other discriminatory practices. These misgivings are based on the familiar and not-unfounded premise that certain minority groups—especially black men—have already been stereotyped as uncontrollably violent. Some worry that attempts to make domestic violence an object of political action may only serve to confirm such stereotypes and undermine efforts to combat negative beliefs about the black community.

This account sharply illustrates how women of color can be erased by the strategic silences of antiracism and feminism. The political priorities of both have been defined in ways that suppress information that could facilitate attempts to confront the problem of domestic violence in communities of color.

#### I. DOMESTIC VIOLENCE AND ANTI-RACIST POLITICS

Within communities of color, efforts to stem the politicization of domestic violence are often grounded in attempts to maintain the integrity of the community. The articulation of this perspective takes different forms. Some critics allege that feminism has no place within communities of color, that the issues are internally divisive, and that they represent the migration of white women's concerns into a context in which they are not merely irrelevant but harmful. At its most extreme, this rhetoric denies that gender violence is a problem in the community and characterizes any effort to politicize gender subordination as itself a community problem. This is the position taken by Shahrazad Ali in her controversial book, *The Blackman's Guide to Understanding the Blackwoman*.<sup>15</sup> In this stridently antifeminist tract, Ali draws a positive correlation between domestic violence and the liberation of African-Americans. Ali blames the deteriorating conditions within the black community on the insubordination of black women and on the failure of black men to

control them.<sup>16</sup> She goes so far as to advise black men to physically chastise black women when they are "disrespectful."<sup>17</sup> While she cautions that black men must use moderation in disciplining "their" women, she argues that they must sometimes resort to physical force to re-establish the authority over black women that racism has disrupted.

Ali's premise is that patriarchy is beneficial for the black community, and that it must be strengthened through coercive means if necessary.<sup>18</sup> Yet the violence that accompanies this will to control is devastating, not just for the black women who are victimized but for the entire black community.<sup>19</sup> The recourse to violence to resolve conflicts establishes a dangerous pattern for children raised in such environments and contributes to many other pressing problems.<sup>20</sup> It has been estimated that nearly 40 percent of all homeless women and children have fled violence in the home,<sup>21</sup> and an estimated 63 percent of young men between the ages of eleven and twenty who are imprisoned for homicide have killed their mothers' batterers.<sup>22</sup> Moreover, while gang violence, homicide, and other forms of black-on-black crime have increasingly been discussed within African-American politics, patriarchal ideas about gender and power preclude the recognition of domestic violence as yet another compelling form of black-on-black crime.

Efforts such as Ali's to justify violence against women in the name of black liberation are indeed extreme.<sup>23</sup> The more common problem is that the political or cultural interests of the community are interpreted in a way that precludes full public recognition of the problem of domestic violence. While it would be misleading to suggest that white Americans have come to terms with the degree of violence in their own homes, it is nonetheless the case that race adds yet another dimension to sources of suppression of the problem of domestic violence within nonwhite communities. People of color often must weigh their interests in avoiding issues that might reinforce distorted public perceptions against the need to acknowledge and address intracommunity problems. Yet the cost of suppression is seldom recognized, in part because the failure to discuss the issue shapes

perceptions of how serious the problem is in the first place.

The controversy over Alice Walker's novel *The Color Purple* can be understood as an intra-community debate about the political costs of exposing gender violence within the black community. Some critics chastised Walker for portraying black men as violent brutes. One critic lambasted Walker's portrayal of Celie, the emotionally and physically abused protagonist who finally triumphs in the end; the critic contended that Walker had created in Celie a black woman whom she couldn't imagine existing in any black community she knew or could conceive of.<sup>24</sup>

The claim that Celie was somehow an inauthentic character might be read as a consequence of silencing discussion of intracommunity violence. Celie may be unlike any black woman we know because the real terror experienced daily by minority women is routinely concealed in a misguided (though perhaps understandable) attempt to forestall racial stereotyping. Of course, it is true that representations of black violence—whether statistical or fictional—are often written into a larger script that consistently portrays black and other minority communities as pathologically violent. The problem, however, is not so much the portrayal of violence itself as it is the absence of other narratives and images portraying a fuller range of black experience. Suppression of some of these issues in the name of antiracism imposes real costs: where information about violence in minority communities is not available, domestic violence is unlikely to be addressed as a serious issue.

The political imperatives of a narrowly focused antiracist strategy support other practices that isolate women of color. For example, activists who have attempted to provide support services to Asian- and African-American women report intense resistance from those communities. At other times, cultural and social factors contribute to suppression. Nilda Remonte, director of Everywoman's Shelter in Los Angeles, points out that in the Asian community, saving the honor of the family from shame is a priority. Unfortunately, this priority tends

to be interpreted as obliging women not to scream rather than obliging men not to hit.

Race and culture contribute to the suppression of domestic violence in other ways as well. Women of color are often reluctant to call the police, a hesitancy likely due to a general unwillingness among people of color to subject their private lives to the scrutiny and control of a police force that is frequently hostile. This is also a more generalized community attitude against public intervention, the product of a desire to create a private world free from diverse assaults on the public lives of race-subordinated people. The home is not simply a man's castle in the patriarchal sense: it may also function as a safe haven from the indignities of life in a racist society. However, but for a "safe haven" in many cases, women of color victimized by violence might otherwise seek help.

There is also a general tendency within anti-racist discourse to regard the problem of violence against women of color as just another manifestation of racism. In this sense, the relevance of gender domination within the community is reconfigured as a consequence of discrimination against men. Of course, it is probably true that racism contributes to the cycle of violence, given the stress that men of color experience in dominant society; it is therefore more than reasonable to explore the links between racism and domestic violence. Yet the chain of violence is more complex and extensive beyond this single link. Racism is linked to patriarchy to the extent that racism denies women of color the power and privilege that dominant men enjoy. When violence is understood as acting-out of being denied male power in other spheres, it seems counterproductive to embrace constructs that implicitly link the solution of domestic violence to the acquisition of greater male power. The more promising political imperative is to challenge the legitimacy of such power expectations by exposing their dysfunctional and debilitating effect on families and communities of color. Moreover, while understanding links between racism and domestic violence is an important component of an effective intervention strategy, it is also crucial

as obliging women not to oblige men not to hit. They contribute to the suppression of violence in other ways as well. They are often reluctant to call attention likely due to a general aversion people of color to subjecting them to the scrutiny and control of a frequently hostile. There is a generalized community ethic of intervention, the product of a private world free from the control in the public lives of racially diverse people. The home is not simply a safe patriarchal sense: it may also be a haven from the indignities of society. However, but for this many cases, women of color experience might otherwise seek

a general tendency within anti-violence movements to regard the problem of violence against women of color as just another aspect of racism. In this sense, the relegation of women of color to the margins within the community is seen as a consequence of discrimination. Of course, it is probably true that racism contributes to the cycle of violence. The stress that men of color are dominant in a dominant society; it is therefore understandable to explore the links between racism and domestic violence. Yet the link is more complex and extends beyond the simple link. Racism is linked to the extent that racism denies men power and privilege that dominant culture affords. Violence is understood as an attempt to deny male power in other areas. It is counterproductive to embrace racism and implicitly link the solution to racism to the acquisition of greater power. More promising political interventions challenge the legitimacy of such linkages by exposing their dysfunctionalizing effect on families and communities of color. Moreover, while understanding the relationship between racism and domestic violence is an important component of any intervention strategy, it is also clear

that women of color need not await the ultimate triumph over racism before they can expect to live violence-free lives.

## 2. RACE AND THE DOMESTIC VIOLENCE LOBBY

Not only do race-based priorities function to obscure the problem of violence suffered by women of color; feminist concerns often suppress minority experiences as well. Strategies for increasing awareness of domestic violence within the white community tend to begin by citing the commonly shared assumption that battering is a minority problem. The strategy then focuses on demolishing this straw man, stressing that spousal abuse also occurs in the white community. Countless first-person stories begin with a statement like, "I was not supposed to be a battered wife." That battering occurs in families of all races and all classes seems to be an ever-present theme of antiabuse campaigns. First-person anecdotes and studies, for example, consistently assert that battering cuts across racial, ethnic, economic, educational, and religious lines. Such disclaimers seem relevant only in the presence of an initial, widely held belief that domestic violence occurs primarily in minority or poor families. Indeed, some authorities explicitly renounce the "stereotypical myths" about battered women; a few commentators have even transformed the message that battering is not *exclusively* a problem of the poor or minority communities into a claim that it *equally* affects all races and classes. Yet these comments seem less concerned with exploring domestic abuse within "stereotyped" communities than with removing the stereotype as an obstacle to exposing battering within white middle- and upper-class communities.<sup>25</sup>

Efforts to politicize the issue of violence against women challenge beliefs that violence occurs only in homes of Others. While it is unlikely that advocates and others who adopt this rhetorical strategy intend to exclude or ignore the needs of poor and colored women, the underlying premise of this seemingly universalistic appeal is to keep the sensibilities of dominant social groups focused on the experiences of those groups. Indeed, as subtly suggested by the opening comments of Senator

David Boren (Dem.-Okla.) in support of the Violence Against Women Act of 1991, the displacement of the Other as the presumed victim of domestic violence works primarily as a political appeal to rally white elites. Boren said: "Violent crimes against women are not limited to the streets of the inner cities, but also occur in homes in the urban and rural areas across the country. Violence against women affects not only those who are actually beaten and brutalized, but indirectly affects all women. Today, our wives, mothers, daughters, sisters, and colleagues are held captive by fear generated from these violent crimes—held captive not for what they do or who they are, but solely because of gender."<sup>26</sup> Rather than focusing on and illuminating how violence is disregarded when the home is somehow Other, the strategy implicit in Senator Boren's remarks functions instead to politicize the problem only within the dominant community. This strategy permits white women victims to come into focus, but it does little to disrupt the patterns of neglect that permitted the problem to continue as long as it was imagined to be a minority problem. Minority women's experience of violence is ignored, except to the extent that it gains white support for domestic violence programs in the white community.

Senator Boren and his colleagues no doubt believe that they have provided legislation and resources that will address the problems of all women victimized by domestic violence. Yet despite their universalizing rhetoric of "all" women, they were able to empathize with female victims of domestic violence only by looking past the plight of Other women and by recognizing the familiar faces of their own. The strength of the appeal to "protect our women" must be its race and class specificity. After all, it has always been someone's wife, mother, sister, or daughter who has been abused, even when the violence was stereotypically black or brown, and poor. The point here is not that the Violence Against Women Act is particularistic on its own terms, but that unless the senators and other policymakers ask why violence remained insignificant as long as it was understood as a minority problem, it is unlikely that

women of color will share equally in the distribution of resources and concern. It is even more unlikely, however, that those in power will be forced to confront this issue. As long as attempts to politicize domestic violence focus on convincing whites that this is not a "minority" problem but *their* problem, any authentic and sensitive attention to the experiences of black and other minority women probably will continue to be regarded as jeopardizing the movement.

While Senator Boren's statement reflects a self-consciously political presentation of domestic violence, an episode of the CBS news program *48 Hours* shows how similar patterns of othering nonwhite women are apparent in journalistic accounts of domestic violence as well.<sup>27</sup> The program presented seven women who were victims of abuse. Six were interviewed at some length along with their family members, friends, supporters, and even detractors. The viewer got to know something about each of these women. These victims were humanized. Yet the seventh woman, the only nonwhite one, never came into focus. She was literally unrecognizable throughout the segment, first introduced by photographs showing her face badly beaten and later shown with her face electronically altered in the videotape of a hearing at which she was forced to testify. Other images associated with this woman included shots of a bloodstained room and blood-soaked pillows. Her boyfriend was pictured handcuffed while the camera zoomed in for a close-up of his bloodied sneakers. Of all the presentations in the episode, hers was the most graphic and impersonal. The overall point of the segment "featuring" this woman was that battering might not escalate into homicide if battered women would only cooperate with prosecutors. However, in focusing on its own agenda and failing to explore why this woman refused to cooperate, the program diminished this woman, communicating, however subtly, that she was responsible for her own victimization.

Unlike the other women, all of whom, again, were white, this black woman had no name, no family, no context. The viewer sees her only as victimized and uncooperative. She cries when

shown pictures; she pleads not to be forced to view the bloodstained room and her disfigured face. The program does not help the viewer to understand her predicament. The possible reasons she did not want to testify—fear, love, or possibly both—are never suggested. Most unfortunately, she, unlike the other six, is given no epilogue. While the fates of the other women are revealed at the end of the episode, we discover nothing about the black woman. She, like the Others she represents, is simply left to herself and soon forgotten.

I offer this description to suggest that Other women are silenced as much by being relegated to the margin of experience as by total exclusion. Tokenistic, objectifying, voyeuristic inclusion is at least as disempowering as complete exclusion. The effort to politicize violence against women will do little to address black and other minority women if their images are retained simply to magnify the problem rather than to humanize their experiences. Similarly, the antiracist agenda will not be advanced significantly by forcibly suppressing the reality of battering in minority communities. As the *48 Hours* episode makes clear, the images and stereotypes we fear are indeed readily available, and they are frequently deployed in ways that do not generate sensitive understanding of the nature of domestic violence in minority communities.

### 3. RACE AND DOMESTIC VIOLENCE SUPPORT SERVICES

Women working in the field of domestic violence have sometimes reproduced the subordination and marginalization of women of color by adopting policies, priorities, or strategies of empowerment that either elide or wholly disregard the particular intersectional needs of women of color. While gender, race, and class intersect to create the particular context in which women of color experience violence, certain choices made by "allies" can reproduce intersectional subordination within the very resistance strategies developed to respond to the problem.

This problem is starkly illustrated by the inaccessibility of domestic violence support ser-

she pleads not to be forced to stand room and her disfigured form does not help the viewer in her predicament. The possible fear, love, and want to testify—fear, love, are never suggested. Most unlike the other six, is given while the fates of the other end at the end of the episode, leaving about the black woman. Hers she represents, is simply soon forgotten.

Description to suggest that Other is as much by being relegated experience as by total exclusion, objectifying, voyeuristic inclusion, disempowering as complete effort to politicize violence will do little to address black women if their images are magnify the problem rather than their experiences. Similarly, it will not be advanced significantly by suppressing the reality of minority communities. As the 48 cases clear, the images and stories are indeed readily available, currently deployed in ways that sensitive understanding of domestic violence in minority

## DOMESTIC VIOLENCE SUPPORT

In the field of domestic violence, reproduced the subordination of women of color to ideologies, priorities, or strategies that either elide or wholly ignore the intersectional needs of women. While gender, race, and class are the particular context in which color experience violence, certainly by "allies" can reproduce this subordination within the very redeveloped to respond to the

is starkly illustrated by the domestic violence support ser-

vices for many non-English-speaking women. In a letter written to the deputy commissioner of the New York State Department of Social Services, Diana Campos, director of Human Services for Programas de Ocupaciones y Desarrollo Económico Real, Inc. (PODER), detailed the case of a Latina in crisis who was repeatedly denied accommodation at a shelter because she could not prove that she was English-proficient. The woman had fled her home with her teenaged son, believing her husband's threats to kill them both. She called the domestic violence hotline administered by PODER, seeking shelter for herself and her son. However, because most shelters would not accommodate the woman with her son, they were forced to live on the streets for two days. The hotline counselor was finally able to find an agency that would take both the mother and her son, but when the counselor told the intake coordinator at the shelter that the woman spoke limited English, the coordinator told her that they could not take anyone who was not English-proficient. When the woman in crisis called back and was told of the shelter's "rule," she replied that she could understand English if spoken to her slowly. As Campos explains, Mildred, the hotline counselor, told Wendy, the intake coordinator

that the woman said that she could communicate a little in English. Wendy told Mildred that they could not provide services to this woman because they have house rules that the woman must agree to follow. Mildred asked her, "What if the woman agrees to follow your rules? Will you still not take her?" Wendy responded that all of the women at the shelter are required to attend [a] support group and they would not be able to have her in the group if she could not communicate. Mildred mentioned the severity of this woman's case. She told Wendy that the woman had been wandering the streets at night while her husband is home, and she had been mugged twice. She also reiterated the fact that this woman was in danger of being killed by either her husband or a mugger. Mildred expressed that the woman's safety was a priority at this point, and that once in a safe place, receiving counseling in a support group could be dealt with.<sup>28</sup>

The intake coordinator restated the shelter's policy of taking only English-speaking women,

and stated further that the woman would have to call the shelter herself for screening. If the woman could communicate with them in English, she might be accepted. When the woman called the PODER hotline later that day, she was in such a state of fear that the hotline counselor who had been working with her had difficulty understanding her in Spanish. The woman had been slipping back into her home during the day when her husband was at work. She remained in a heightened state of anxiety because he was returning shortly, and she would be forced to go back out into the streets for yet another night. Campos directly intervened at this point, calling the executive director of the shelter. A counselor called back from the shelter. As Campos reports, the counselor told her that

they did not want to take the woman in the shelter because they felt that the woman would feel isolated. I explained that the son agreed to translate for his mother during the intake process. Furthermore, that we would assist them in locating a Spanish-speaking battered women's advocate to assist in counseling her. Marie stated that utilizing the son was not an acceptable means of communication for them, *since it further victimized the victim*. In addition, she stated that they had similar experiences with women who were non-English-speaking, and that the women eventually just left because they were not able to communicate with anyone. I expressed my extreme concern for her safety and reiterated that we would assist them in providing her with the necessary services until we could get her placed someplace where they had bilingual staff.<sup>29</sup>

After several more calls, the shelter finally agreed to take the woman. The woman called once more during the negotiation; however, once a plan was in place, the woman never called back. Said Campos, "After so many calls, we are now left to wonder if she is alive and well, and if she will ever have enough faith in our ability to help her to call us again the next time she is in crisis."<sup>30</sup>

Despite this woman's desperate need, she was unable to receive the protection afforded English-speaking women, due to the shelter's rigid commitment to exclusionary policies. Perhaps even more troubling than the shelter's lack of bilingual resources was its refusal to allow a

friend or relative to translate for the woman. This story illustrates the absurdity of a feminist approach that makes the ability to attend a support group without a translator a more significant consideration in the distribution of resources than the risk of physical harm on the street. The point is not that the shelter's image of empowerment is empty but, rather, that it was imposed without regard to the disempowering consequences for women who didn't match the kind of client the shelter's administrators imagined. Thus, they failed to accomplish the basic priority of the shelter movement—to get the woman out of danger.

Here the woman in crisis was made to bear the burden of the shelter's refusal to anticipate and provide for the needs of non-English-speaking women. Said Campos, "It is unfair to impose more stress on victims by placing them in the position of having to demonstrate their proficiency in English in order to receive services that are readily available to other battered women."<sup>31</sup> The problem is not easily dismissed as one of well-intentioned ignorance. The specific issue of monolingualism and the monistic view of women's experience that set the stage for this tragedy were not new issues in New York. Indeed, several women of color have reported that they had repeatedly struggled with the New York State Coalition Against Domestic Violence over language exclusion and other practices that marginalized the interests of women of color.<sup>32</sup> Yet despite repeated lobbying, the coalition did not act to incorporate the specific needs of nonwhite women into its central organizing vision.

Some critics have linked the coalition's failure to address these issues to the narrow vision of coalition that animated its interaction with women of color in the first place. The very location of the coalition's headquarters in Woodstock, New York—an area where few people of color live—seemed to guarantee that women of color would play a limited role in formulating policy. Moreover, efforts to include women of color came, it seems, as something of an afterthought. Many were invited to participate only after the coalition was awarded a grant by the state to recruit women of color. However,

as one "recruit" said, "they were not really prepared to deal with us or our issues. They thought that they could simply incorporate us into their organization without rethinking any of their beliefs or priorities and that we would be happy."<sup>33</sup> Even the most formal gestures of inclusion were not to be taken for granted. On one occasion when several women of color attended a meeting to discuss a special task force on women of color, the group debated all day over including the issue on the agenda.<sup>34</sup>

The relationship between the white women and the women of color on the board was a rocky one from beginning to end. Other conflicts developed over differing definitions of feminism. For example, the board decided to hire a Latina staffperson to manage outreach programs to the Latino community, but the white members of the hiring committee rejected candidates favored by Latina committee members who did not have recognized feminist credentials. As Campos pointed out, by measuring Latinas against their own biographies, the white members of the board failed to recognize the different circumstances under which feminist consciousness develops and manifests itself within minority communities. Many of the women who interviewed for the position were established activists and leaders within their own community, a fact in itself suggesting that these women were probably familiar with the specific gender dynamics in their communities and were accordingly better qualified to handle outreach than were other candidates with more conventional feminist credentials.<sup>35</sup>

The coalition ended a few months later, when the women of color walked out.<sup>36</sup> Many of these women returned to community-based organizations, preferring to struggle over women's issues within their communities rather than struggle over race and class issues with white middle-class women. Yet as illustrated by the case of the Latina who could find no shelter, the dominance of a particular perspective and set of priorities within the shelter community continues to marginalize the needs of women of color.

The struggle over which differences matter and which do not is neither abstract nor insig-

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nificant. Indeed, these conflicts are about more than difference as such; they raise critical issues of power. The problem is not simply that women who dominate the antiviolence movement are different from women of color but, rather, that they frequently have the power to determine, either through material resources or rhetorical resources, whether the intersectional differences of women of color will be incorporated at all into the basic formulation of policy. Thus, the struggle over incorporating these differences is not a petty or superficial conflict about who gets to sit at the head of the table. In the context of violence, it is sometimes a deadly serious matter of who will survive—and who will not.<sup>37</sup>

#### *B. Political Intersectionalities in Rape*

In the previous sections, I have used intersectionality to describe or frame various relationships between race and gender. I have used it as a way to articulate the interaction of racism and patriarchy generally. I have also used intersectionality to describe the location of women of color both within overlapping systems of subordination and at the margins of feminism and antiracism. When race and gender factors are examined in the context of rape, intersectionality can be used to map the ways in which racism and patriarchy have shaped conceptualizations of rape, to describe the unique vulnerability of women of color to these converging systems of domination, and to track the marginalization of women of color within antiracist and antirape discourses.<sup>38</sup>

#### I. RACISM AND SEXISM IN DOMINANT CONCEPTUALIZATIONS OF RAPE

Generations of critics and activists have criticized dominant conceptualizations of rape as racist and sexist. These efforts have been important in revealing the way in which representations of rape both reflect and reproduce race and gender hierarchies in American society. Black women, at once women and people of color, are situated within both groups, each of which has benefited from challenges to sexism and racism, respectively; yet the particular dynamics of gender and race relating to the

rape of black women have received scant attention. Although antiracist and antisexist assaults on rape have been politically useful to black women, at some level, the monofocal antiracist and feminist critiques have also produced a political discourse that diserves black women.

Historically, the dominant conceptualization of rape as quintessentially involving a black offender and a white victim has left black men subject to legal and extralegal violence. The use of rape to legitimize efforts to control and discipline the black community is well established, and the casting of all black men as potential threats to the sanctity of white womanhood is a familiar construct that antiracists confronted and attempted to dispel over a century ago.

Feminists have attacked other dominant, essentially patriarchal, conceptions of rape, particularly as represented through law. The early emphasis of rape law on the propertylike aspect of women's chastity resulted in less solicitude for rape victims whose chastity had been in some way devalued. Some of the most insidious assumptions were written into the law, including the early common law notion that a woman alleging rape must be able to show that she resisted to the utmost in order to prove that she was raped rather than seduced. Women themselves were put on trial, as judge and jury scrutinized their lives to determine whether they were innocent victims or women who essentially got what they were asking for. Legal rules thus functioned to legitimize a good/bad woman dichotomy, and women who led sexually autonomous lives were usually the least likely to be vindicated if they were raped.

Today, long after the most egregious discriminatory laws have been eradicated, constructions of rape in popular discourse and in criminal law continue to manifest vestiges of these racist and sexist themes. As Valerie Smith notes, "a variety of cultural narratives that historically have linked sexual violence with racial oppression continue to determine the nature of public response" to interracial rapes.<sup>39</sup> Smith reviews the well-publicized case of a jogger who was raped in New York's Central Park to expose how the public discourse on the assault "made the story

of sexual victimization inseparable from the rhetoric of racism.<sup>40</sup> Smith contends that in dehumanizing the rapists as "savages," "wolves," and "beasts," the press "shaped the discourse around the event in ways that inflamed pervasive fears about black men."<sup>41</sup> Given the chilling parallels between the media representations of the Central Park rape and the sensationalized coverage of similar allegations that in the past frequently culminated in lynchings, one could hardly be surprised when Donald Trump took out a full-page ad in four New York newspapers demanding that New York "Bring Back the Death Penalty, Bring Back Our Police."<sup>42</sup>

Other media spectacles suggest that traditional gender-based stereotypes that oppress women continue to figure in the popular construction of rape. In Florida, for example, a controversy was sparked by a jury's acquittal of a man accused of a brutal rape because, in the jurors' view, the woman's attire suggested that she was asking for sex. Even the press coverage of William Kennedy Smith's rape trial involved a considerable degree of speculation regarding the sexual history of his accuser.

The racism and sexism written into the social construction of rape are merely contemporary manifestations of rape narratives emanating from a historical period when race and sex hierarchies were more explicitly policed. Yet another is the devaluation of black women and the marginalization of their sexual victimizations. This was dramatically shown in the special attention given to the rape of the Central Park jogger during a week in which twenty-eight other cases of first-degree rape or attempted rape were reported in New York. Many of these rapes were as horrific as the rape in Central Park, yet all were virtually ignored by the media. Some were gang rapes, and in a case that prosecutors described as "one of the most brutal in recent years," a woman was raped, sodomized, and thrown fifty feet off the top of a four-story building in Brooklyn. Witnesses testified that the victim "screamed as she plunged down the air shaft.... She suffered fractures of both ankles and legs, her pelvis was shattered and she suffered extensive internal

injuries."<sup>43</sup> This rape survivor, like most of the other forgotten victims that week, was a woman of color.

In short, during the period when the Central Park jogger dominated the headlines, many equally horrifying rapes occurred. None, however, elicited the public expressions of horror and outrage that attended the Central Park rape. To account for these different responses, Smith suggests a sexual hierarchy in operation that holds certain female bodies in higher regard than others.<sup>44</sup> Statistics from prosecution of rape cases suggest that this hierarchy is at least one significant, albeit often-overlooked, factor in evaluating attitudes toward rape.<sup>45</sup> A study of rape dispositions in Dallas, for example, showed that the average prison term for a man convicted of raping a black woman was two years,<sup>46</sup> as compared to five years for the rape of a Latina and ten years for the rape of a white woman.<sup>47</sup> A related issue is the fact that African-American victims of rape are the least likely to be believed.<sup>48</sup> The Dallas study and others like it also point to a more subtle problem: neither the antirape nor the antiracist political agenda has focused on the black rape victim. This inattention stems from the way the problem of rape is conceptualized within antiracist and antirape reform discourses. Although the rhetoric of both agendas formally includes black women, racism is generally not problematized in feminism, and sexism is not problematized in antiracist discourses. Consequently, the plight of black women is relegated to a secondary importance: the primary beneficiaries of policies supported by feminists and others concerned about rape tend to be white women, and the primary beneficiaries of the black community's concern over racism and rape tend to be black men. Ultimately, the reformist and rhetorical strategies that have grown out of antiracist and feminist rape reform movements have been ineffective in politicizing the treatment of black women.

## 2. RACE AND THE ANTIRAPE LOBBY

Feminist critiques of rape have focused on the way that rape law has reflected dominant racial

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#### ANTIRAPE LOBBY

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and expectations that tightly regulate the sexuality of women. In the context of the rape trial, the formal definition of rape as well as the evidentiary rules applicable in a rape trial discriminate against women by measuring the rape victim against a narrow norm of acceptable sexual conduct for women. Deviation from that norm tends to turn women into illegitimate rape victims, leading to rejection of their claims.

Historically, legal rules dictated, for example, that rape victims must have resisted their assailants in order for their claims to be accepted. Any abatement of struggle was interpreted as the woman's consent to the intercourse, under the logic that a real rape victim would protect her honor virtually to the death. While utmost resistance is not formally required anymore, rape law continues to weigh the credibility of women against narrow normative standards of female behavior. A woman's sexual history, for example, is frequently explored by defense attorneys as a way of suggesting that a woman who consented to sex on other occasions was likely to have consented in the case at issue. Past sexual conduct as well as the specific circumstances leading up to the rape are often used to distinguish the moral character of the "legitimate" rape victim from women who are regarded as morally debased or in some other way "responsible" for their own victimization.

This type of feminist critique of rape law has informed many of the fundamental reform measures enacted in antirape legislation, including increased penalties for convicted rapists and changes in evidentiary rules to preclude attacks on the woman's moral character. These reforms limit the tactics attorneys might use to tarnish the image of the rape victim, but they operate within preexisting social constructs that distinguish victims from nonvictims on the basis of their sexual character. Thus, these reforms, while beneficial, do not challenge the background cultural narratives that undermine the credibility of black women.

Because black women face subordination based on both race and gender, reforms of rape law and judicial procedures which are premised on narrow conceptions of gender subordination

may not address the devaluation of black women. Much of the problem results from the way that certain gender expectations for women intersect with certain sexualized notions of race—notions that are deeply entrenched in American culture. Sexualized images of African-Americans go all the way back to Europeans' first engagement with Africans. Blacks have long been portrayed as more sexual, more earthy, more gratification-oriented; these sexualized images of race intersect with norms of women's sexuality, norms that are used to distinguish good women from bad, madonnas from whores. Thus, black women are essentially prepackaged as bad women in cultural narratives about good women who can be raped and bad women who cannot. The discrediting of black women's claims is the consequence of a complex intersection of a gendered sexual system, one that constructs rules appropriate for good and bad women, and a race code that provides images defining the allegedly essential nature of black women. If these sexual images form even part of the cultural imagery of black women, then the very representation of a black female body at least suggests certain narratives that may make black women's rape either less believable or less important. These narratives may explain why rapes of black women are less likely to result in convictions and long prison terms than are rapes of white women.

Rape law reform measures that do not in some way engage and challenge the narratives that are read onto black women's bodies are unlikely to affect the way that cultural beliefs oppress black women in rape trials. While the degree to which legal reform can directly challenge cultural beliefs that shape rape trials is limited, the very effort to mobilize political resources toward addressing the sexual oppression of black women can be an important first step in drawing greater attention to the problem. One obstacle to such an effort has been the failure of most antirape activists to analyze specifically the consequences of racism in the context of rape. In the absence of a direct attempt to address the racial dimensions of rape, black women are simply presumed to

be represented in and benefited by prevailing feminist critiques.

### 3. ANTIRACISM AND RAPE

Antiracist critiques of rape law focus on how the law operates primarily to condemn rapes of white women by black men. While the heightened concern with protecting white women against black men has been primarily criticized as a form of discrimination against black men, it just as surely reflects devaluation of black women; this disregard for black women results from an exclusive focus on the consequences of the problem for black men.<sup>49</sup> Of course, rape accusations historically have provided a justification for white terrorism against the black community, generating a legitimating power of such strength that it created a veil virtually impenetrable to appeals based on either humanity or fact. Ironically, while the fear of the black rapist was exploited to legitimate the practice of lynching, rape was not even alleged in most cases. The well-developed fear of black sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep blacks under control. Within the African-American community, cases involving race-based accusations against black men have stood as hallmarks of racial injustice. The prosecution of the Scottsboro boys and the Emmett Till tragedy, for example, triggered African-American resistance to the rigid social codes of white supremacy. To the extent that rape of black women is thought to dramatize racism, it is usually cast as an assault on black manhood, demonstrating his inability to protect black women. The direct assault on black womanhood is less frequently seen as an assault on the black community.

The sexual politics that this limited reading of racism and rape engenders continues to play out today, as illustrated by the Mike Tyson rape trial. The use of antiracist rhetoric to mobilize support for Tyson represented an ongoing practice of viewing with considerable suspicion rape accusations against black men and interpreting sexual racism through a male-centered frame. The historical experience of black men has so

completely occupied the dominant conceptions of racism and rape that there is little room to squeeze in the experiences of black women. Consequently, racial solidarity was continually raised as a rallying point on behalf of Tyson, but never on behalf of Desiree Washington, Tyson's black accuser. Leaders ranging from Benjamin Hooks to Louis Farrakhan expressed their support for Tyson, yet no established black leader voiced any concern for Washington. Thus, the fact that black men have often been falsely accused of raping white women underlies the antiracist defense of black men accused of rape even when the accuser herself is a black woman.

As a result of this continual emphasis on black male sexuality as the core issue in antiracist critiques of rape, black women who raise claims of rape against black men are not only disregarded but also sometimes vilified within the African-American community. One can only imagine the alienation experienced by a black rape survivor such as Desiree Washington when the accused rapist is embraced and defended as a victim of racism while she is, at best, disregarded and, at worst, ostracized and ridiculed. In contrast, Tyson was the beneficiary of the long-standing practice of using antiracist rhetoric to deflect the injury suffered by black women victimized by black men. Some defended the support given to Tyson on the ground that all African-Americans can readily imagine their sons, fathers, brothers, or uncles being wrongly accused of rape; yet daughters, mothers, sisters, and aunts also deserve at least a similar concern, since statistics show that black women are more likely to be raped than black men are to be falsely accused of it. Given the magnitude of black women's vulnerability to sexual violence, it is not unreasonable to expect as much concern for black women who are raped as is expressed for the men who are accused of raping them.

Black leaders are not alone in their failure to empathize with or rally around black rape victims. Indeed, some black women were among Tyson's staunchest supporters and Washington's harshest critics.<sup>50</sup> The media widely noted

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the lack of sympathy black women had for Washington; Barbara Walters used the observation as a way of challenging Washington's credibility, going so far as to press her for a reaction.<sup>51</sup> The most troubling revelation was that many of the women who did not support Washington also doubted Tyson's story. These women did not sympathize with Washington because they believed that she had no business being in Tyson's hotel room at 2:00 A.M. A typical response was offered by one young black woman who stated, "She asked for it, she got it, it's not fair to cry rape."

Indeed, some of the women who expressed their disdain for Washington acknowledged that they encountered the threat of sexual assault almost daily.<sup>52</sup> Yet it may be precisely this threat—along with the relative absence of rhetorical strategies challenging the sexual subordination of black women—that animated their harsh criticism. In this regard, black women who condemned Washington were quite like all other women who seek to distance themselves from rape victims as a way of denying their own vulnerability. Prosecutors who handle sexual assault cases acknowledge that they often exclude women as potential jurors because women tend to empathize least with the victim.<sup>53</sup> To identify too closely with victimization may reveal their own vulnerability.<sup>54</sup> Consequently, women often look for evidence that the victim brought the rape on herself, usually by breaking social rules that are generally held applicable only to women. And when the rules classify women as dumb, loose, or weak, on the one hand, and smart, discriminating, and strong, on the other, it is not surprising that women who cannot step outside the rules to critique them would attempt to validate themselves within them. The position of most black women on this issue is particularly problematic, first, because of the extent to which they are consistently reminded that they are the group most vulnerable to sexual victimization, and, second, because most black women share the African-American community's general resistance to explicitly feminist analysis when it appears to run up against long-standing narra-

tives that construct black men as the primary victims of sexual racism.

### C. Rape and Intersectionality in Social Science

The marginalization of black women's experiences within the antiracist and feminist critiques of rape law are facilitated by social science studies that fail to examine the ways in which racism and sexism converge. Gary LaFree's *Rape and Criminal Justice: The Social Construction of Sexual Assault* is a classic example.<sup>55</sup> Through a study of rape prosecutions in Minneapolis, LaFree attempts to determine the validity of two prevailing claims regarding rape prosecutions. The first claim is that black defendants face significant racial discrimination;<sup>56</sup> the second is that rape laws serve to regulate the sexual conduct of women by withholding from rape victims the ability to invoke sexual assault law when they have engaged in nontraditional behavior.<sup>57</sup> LaFree's compelling study concludes that law constructs rape in ways that continue to manifest both racial and gender domination.<sup>58</sup> Although black women are positioned as victims of both the racism and the sexism that LaFree so persuasively details, his analysis is less illuminating than might be expected, because black women fall through the cracks of his dichotomized theoretical framework.

#### I. RACIAL DOMINATION AND RAPE

LaFree confirms the findings of earlier studies which show that race is a significant determinant in the ultimate disposition of rape cases. He finds that black men accused of raping white women were treated most harshly, while black offenders accused of raping black women were treated most leniently.<sup>59</sup> These effects held true even after controlling for other factors such as injury to the victim and acquaintance between victim and assailant: "Compared to other defendants, blacks who were suspected of assaulting white women received more serious charges, were more likely to have their cases filed as felonies, were more likely to receive prison sentences if convicted, were more likely to be incarcerated in the state penitentiary (as op-

posed to a jail or minimum-security facility), and received longer sentences on the average."<sup>60</sup>

LaFree's conclusions that black men are differentially punished depending on the race of the victim do not, however, contribute much to understanding the plight of black rape victims. Part of the problem lies in the author's use of "sexual stratification" theory, which posits both that women are differently valued according to their race and that there are certain "rules of sexual access" governing who may have sexual contact with whom in this sexually stratified market.<sup>61</sup> According to the theory, black men are discriminated against in that their forced "access" to white women is more harshly penalized than their forced "access" to black women.<sup>62</sup> LaFree's analysis focuses on the harsh regulation of access by black men to white women, but is silent about the relative subordination of black women to white women. The emphasis on differential access to women is consistent with analytical perspectives that view racism primarily in terms of the inequality between men. From this prevailing viewpoint, the problem of discrimination is that white men can rape black women with relative impunity while black men cannot do the same with white women.<sup>63</sup> Black women are considered victims of discrimination only to the extent that white men can rape them without fear of significant punishment. Rather than being viewed as victims of discrimination in their own right, they become merely the means by which discrimination against black men can be recognized. The inevitable result of this orientation is that efforts to fight discrimination tend to ignore the particularly vulnerable position of black women, who must both confront racial bias *and* challenge their status as instruments, rather than beneficiaries, of the civil rights struggle.

Where racial discrimination is framed by LaFree primarily in terms of a contest between black and white men over women, the racism experienced by black women will only be seen in terms of white male access to them. When rape of black women by white men is eliminated as a factor in the analysis, whether for statistical or other reasons, racial discrimination against black women no longer matters, since LaFree's

analysis involves comparing the "access" of white and black men to white women. Yet discrimination against black women does not result simply from white men raping them with little sanction and being punished less than black men who rape white women, nor from white men raping them but not being punished as white men who rape white women would be. Black women are also discriminated against because intraracial rape of white women is treated more seriously than is intraracial rape of black women. However, the differential protection that black and white women receive against intraracial rape is not seen as racist because intraracial rape does not involve a contest between black and white men. In other words, the way the criminal justice system treats rapes of black women by black men and rapes of white women by white men is not seen as raising issues of racism, because black and white men are not involved with each other's women.

In sum, black women who are raped are racially discriminated against because their rapists, whether black or white, are less likely to be charged with rape; and, when charged and convicted, their rapists are less likely to receive significant jail time than are the rapists of white women. While sexual stratification theory does posit that women are stratified sexually by race, most applications of the theory focus on the inequality of male agents of rape rather than on the inequality of rape victims, thus marginalizing the racist treatment of black women by consistently portraying racism in terms of the relative power of black and white men.

In order to understand and treat the victimization of black women as a consequence of racism and of sexism, it is necessary to shift the analysis away from the differential access of men, and more toward the differential protection of women. Throughout his analysis, LaFree fails to do so. His sexual stratification thesis—in particular, its focus on the comparative power of male agents of rape—illustrates how the marginalization of black women in antiracist politics is replicated in social science research. Indeed, the thesis leaves unproblematised the racist subordination of less valuable objects (black women) to more valuable objects

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To stand and treat the victimization of black women as a consequence of racism, it is necessary to shift the focus away from the differential access of black women toward the differential protection of black women throughout his analysis, LaFree notes. His sexual stratification theory, its focus on the comparison of black women to white women as agents of rape—illustrates the marginalization of black women in the social sciences. This thesis leaves unproblematic the differential protection of less valuable black women to more valuable objects.

(white women), and it perpetuates the sexist treatment of women as property extensions of "their" men.

## 2. RAPE AND GENDER SUBORDINATION

Although LaFree does attempt to address gender-related concerns of women in his discussion of rape and the social control of women, his theory of sexual stratification fails to focus sufficiently on the effects of stratification on women.<sup>64</sup> LaFree quite explicitly uses a framework that treats race and gender as separate categories, but he gives no indication that he understands how black women may fall between categories, or within both. The problem with LaFree's analysis lies not in its individual observations, which can be insightful and accurate, but rather in his failure to connect them and to develop a broader, deeper perspective. His two-track framework makes for a narrow interpretation of the data because it leaves untouched the possibility that these two tracks may intersect. Further, it is those who exist at the intersection of gender and race discrimination—black women—who suffer from this fundamental oversight.

LaFree attempts to test the feminist hypothesis that "the application of law to nonconformist women in rape cases may serve to control the behavior of all women."<sup>65</sup> This inquiry is important, he explains, because "if women who violate traditional sex roles and are raped are unable to obtain justice through the legal system, then the law may be interpreted as an institutional arrangement for reinforcing women's gender-role conformity."<sup>66</sup> He finds that "acquittals were more common and final sentences were shorter when nontraditional victim behavior was alleged."<sup>67</sup> Thus, LaFree concludes, the victim's moral character was more important than victim injury—indeed, was second only to the defendant's character. Overall, 82.3 percent of the traditional victim cases resulted in convictions and average sentences of 43.38 months; only 50 percent of nontraditional victim cases led to convictions, with an average term of 27.83 months. The effects of traditional and nontraditional behavior by black women are difficult to determine from the information

given and must be inferred from LaFree's passing comments. For example, he notes that black victims were evenly divided between traditional and nontraditional gender roles. This observation, together with the lower rate of conviction for men accused of raping blacks, suggests that gender-role behavior was not as significant in determining case disposition as it was in cases involving white victims. Indeed, LaFree explicitly notes that "the victim's race was . . . [an] important predictor of jurors' case evaluations."<sup>68</sup>

Jurors were less likely to believe in a defendant's guilt when the victim was black. Our interviews with jurors suggested that part of the explanation for this effect was that jurors . . . [w]ere influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the assault. In a case involving the rape of a young black girl, one juror argued for acquittal on the grounds that a girl her age from "that kind of neighborhood" probably wasn't a virgin anyway.<sup>69</sup>

LaFree also notes that "[o]ther jurors were simply less willing to believe the testimony of black complainants."<sup>70</sup> One white juror is quoted as saying: "Negroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."<sup>71</sup>

Despite explicit evidence that the race of the victim is significant in determining the disposition of rape cases, LaFree concludes that rape law functions to penalize nontraditional behavior in women. LaFree fails to note that racial identification may in some cases serve as a proxy for nontraditional behavior. That is, rape law serves not only to penalize actual examples of nontraditional behavior but also to diminish and devalue women who belong to groups in which nontraditional behavior is perceived as common. For the black rape victim, the disposition of her case may often turn less on her behavior than on her identity. LaFree misses the point that although white and black women have shared interests in resisting the madonna/whore dichotomy altogether, they nevertheless experience its oppressive power differently. Black women continue to be judged by who they are, not by what they do.

### 3. COMPOUNDING THE MARGINALIZATIONS OF RAPE

LaFree offers clear evidence that racial and sexual hierarchies subordinate black women to white women, as well as to men—both black and white. However, the different effects of rape law on black women are scarcely mentioned in LaFree's conclusions. In a final section, LaFree treats the devaluation of black women as an aside—one without apparent ramifications for rape law. He concludes: "The more severe treatment of black offenders who rape white women (*or, for that matter, the milder treatment of black offenders who rape black women*) is probably best explained in terms of racial discrimination within a broader context of continuing social and physical segregation between blacks and whites."<sup>72</sup> Implicit throughout LaFree's study is the assumption that blacks who are subjected to social control are black men. Moreover, the social control to which he refers is limited to securing the boundaries between black males and white females. His conclusion that race differentials are best understood within the context of social segregation as well as his emphasis on the inter-racial implications of boundary enforcement overlook the intraracial dynamics of race and gender subordination. When black men are leniently punished for raping black women, the problem is *not* "best explained" in terms of social segregation, but in terms of both the race- and gender-based devaluation of black women. By failing to examine the sexist roots of such lenient punishment, LaFree and other writers sensitive to racism ironically repeat the mistakes of those who ignore race as a factor in such cases. Both groups fail to consider directly the situation of black women.

Studies like LaFree's do little to illuminate how the interaction of race, class, and nontraditional behavior affects the disposition of rape cases involving black women. Such an oversight is especially troubling given evidence that many cases involving black women are dismissed outright. Over 20 percent of rape complaints were recently dismissed as "unfounded" by the Oakland Police Department, which did not even interview many, if not most, of the women involved.<sup>73</sup> Not coincidentally, the vast majority

of the complainants were black and poor; many of them were substance abusers or prostitutes. Explaining their failure to pursue these complaints, the police remarked that "those cases were hopelessly tainted by women who are transient, uncooperative, untruthful or not credible as witnesses in court."<sup>74</sup>

The effort to politicize violence against women will do little to address the experiences of black and other nonwhite women until the ramifications of racial stratification among women are acknowledged. At the same time, the antiracist agenda will not be furthered by suppressing the reality of intraracial violence against women of color. The effect of both these marginalizations is that women of color have no ready means to link their experiences with those of other women. This sense of isolation compounds efforts to politicize sexual violence within communities of color and perpetuates the deadly silence surrounding these issues.

#### *D. Implications*

With respect to the rape of black women, race and gender converge in ways that are only vaguely understood. Unfortunately, the analytical frameworks that have traditionally informed both antirape and antiracist agendas tend to focus only on single issues. They are thus incapable of developing solutions to the compound marginalization of black women victims, who, yet again, fall into the void between concerns about women's issues and concerns about racism. This dilemma is complicated by the role that cultural images play in the treatment of black women victims. That is, the most critical aspects of these problems may revolve less around the political agendas of separate race- and gender-sensitive groups, and more around the social and cultural devaluation of women of color. The stories our culture tells about the experience of women of color present another challenge—and a further opportunity—to apply and evaluate the usefulness of the intersectional critique.

#### III. CONCLUSION

THIS article has presented intersectionality as a way of framing the various interactions of race and gender in the context of

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violence against women of color. Yet intersectionality might be more broadly useful as a way of mediating the tension between assertions of multiple identity and the ongoing necessity of group politics. It is helpful in this regard to distinguish intersectionality from the closely related perspective of antiessentialism, from which women of color have critically engaged white feminism for the absence of women of color, on the one hand, and for speaking for women of color, on the other. One rendition of this antiessentialist critique—that feminism essentializes the category "woman"—owes a great deal to the postmodernist idea that categories we consider natural or merely representational are actually socially constructed in a linguistic economy of difference. While the descriptive project of postmodernism—questioning the ways in which meaning is socially constructed—is generally sound, this critique sometimes misreads the meaning of social construction and distorts its political relevance.

One version of antiessentialism, embodying what might be called the vulgarized social construction thesis, is that since all categories are socially constructed, there is no such thing as, say, blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.<sup>75</sup> Even the Supreme Court has gotten into this act. In *Metro Broadcasting, Inc. v. FCC*,<sup>76</sup> the court conservatives, in rhetoric that oozes vulgar constructionist smugness, proclaimed that any set-aside designed to increase the voices of minorities on the airwaves was itself based on a racist assumption that skin color is in some way connected to the likely content of one's broadcast.<sup>77</sup>

To say that a category such as race or gender is socially constructed is not to say that that category has no significance in our world. On the contrary, a large and continuing project for subordinated people—and indeed, one of the projects for which postmodern theories have been very helpful—is thinking about the way in which power has clustered around certain categories and is exercised against others. This project attempts to unveil the processes of subordination and the various ways in which those processes are experienced by people who are subordinated and people who are privileged by

them. It is, then, a project that presumes that categories have meaning and consequences. This project's most pressing problem, in many if not most cases, is not the existence of the categories but, rather, the particular values attached to them and the way those values foster and create social hierarchies.

This is not to deny that the process of categorization is itself an exercise of power; the story is much more complicated and nuanced than that. First, the process of categorizing—or, in identity terms, naming—is not unilateral. Subordinated people can and do participate, sometimes even subverting the naming process in empowering ways. One need only think about the historical subversion of the category "black" or the current transformation of "queer" to understand that categorization is not a one-way street. Clearly, there is unequal power, but there is nonetheless some degree of agency that people can and do exert in the politics of naming. Moreover, it is important to note that identity continues to be a site of resistance for members of different subordinated groups. We all can recognize the distinction between the claims "I am black" and the claim "I am a person who happens to be black." "I am black" takes the socially imposed identity and empowers it as an anchor of subjectivity; "I am black" becomes not simply a statement of resistance but also a positive discourse of self-identification, intimately linked to celebratory statements like the black nationalist "black is beautiful." "I am a person who happens to be black," on the other hand, achieves self-identification by straining for a certain universality (in effect, "I am first a person") and for a concomitant dismissal of the imposed category ("black") as contingent, circumstantial, nondeterminant. There is truth in both characterizations, of course, but they function quite differently, depending on the political context. At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.

Vulgar constructionism thus distorts the possibilities for meaningful identity politics by conflating at least two separate but closely linked manifestations of power. One is the power exer-

cised simply through the process of categorization; the other, the power to cause that categorization to have social and material consequences. While the former power facilitates the latter, the political implications of challenging one over the other matter greatly. We can look at debates over racial subordination throughout history and see that, in each instance, there was a possibility of challenging either the construction of identity or the system of subordination based on that identity. Consider, for example, the segregation system in *Plessy v. Ferguson*.<sup>78</sup> At issue were multiple dimensions of domination, including categorization, the sign of race, and the subordination of those so labeled. There were at least two targets for Plessy to challenge: the construction of identity ("What is a black?"), and the system of subordination based on that identity ("Can blacks and whites sit together on a train?"). Plessy actually made both arguments, one against the coherence of race as a category, the other against the subordination of those deemed to be black. In his attack on the former, Plessy argued that the segregation statute's application to him, given his mixed race status, was inappropriate. The court refused to see this as an attack on the coherence of the race system and instead responded in a way that simply reproduced the black/white dichotomy that Plessy was challenging. As we know, Plessy's challenge to the segregation system was not successful either. In evaluating various resistance strategies today, it is useful to ask which of Plessy's challenges would have been best for him to have won—the challenge against the coherence of the racial categorization system or the challenge to the practice of segregation?

The same question can be posed for *Brown v. Board of Education*.<sup>79</sup> Which of two possible arguments was politically more empowering—that segregation was unconstitutional because the racial categorization system on which it was based was incoherent, or that segregation was unconstitutional because it was injurious to black children and oppressive to their communities? While it might strike some as a difficult question, for the most part, the dimension of racial domination that has been most vexing to African-Americans has not been the social

categorization as such but, rather, the myriad ways in which those of us so defined have been systematically subordinated. With particular regard to problems confronting women of color when identity politics fail us, as they frequently do, it is not primarily because those politics take as natural certain categories that are socially constructed—instead, it is because the descriptive content of those categories and the narratives on which they are based have privileged some experiences and excluded others.

Along these lines, consider the controversy involving Clarence Thomas and Anita Hill. During the Senate hearings for the confirmation of Clarence Thomas to the Supreme Court, Anita Hill, in bringing allegations of sexual harassment against Thomas, was rhetorically disempowered in part because she fell between the dominant interpretations of feminism and antiracism. Caught between the competing narrative tropes of rape (advanced by feminists), on the one hand, and lynching (advanced by Thomas and his antiracist supporters), on the other, the race and gender dimensions of her position could not be told. This dilemma could be described as the consequence of antiracism's having essentialized blackness and feminism's having essentialized womanhood. However, recognizing as much does not take us far enough, for the problem is not simply linguistic or philosophical in nature; rather, it is specifically political: the narratives of gender are based on the experience of white, middle-class women, and the narratives of race are based on the experience of black men. The solution does not merely entail arguing for the multiplicity of identities or challenging essentialism generally. Instead, in Hill's case, for example, it would have been necessary to assert those crucial aspects of her location which were erased, even by many of her advocates—that is, to state what difference her difference made.

If, as this analysis asserts, history and context determine the utility of identity politics, how then do we understand identity politics today, especially in light of our recognition of multiple dimensions of identity? More specifically, what does it mean to argue that gender identities have been obscured in antiracist discourses, just

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asserts, history and context of identity politics, how and identity politics today, our recognition of multiple identities? More specifically, what role that gender identities play in antiracist discourses, just

as race identities have been obscured in feminist discourses? Does that mean we cannot talk about identity? Or instead, that any discourse about identity has to acknowledge how our identities are constructed through the intersection of multiple dimensions? A beginning response to these questions requires us first to recognize that the organized identity groups in which we find ourselves are in fact coalitions, or at least potential coalitions waiting to be formed.

In the context of antiracism, recognizing the ways in which the intersectional experiences of women of color are marginalized in prevailing conceptions of identity politics does not require that we give up attempts to organize as communities of color. Rather, intersectionality provides a basis for reconceptualizing race as a coalition between men and women of color. For example, in the area of rape, intersectionality provides a way of explaining why women of color must abandon the general argument that the interests of the community require the suppression of any confrontation around intraracial rape. Intersectionality may provide the means for dealing with other marginalizations as well. For example, race can also be a coalition of straight and gay people of color, and thus serve as a basis for critique of churches and other cultural institutions that reproduce heterosexism.

With identity thus reconceptualized, it may be easier to understand the need for—and to summon—the courage to challenge groups that are after all, in one sense, "home" to us, in the name of the parts of us that are not made at home. This takes a great deal of energy and arouses intense anxiety. The most one could expect is that we will dare to speak against internal exclusions and marginalizations, that we might call attention to how the identity of "the group" has been centered on the intersectional identities of a few. Recognizing that identity politics takes place at the site where categories intersect thus seems more fruitful than challenging the possibility of talking about categories at all. Through an awareness of intersectionality, we can better acknowledge and ground the differences among us and negotiate the means by which these differences will find expression in constructing group politics.

## NOTES

1. Feminist academics and activists have played a central role in forwarding an ideological and institutional challenge to the practices that condone and perpetuate violence against women. See generally S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975); L. M. G. Clark and D. J. Lewis, *Rape: The Price of Coercive Sexuality* (1977); R. E. Dobash and R. Dobash, *Violence against Wives: A Case against the Patriarchy* (1979); N. Gager and C. Schurr, *Sexual Assault: Confronting Rape in America* (1976); D. E. H. Russell, *The Politics of Rape: The Victim's Perspective* (1974); E. A. Stanko, *Intimate Intrusions: Women's Experience of Male Violence* (1985); L. E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989); L. E. Walker, *The Battered Woman Syndrome* (1984); L. E. Walker, *The Battered Woman* (1979).

2. See, for example, S. Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (1982) (arguing that battering is a means of maintaining women's subordinate position); S. Brownmiller, *supra* note 1 (arguing that rape is a patriarchal practice that subordinates women to men); E. Schneider, "The Violence of Privacy," 23 *Conn. L. Rev.*, 973, 974 (1991) (discussing how "concepts of privacy permit, encourage and reinforce violence against women"); S. Estrich, "Rape," 95 *Yale L. J.* 1087 (1986) (analyzing rape law as one illustration of sexism in criminal law); see also C. A. Mackinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, 143-213 (1979) (arguing that sexual harassment should be redefined as sexual discrimination actionable under Title VII, rather than viewed as misplaced sexuality in the workplace).

3. Although the objective of this article is to describe the intersectional location of women of color and their marginalization within dominant resistance discourses, I do not mean to imply that the disempowerment of women of color is singularly or even primarily caused by feminist and antiracist theorists or activists. Indeed, I hope to dispel any such simplistic interpretations by capturing, at least in part, the way that prevailing structures of domination shape various discourses of resistance. As I have noted elsewhere, "People can only demand change in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect . . . dominant ideology . . . will probably be ineffective"; Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, at 1367. Although there are significant political and conceptual obstacles to moving against structures of domination with an intersectional sensibility, my point is that the effort to do so should be a central theoretical and political objective of both antiracism and feminism.

4. Although this article deals with violent assault perpetrated by men against women, women are also subject to violent assault by women. Violence among lesbians is a hidden but significant problem. One expert reported in a study of 90 lesbian couples that roughly 46 percent of

lesbians have been physically abused by their partners; J. Garcia, "The Cost of Escaping Domestic Violence: Fear of Treatment in a Largely Homophobic Society May Keep Lesbian Abuse Victims from Calling for Help," *Los Angeles Times* (May 6, 1991), 2; see also K. Lobel, ed., *Naming the Violence: Speaking Out about Lesbian Battering* (1986); R. Robson, "Lavender Bruises: Intralesbian Violence, Law and Lesbian Legal Theory," 20 *Golden Gate U. L. Rev.*, 567 (1990). There are clear parallels between violence against women in the lesbian community and violence against women in communities of color. Lesbian violence is often shrouded in secrecy for reasons similar to those which have suppressed the exposure of heterosexual violence in communities of color—fear of embarrassing other members of the community, which is already stereotyped as deviant, and fear of being ostracized from the community. Despite these similarities, there are nonetheless distinctions between male abuse of women and female abuse of women that, in the context of patriarchy, racism, and homophobia, warrant more focused analysis than is possible here.

5. K. Crenshaw, "Demarginalizing the Intersection of Race and Sex," *U. Chi. Legal F.*, 139 (1989).

6. I explicitly adopt a black feminist stance in this survey of violence against women of color. I do this cognizant of several tensions that such a position entails. The most significant one stems from the criticism that while feminism purports to speak for women of color through its invocation of the term "woman," the feminist perspective excludes women of color because it is based upon the experiences and interests of a certain subset of women. On the other hand, when white feminists attempt to include other women, they often add our experiences into an otherwise unaltered framework. It is important to name the perspective from which one constructs her analysis; and for me, that is as a black feminist. Moreover, it is important to acknowledge that the materials that I incorporate in my analysis are drawn heavily from research on black women. On the other hand, I see my own work as part of a broader collective effort among feminists of color to expand feminism to include analyses of race and other factors such as class, sexuality, and age. I have attempted therefore to offer my sense of the tentative connections between my analysis of the intersectional experiences of black women and the intersectional experiences of other women of color. I stress that this analysis is not intended to include falsely nor to exclude unnecessarily other women of color.

7. I consider intersectionality a provisional concept linking contemporary politics with postmodern theory. In mapping the intersections of race and gender, the concept does engage dominant assumptions that race and gender are essentially separate categories. By tracing the categories to their intersections, I hope to suggest a methodology that will ultimately disrupt the tendencies to see race and gender as exclusive or separable. While the primary intersections that I explore here are between race and gender, the concept can and should be expanded by factoring in issues such as class, sexual orientation, age, and color.

8. 8 U.S.C. § 1186a (1988). The marriage fraud amendments provide that an alien spouse "shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on conditional basis subject to the provisions of this section"; 1186a(a)(1). An alien spouse with permanent resident status under this conditional basis may have her status terminate if the attorney general finds that the marriage was "improper" (§ 1186a(b)(1)), or if she fails to file a petition to appear at the personal interview (§ 1186a(c)(2)(A)).

9. The marriage fraud amendments provided that for the conditional resident status to be removed "the alien spouse and the petitioning spouse (if not deceased) jointly must submit to the Attorney General . . . a petition which requests the removal of such conditional basis and which states, under penalty of perjury, the facts and information" § 1186a(b)(1)(A) (emphasis added). The amendments provided for a waiver, at the attorney general's discretion, if the alien spouse was able to demonstrate that deportation would result in extreme hardship, or that the qualifying marriage was terminated for good cause; § 1186a(c)(4). However, the terms of this hardship waiver have not adequately protected battered spouses. For example, the requirement that the marriage be terminated for good cause may be difficult to satisfy in states with no-fault divorces; E. P. Lynsky "Immigration Marriage Fraud Amendments of 1986: Til Congress Do Us Part," 41 *U. Miami L. Rev.*, 1087, 1091 n. 47 (1987) (student author) (citing J. B. Ingber and R. L. Prischet, "The Marriage Fraud Amendments," in S. Mailman, ed., *The New Simpson-Rodino Immigration Law of 1986*, 564–65 (1986)).

10. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The act, introduced by Rep. Louise Slaughter (Dem.-N.Y.), provides that a battered spouse who has conditional permanent resident status can be granted a waiver for failure to meet the requirements if she can show that "the marriage was entered into in good faith and that after the marriage the alien spouse was battered by or was subjected to extreme mental cruelty by the U.S. citizen or permanent resident spouse"; H.R. Rep. No. 723(I), 101st Cong., 2d Sess. 78 (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6758; see also 8 C.F.R. § 216.5(g) (1992) (regulations for application for waiver based on claim of having been battered or subjected to extreme mental cruelty).

11. H.R. Rep. No. 723(I), *supra* note 10, at 79, reprinted in 1990 U.S.C.C.A.N. 6710, 6759.

12. D. Hodgin, "Mail-Order' Brides Marry Pain to Get Green Cards," *Washington Post*, October 16, 1990, at E5.

13. *Id.*

14. Most crime statistics are classified by sex or race but none are classified by sex and race. Because we know that most rape victims are women, the racial breakdown reveals, at best, rape rates for black women. Yet even given this head start, rates for other nonwhite women are difficult to collect. While there are some statistics for Latinas, statistics for Asian and Native American women are virtually nonexistent.

988). The marriage fraud amendment spouse "shall be considered, at status of an alien lawfully admitted to have obtained such status on a to the provisions of this section"; § ease with permanent resident status this may have her status terminated finds that the marriage was "improper if she fails to file a petition or oral interview (§ 1186a(c)(2)(A)).

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f 1990, Pub. L. No. 101-649, 104 produced by Rep. Louise Slaughter that a battered spouse who has resident status can be granted a the requirements if she can show entered into in good faith and that spouse was battered by or was mental cruelty by the U.S. citizen or he"; H.R. Rep. No. 723(I), 101st reprinted in 1990 U.S.C.C.A.N. T.R. § 216.5(3) (1992) (regulations based on claim of having been extreme mental cruelty).

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istent; cf. G. Chezia Caraway, "Violence Against Women of Color," 43 Stan. L. Rev., 1301 (1993).

15. S. Ali, *The Blackman's Guide to Understanding the Blackwoman* (1989). Ali's book sold quite well for an independently published title, an accomplishment no doubt due in part to her appearances on the Phil Donahue, Oprah Winfrey, and Sally Jesse Raphael television talk shows. For public and press reaction, see D. Gillism, "Sick, Distorted Thinking," *Washington Post*, (Oct. 11, 1990), D3; L. Williams, "Black Woman's Book Starts a Predictable Storm," *New York Times* (Oct. 2, 1990), C11; see also P. Cleaue, *Mad at Miles: A Black Woman's Guide to Truth* (1990). The title clearly styled after Ali's, *Mad at Miles* responds not only to issues raised by Ali's book, but also to Miles Davis's admission in his autobiography, *Miles: The Autobiography* (1989), that he had physically abused, among other women, his former wife, actress Cicely Tyson.

16. Ali suggests that the Blackwoman "certainly does not believe that her disrespect for the Blackman is destructive, nor that her opposition to him has deteriorated the Black nation"; S. Ali, *supra* note 15, at viii. Blaming the problems of the community on the failure of the black woman to accept her "real definition," Ali explains that "[n]o nation can rise when the natural order of the behavior of the male and the female have been altered against their wishes by force. No species can survive if the female of the genus disturbs the balance of her nature by acting other than herself"; *id.* at 76.

17. Ali advises the Blackman to hit the Blackwoman in the mouth, "[b]ecause it is from that hole, in the lower part of her face, that all her rebellion culminates into words. Her unbridled tongue is a main reason she cannot get along with the Blackman. She often needs a reminder"; *id.* at 161. Ali warns that "if [the Blackwoman] ignores the authority and superiority of the Blackman, there is a penalty. When she crosses this line and becomes viciously insulting it is time for the Blackman to soundly slap her in the mouth"; *id.*

18. In this regard, Ali's arguments bear much in common with those of neoconservatives who attribute many of the social ills plaguing black America to the breakdown of patriarchal family values; see, for example, W. Raspberry, "If We Are to Rescue American Families, We Have to Save the Boys," *Chicago Tribune* (July 19, 1989), C15; G. F. Will, "Voting Rights Won't Fix It," *Washington Post* (Jan. 23, 1986), A23; G. F. Will, "White Racism' Doesn't Make Blacks Mere Victims of Fate," *Milwaukee Journal* (Feb. 21, 1986), 9. Ali's argument shares remarkable similarities to the controversial "Moynihan Report" on the black family, so called because its principal author was now-Senator Daniel P. Moynihan (Dem.-N.Y.). In the infamous chapter entitled "The Tangle of Pathology," Moynihan argued that "the Negro community has been forced into a matriarchal structure which, because it is so out of line with the rest of American society, seriously retards the progress of the group as a whole, and imposes a crushing burden on the Negro male and, in consequence, on a great many Negro women

as well"; Office of Policy Planning and Research, U.S. Department of Labor, *The Negro Family: The Case for National Action*, 29 (1965), reprinted in L. Rainwater and W. L. Yancey, *The Moynihan Report and the Politics of Controversy* 75 (1967). A storm of controversy developed over the book, although few commentators challenged the patriarchal discourse embedded in the analysis. Bill Moyers, then a young minister and speechwriter for President Lyndon B. Johnson, firmly believed that the criticism directed at Moynihan was unfair. Some twenty years later, Moyers resurrected the Moynihan thesis in a special television program, *The Vanishing Family: Crisis in Black America* (CBS television broadcast, Jan. 25, 1986). The show first aired in January 1986 and featured several African-American men and women who had become parents but were unwilling to marry. See A. Linger, "Hardhitting Special About Black Families," *Christian Science Monitor* (Jan. 23, 1986), 23. Many saw the Moyers show as a vindication of Moynihan. President Reagan took the opportunity to introduce an initiative to revamp the welfare system a week after the program aired; M. Barone, "Poor Children and Politics," *Washington Post* (Feb. 10, 1986), A1. Said one official, "Bill Moyers has made it safe for people to talk about this issue, the disintegrating black family structure"; R. Pear, "President Reported Ready to Propose Overhaul of Social Welfare System," *New York Times* (Feb. 1, 1986), A12. Critics of the Moynihan/Moyers thesis have argued that it scapegoats the black family generally and black women in particular. For a series of responses, see "Scapegoating the Black Family," *The Nation* (July 24, 1989) (special issue, edited by Jewell Handy Gresham and Margaret B. Wilkerson, with contributions from Margaret Burnham, Constance Clayton, Dorothy Height, Faye Wattleton, and Marian Wright Edelman). For an analysis of the media's endorsement of the Moynihan/Moyers thesis, see C. Ginsburg, *Race and Media: The Enduring Life of the Moynihan Report* (1989).

19. Domestic violence relates directly to issues that even those who subscribe to Ali's position must also be concerned about. The socioeconomic condition of black males has been one such central concern. Recent statistics estimate that 25 percent of black males in their twenties are involved in the criminal justice systems; see D. G. Savage, "Young Black Males in Jail or in Court Control Study Says," *Los Angeles Times* (Feb. 27, 1990), A1; *Newsday* (Feb. 27, 1990), 15; "Study Shows Racial Imbalance in Penal System," *New York Times* (Feb. 27, 1990), A18. One would think that the linkages between violence in the home and the violence on the streets would alone persuade those like Ali to conclude that the African-American community cannot afford domestic violence and the patriarchal values that support it.

20. A pressing problem is the way domestic violence reproduces itself in subsequent generations. It is estimated that boys who witness violence against women are ten times more likely to batter female partners as adults; *Women and Violence: Hearings before the Senate Comm. on the Judiciary on Legislation to Reduce the Growing Problem of Violent Crime against Women*, 101st Cong., 2d Sess., pt. 2, at 89

(1991) (testimony of Charlotte Fedders). Other associated problems for boys who witness violence against women include higher rates of suicide, violent assault, sexual assault, and alcohol and drug use; *id.*, pt. 2, at 131 (statement of Sarah M. Buel, assistant district attorney, Massachusetts, and supervisor, Harvard Law School Battered Women's Advocacy Project).

21. *Id.* at 142 (statement of Susan Kelly-Dreiss, discussing several studies in Pennsylvania linking homelessness to domestic violence).

22. *Id.* at 143 (statement of Susan Kelly-Dreiss).

23. Another historical example includes Eldridge Cleaver, who argued that he raped white women as an assault upon the white community. Cleaver "practiced" on black women first; E. Cleaver, *Soul on Ice*, 14-15 (1968). Despite the appearance of misogyny in both works, each professes to worship black women as "queens" of the black community. This "queenly subservience" parallels closely the image of the "woman on a pedestal" against which white feminists have railed. Because black women have been denied pedestal status within dominant society, the image of the African queen has some appeal to many African-American women. Although it is not a feminist position, there are significant ways in which the promulgation of the image directly counters the intersectional effects of racism and sexism that have denied African-American women a perch in the "gilded cage."

24. T. Harris, "On *The Color Purple*, Stereotypes, and Silence," 18 *Black Am. Lit. F.*, 155, (1984).

25. On January 14, 1991, Sen. Joseph Biden (Dem.-Del.) introduced Senate Bill 15, the Violence Against Women Act of 1991, comprehensive legislation addressing violent crime confronting women; S. 15, 102d Cong., 1st Sess. (1991). The bill consists of several measures designed to create safe streets, safe homes, and safe campuses for women. More specifically, Title III of the bill creates a civil rights remedy for crimes of violence motivated by the victim's gender; *id.* § 01. Among the findings supporting the bill were "(1) crimes motivated by the victim's gender constitute bias crimes in violation of the victim's right to be free from discrimination on the basis of gender," and "(2) current law [does not provide a civil rights remedy] for gender crimes committed on the street or in the home"; S. Rep. No. 197, 102d Cong., 1st Sess. 27 (1991).

26. 137 Cong. Rec. S611 (daily ed. Jan. 14, 1991) (statement of Senator Boren). Sen. William Cohen (Dem.-Me.) followed with a similar statement, noting "that rapes and domestic assaults are not limited to the streets of our inner cities or to those few highly publicized cases that we read about in the newspapers or see on the evening news. Women throughout the country, in our nation's urban areas and rural communities, are being beaten and brutalized in the streets and in their homes. It is our mothers, wives, daughters, sisters, friends, neighbors, and coworkers who are being victimized; and in many cases, they are being victimized by family members, friends, and acquaintances"; *id.* (statement of Senator Cohen).

27. 48 Hours, "Till Death Do Us Part" (CBS television broadcast, Feb. 6, 1991).

28. Letter of Diana M. Campos, director of Human Services, PODER, to Joseph Semidei, deputy commissioner, New York State Department of Social Services (Mar. 26, 1992).

29. *Id.* (emphasis added).

30. *Id.*

31. *Id.*

32. Roundtable Discussion on Racism and the Domestic Violence Movement (April 2, 1992) (transcript on file, the *Stanford Law Review*). The participants in the discussion—Diana Campos, director, Bilingual Outreach Project of the New York State Coalition Against Domestic Violence; Elsa A. Rios, project director, Victim Intervention Project (a community-based project in East Harlem, New York, serving battered women); and Haydee Rosario, social worker with the East Harlem Council for Human Services and a Victim Intervention Project volunteer recounted conflicts relating to race and culture during association with the New York State Coalition Against Domestic Violence, a state oversight group that distributes resources to battered women's shelters throughout the state and generally set policy priorities for the shelters that are part of the coalition.

33. *Id.*

34. *Id.*

35. *Id.*

36. Ironically, the specific dispute that led to the withdrawal concerned the housing of the Spanish-language domestic violence hotline. The hotline was initially housed at the coalition's headquarters, but languished after a succession of coordinators left the organization. Latinas on the coalition board argued that the hotline should be housed at one of the community service agencies, while the board insisted on maintaining control of it. The hotline is now housed at PODER; *id.*

37. Said Campos, "It would be a shame that in New York state a battered woman's life or death were dependent upon her English language skills"; D. M. Campos, note 28.

38. The discussion in the following section focuses relatively narrowly on the dynamics of a black-white sexual hierarchy. I specify African-Americans in part because, given the centrality of sexuality as a site of racial domination over African-Americans, any generalizations that might be drawn from this history seem least applicable to other racial groups. To be sure, the specific dynamics of oppression experienced by other racial groups are likely to have a sexual component as well. Indeed, the repertoire of racist imagery that is commonly associated with different racial groups each contain a sexual stereotype as well. These images probably influence the way that rapes involving other minority groups are perceived both internally and externally.

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society at large, but they are likely to function in different ways.

39. V. Smith, "Split Affinities: The Case of Interracial Rape," in M. Hirsch and E. F. Keller, eds., *Conflicts in Feminism*, 271, 274 (1990).

40. *Id.* at 276-78.

41. Smith cites the use of animal images to characterize the accused black rapists, including descriptions such as: "'a wolfpack of more than a dozen young teenagers' and '[t]here was a full moon Wednesday night. A suitable backdrop for the howling of wolves. A vicious pack ran rampant through Central Park. . . . This was bestial brutality.'" An editorial in the *New York Times* was entitled "The Jogger and the Wolf Pack"; *id.* at 277 (citations omitted).

Evidence of the ongoing link between rape and racism in American culture is by no means unique to media coverage of the Central Park jogger case. In December 1990, the George Washington University student newspaper, *The Hatchet*, printed a story in which a white student alleged that she had been raped at knifepoint by two black men on or near the campus; the story caused considerable racial tension. Shortly after the report appeared, the woman's attorney informed the campus police that his client had fabricated the attack. After the hoax was uncovered, the woman said that she hoped the story "would highlight the problems of safety for women"; F. Banger, "False Rape Report Upsetting Campus," *New York Times* (Dec. 12, 1990), A2; see also L. Payne, "A Rape Hoax Stirs Up Hate," *New York Newsday* (Dec. 16, 1990), 6.

42. W. C. Troft, "Deadly Donald," UP (Apr. 30 1989). Donald Trump explained that he spent \$85,000 to take out these ads because "I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed for their crimes"; "Trump Calls for Death to Muggers," *Los Angeles Times* (May 1, 1989), A2. But cf. "Leaders Fear 'Lynch' Hysteria in Response to Trump Ads," UPI (May 6, 1989) (community leaders feared that Trump's ads would fan "the flames of racial polarization and hatred"); C. Fuchs Epstein, "Cost of Full Page Ad Could Help Fight Causes of Urban Violence," *New York Times* (May 15, 1989), A18 ("Mr. Trump's proposal could well lead to further violence").

43. R. D. McFadden, "2 Men Get 6 to 18 Years for Rape in Brooklyn," *New York Times* (Oct. 2, 1990), B2. The woman "lay half naked, moaning and crying for help until a neighbor heard her" in the air shaft; "Community Rallies to Support Victim of Brutal Brooklyn Rape," *New York Daily News* (June 26, 1989), 6. The victim "suffered such extensive injuries that she had to learn to walk again. . . . She faces years of psychological counseling"; McFadden, *supra*.

44. Smith points out that "[t]he relative invisibility of black women victims of rape also reflects the differential value of women's bodies in capitalist societies. To the extent that rape is constructed as a crime against the property of privileged white men, crimes against less valuable women—women of color, working-class women, and lesbians, for example—mean less or mean differently than those against

white women from the middle and upper classes"; Smith, *supra* note 39, at 275-76.

45. "Cases involving black offenders and black victims were treated the least seriously"; G. D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (1989). LaFree also notes, however, that "the race composition of the victim-offender dyad" was not the only predictor of case dispositions; *id.* at 219-20.

46. "Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly," *Dallas Times Herald* (Aug. 19, 1990), A1. A study of 1988 cases in Dallas County's criminal justice system concluded that rapists whose victims were white were punished more severely than those whose victims were black or Hispanic. The *Dallas Times Herald*, which had commissioned the study, reported that "[t]he punishment almost doubled when the attacker and victim were of different races. Except for such interracial crime, sentencing disparities were much less pronounced"; *id.*

47. *Id.* Two criminal law experts, Iowa law professor David Baldus and Carnegie-Mellon University professor Alfred Blumstein "said that the racial inequities might be even worse than the figures suggest"; *id.*

48. See G. LaFree, *supra* note 45, at 219-20 (quoting jurors who doubted the credibility of black rape survivors); see also H. Field and L. Bienen, *Jurors and Rape: A Study in Psychology and Law* 141 (1980), at 117-18.

49. The statistic that 89 percent of all men executed for rape in this country were black is a familiar one. *Furman v. Georgia*, 408 U.S. 238, 364 (1972) (Marshall, J., concurring). Unfortunately, the dominant analysis of racial discrimination in rape prosecutions generally does not discuss whether any of the rape victims in these cases were black; see J. Wiggins, "Rape, Racism, and the Law," 6 *Harv. Women's L.J.*, 103, 113 (1983) (student author).

50. See M. Rosenfeld, "After the Verdict, the Doubts: Black Women Show Little Sympathy for Tyson's Accuser," *Washington Post* (Feb. 13, 1992), D1; A. Johnson, "Tyson Rape Case Strikes a Nerve Among Blacks," *Chicago Tribune* (Mar. 29, 1992), C1; S. P. Kelly, "Black Women Wrestle with Abuse Issue: Many Say Choosing Racial over Gender Loyalty Is Too Great a Sacrifice," *Chicago Star Tribune* (Feb. 18, 1992), A1.

51. 20/20 (ABC television broadcast, Feb. 21, 1992).

52. According to a study by the Bureau of Justice, black women are significantly more likely to be raped than white women, and women in the 16-24 age group are two to three times more likely to be victims of rape or attempted rape than women in any other age group; see R. J. Ostrow, "Typical Rape Victim Called Poor, Young," *Los Angeles Times* (Mar. 25, 1985), 8.

53. See P. Tyre, "What Experts Say About Rape Jurors," *New York Newsday* (May 19, 1991), 10 (reporting that "researchers had determined that jurors in criminal trials side with the complainant or defendant whose ethnic, economic and religious background most closely resembles their own.

The exception to the rule . . . is the way women jurors judge victims of rape and sexual assault"). Linda Fairstein, a Manhattan prosecutor, states, "too often women tend to be very critical of the conduct of other women, and they often are not good jurors in acquaintance-rape cases"; M. Carlson, "The Trials of Convicting Rapists," *Time* (Oct. 14, 1991), II.

54. As sex crimes prosecutor Barbara Eganhauser notes, even young women with contemporary lifestyles often reject a woman's rape accusation out of fear. "To call another woman the victim of rape is to acknowledge the vulnerability in yourself. They go out at night, they date, they go to bars, and walk alone. To deny it is to say at the trial that women are not victims"; Tyre, *supra* note 53.

55. G. LaFree, *supra* note 45.

56. *Id.* at 49-50.

57. *Id.* at 50-51.

58. *Id.* at 237-40.

59. LaFree concludes that recent studies finding no discriminatory effect were inconclusive because they analyzed the effects of the defendant's race independently of the race of victim. The differential race effects in sentencing are often concealed by combining the harsher sentences given to black men accused of raping white women with the more lenient treatment of black men accused of raping black women; *id.* at 117, 140. Similar results were found in another study: see A. Walsh, "The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race," 25 *Criminology*, 153, 170 (1987) ("sentence severity mean for blacks who assaulted whites, which was significantly in excess of mean for whites who assaulted whites, was masked by the lenient sentence severity mean for blacks who assaulted blacks").

60. G. LaFree, *supra* note 45, at 139-40.

61. Sexual stratification, according to LaFree, refers to the differential valuation of women according to their race and to the creation of "rules of sexual access" governing who may have contact with whom. Sexual stratification also dictates what the penalty will be for breaking these rules: the rape of a white woman by a black man is seen as a trespass on the valuable property rights of white men and is punished most severely; *id.* at 48-49. The fundamental propositions of the sexual stratification thesis have been summarized as follows: (1) Women are viewed as the valued and scarce property of the men of their own race. (2) White women, by virtue of membership in the dominant race, are more valuable than black women. (3) The sexual assault of a white by a black threatens both the white man's "property rights" and his dominant social position. This dual threat accounts for the strength of the taboo attached to interracial sexual assault. (4) A sexual assault by a male of any race upon members of the less valued black race is perceived as nonthreatening to the status quo and therefore less serious. (5) White men predominate as agents of social control. Therefore, they have the power to sanction differentially

according to the perceived threat to their favor position; Walsh, *supra* note 59, at 155.

62. I use the term "access" guardedly because inapt euphemism for rape. On the other hand conceptualized differently depending on whether race-specific rules of sexual access are violated. Violence is not explicitly written into the sexual stratification theory, it does work itself into the rules, in the intercourse which violates the racial access rules is to be coercive rather than voluntary; see, for example *v. Balkam*, 136 S.E. 2d 766, 769 (Ga. 1964) (describing rape of a white woman by a black man as "a crime more horrible than death"); *Story v. State*, 59 So. 480 (1914) ("The consensus of public opinion, unrestricted by race, is that a white woman prostitute is yet, though virtuous, above the even greater sacrifice of the submission of her person to the embraces of a member of the black race"); Wiggins, *supra* note 49, at 125, 127.

63. This traditional approach places black women in the position of denying their own victimization, requiring them to argue that it is racist to punish black men more harshly for raping white women than for raping black women. However, in the wake of the Mike Tyson trial, it appears that many black women are prepared to do just what notes 50-52 *supra* and accompanying text.

64. G. LaFree, *supra* note 45, at 148. LaFree's focus on the interaction between race and gender suggests that the shift away from the sexual stratification theory does not loosen the frame enough to permit discussion of the combined effects of race and gender subordination on black women. LaFree repeatedly separates race from gender, as if they were wholly distinguishable issues; see, for example, *id.* at 147.

65. *Id.*

66. *Id.* at 151. LaFree interprets nontraditional sex to include drinking, drug use, extramarital sex, ill behavior, and "having a reputation as a 'party girl,' a 'hooker,' or someone who stays out late at night"; *id.* at 152.

67. *Id.* at 204.

68. *Id.* at 219 (emphasis added). While there is direct evidence that prosecutors are influenced by the race of the victim, it is not unreasonable to assume that race is an important predictor of conviction, particularly if the prosecutor is determined to maintain a high conviction rate regardless of the race of the victim. This calculus is probably reinforced when jurors are asked to convict in strong cases involving black victims. For example, in the case of the gang rape of a Jamaican schoolmate at St. John's University, the prosecutor argued that the acquittal of three white St. John's University students was intentional as racially influenced. Witnesses testified that the woman was incapacitated during much of the ordeal and had ingested a mixture of alcohol given to her by a black man who subsequently initiated the assault. The juror who convicted the black man stated that race played no role in their decision to acquit him, saying, "I think we all agreed that he was guilty, we all agreed to it," said one juror, "I was trying to make it racial but it wasn't," said another.

ived threat to their favored social note 59, at 155.

"access" guardedly because it is an rape. On the other hand, rape is partly depending on whether certain sexual access are violated. Although written into the sexual stratification itself into the rules, in that sexual the racial access rules is presumed voluntary; see, for example, *Sims*, 766, 769 (Ga. 1964) (describing the by a black man as "a crime more *Story v. State*, 59 So. 480 (Ala. 1912) public opinion, unrestricted to either woman prostitute is yet, though lost of greater sacrifice of the voluntary person to the embraces of the other note 49, at 125, 127.

approach places black women in their own victimization, requiring them to punish black men more harshly than for raping black women. In the Mike Tyson trial, it seems men are prepared to do just that; see accompanying text.

*LaFree* note 45, at 148. LaFree's transition gender suggests that the shift might be enough to permit discussion of the race and gender subordination on repeatedly separates race from gender, wholly distinguishable issues; see, for

*LaFree* interprets nontraditional behavior drug use, extramarital sex, illegitimate a reputation as a 'partier,' a 'pleasure who stays out late at night'; *id.* at 201.

(emphasis added). While there is little prosecutors are influenced by the race not unreasonable to assume that since predictor of conviction, prosecutors gain a high conviction rate might be less involving a black victim than a white probably reinforced when juries fail to involving black victims. For example, white St. John's University athletes for Jamaican schoolmate was interpreted by influenced. Witnesses testified that the stated during much of the ordeal, having of alcohol given to her by a classmate initiated the assault. The jurors insisted role in their decision to acquit. "There agreed to it," said one juror; "They were racial but it wasn't," said another; "Jurors:

"It Wasn't Racial," *New York Newsday* (July 25, 1991), at 4. Yet it is possible that race did influence on some level their belief that the woman consented to what by all accounts, amounted to dehumanizing conduct; see, for example, C. Agus, "Whatever Happened to 'The Rules,'" *New York Newsday* (July 28, 1991), 11 (citing testimony that at least two of the assailants hit the victim in the head with their penises). The jury nonetheless thought, in the words of its foreman, that the defendants' behavior was "obnoxious" but not criminal; see S. H. Schanberg, "Those 'Obnoxious' St. John's Athletes," *New York Newsday* (July 30, 1991), 79. One can imagine a different outcome had the races of the parties only been reversed. Rep. Charles Rangel (Dem.-N.Y.) called the verdict "a rerun of what used to happen in the South"; J. M. Brodie, "The St. John's Rape Acquittal: Old Wounds That Just Won't Go Away," *Black Issues in Higher Educ.* (Aug. 15, 1991), 18. Denise Snyder, executive director of the D.C. Rape Crisis Center, commented: "It's a historical precedent that white men can assault black women and get away with it. Woe be to the black man who assaults white women. All the prejudices that existed a hundred years ago are dormant and not so dormant, and they rear their ugly heads in situations like this. Contrast this with the Central Park jogger who was an upper-class white woman"; J. Mann, "New Age, Old Myths," *Washington Post* (July 26, 1991) C3 (quoting Snyder); see K. Bumiller, "Rape as a Legal Symbol: An Essay on Sexual Violence and Racism," 42 *U. Miami L. Rev.*, 75, 88 ("The cultural meaning of rape is rooted in a symbiosis of racism and sexism that has tolerated the acting out of male aggression against women and, in particular, black women").

69. *Id.* at 219-20 (citations omitted). Anecdotal evidence suggests that this attitude exists among some who are responsible for processing rape cases. Fran Weinman, a student in my seminar on race, gender, and the law, conducted a field study at the Rosa Parks Rape Crisis Center. During her study, she counseled and accompanied a twelve-year-old black rape survivor who became pregnant as a result of the rape. The girl was afraid to tell her parents, who discovered the rape after she became depressed and began to slip in school. Police were initially reluctant to interview the girl. Only after the girl's father threatened to take matters into his own hands did the police department send an investigator to the girl's house. The city prosecutor indicated that the case wasn't a serious one, and was reluctant to prosecute the defendant for statutory rape even though the girl was underage; the prosecutor reasoned, "After all, she looks sixteen." After many frustrations, the girl's family ultimately decided not to pressure the prosecutor any further and the case was dropped; see F. Weinman, "Racism and the Enforcement of Rape Law," 13-30 (1990) (unpublished manuscript) (on file with the *Stanford Law Review*).

70. G. LaFree, *supra* note 45, at 220.

71. *Id.*

72. *Id.* at 239 (emphasis added). The lower conviction rates for those who rape black women may be analogous to

the low conviction rates for acquaintance rape. The central issue in many rape cases is proving that the victim did not consent. The basic presumption in the absence of explicit evidence of lack of consent is that consent exists. Certain evidence is sufficient to disprove that presumption, and the quantum of evidence necessary to prove nonconsent increases as the presumptions warranting an inference of consent increases. Some women—based on their character, identity, or dress—are viewed as more likely to consent than other women. Perhaps it is the combination of the sexual stereotypes about black people along with the greater degree of familiarity presumed to exist between black men and black women that leads to the conceptualization of such rapes as existing somewhere between acquaintance rape and stranger rape.

73. C. Cooper, Nowhere to Turn for Rape Victims: High Proportion of Cases Tossed Aside by Oakland Police, *S. F. Examiner*, Sept. 16, 1990, at Aro.

74. *Id.* Advocates point out that because investigators work from a profile of the kind of case likely to get a conviction, people left out of that profile are people of color, prostitutes, drug users, and people raped by acquaintances. This exclusion results in "a whole class of women... systematically being denied justice. Poor women suffer the most"; *id.*

75. I do not mean to imply that all theorists who have made antiessentialist critiques have lapsed into vulgar constructionism. Indeed, antiessentialists avoid making these troubling moves and would no doubt be receptive to much of the critique set forth herein. I use the phrase "vulgar constructionism" to distinguish between those antiessentialist critiques that leave room for identity politics and those that do not.

76. 110 U.S. 2997 (1990).

77. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because the applicant is "likely to provide [that] distinct perspective." The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. . . . The policies impermissibly value individuals because they presume that persons think in a manner associated with their race; *id.* at 3037 (O'Connor, J., joined by Rehnquist, C. J., and Scalia and Kennedy, J. J., dissenting) (internal citations omitted).

78. 163 U.S. 537 (1896).

79. 397 U.S. 483 (1954).