

# “Kulturkampf[s]” or “fit[s] of spite”?<sup>1</sup> Taking the Academic Culture Wars Seriously

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## INTRODUCTION

Polarization and heated debate within legal academia are nothing new. Some might argue that vigorous contentiousness, even if not always civil, is essential to a healthy intellectual culture. Others would note that lawyers, legal academics especially, are a highly contentious bunch with a reputation for aggressive behavior.<sup>2</sup>

Heated debates between traditionalists and new emerging jurisprudential movements have been part of modern legal academia. Other notable jurisprudential battles include the exchanges between the defenders of classical legal theory and the legal realists in the 1930s through late 1950s. These were followed by the battles between the legal realists and legal process theorists in the 1940s and late 1950s. The legal process school, in turn, spurred a counter-critique by the law and society movement of the 1960s; then followed critical legal studies (CLS), feminist jurisprudence, Critical Race Theory (CRT), and last but not least, law and economics in the 1970s. Fifteen years ago, from his podium as Dean of Duke Law School, Paul Carrington suggested that “nihilist teachers,” a reference to CLS practitioners, had “an ethical duty to depart the law school . . . .”<sup>3</sup> In the debate that followed, Dean Carrington was accused of censorship

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<sup>1</sup> I am paraphrasing from Justice Scalia’s opening line in *Romer v. Evans*, 517 U.S. 620 (1996), where he commented in dissent: “The Court has mistaken a Kulturkampf [culture war] for a fit of spite.” *Id.* at 636 (Scalia, J., dissenting).

<sup>2</sup> LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 34 (1996) (“It is difficult to imagine many historians of either generation writing the kind of mean-spirited polemics law professors periodically produce.”).

<sup>3</sup> See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). He defines nihilists as people who believe that “law is a mere deception by which the powerful weaken the resistance of the powerless.” *Id.* (citing Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983)).

and intolerance.<sup>4</sup> Dean Carrington's defenders eventually pled for the academic freedom to express such views.<sup>5</sup> Meanwhile, CLS as a jurisprudential movement has principally gone international, and in the United States only a handful of scholars continue to explore CLS.

Fundamentally, this Article asks whether strife and disagreement are a necessary part of academic discourse. Part I describes the academic Kulturkamps aimed at CRT that have taken place in the last ten years both outside of and within the CRT movement.<sup>6</sup> Part I particularly examines what it is that academics are actually fighting about, whether the debate is actually overly personal, and whether these "fits of spite" are a part of the necessary conflict of major intellectual movements that are required to advance the collective knowledge. Describing the past and ongoing academic Kulturkamps is a necessary first step to understanding whether the divide can be bridged and whether the conflict that we experience might lead to the better production of knowledge.

Part II further analyzes what is causing the division in the ongoing academic Kulturkamps. Scholarship shrouds the differences in seemingly neutral terms, but much of the struggle is fueled by personal concerns. With respect to outsider critiques of CRT, the sources of strife can be reduced to three central questions. First, do whites, in particular men and heterosexuals, oppress minorities and women? Second, are racism, sexism, and homophobia so endemic that they have become permanent fixtures in American society? Finally, how do you make objective judgments of others in a world where neutrality and objectivity are suspect? Kulturkamps also play out with insider critiques. Recently, we have seen struggles about who defines the discipline of CRT, and seen reactions to the assimilationist–separationist dilemma. Some of the questions cannot be answered, or the differences bridged, but we can ameliorate anxieties by being more exact and careful in how we differ. While resolution may not be possible, it is important to identify the fundamental gaps as well as areas of common ground.

With the democratization of legal academia to include law

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<sup>4</sup> For an overview of this exchange, see generally David A. Kaplan, *A Scholarly War of Words over Academic Freedom*, NAT'L L.J., Feb. 11, 1985, at 1; and "Of Law and the River," and *Of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985) (various authors), which documents revealing exchanges between Dean Carrington and CLS and other liberal scholars (hereinafter "Of Law and the River").

<sup>5</sup> "Of Law and the River", *supra* note 4 *passim*. Dean Carrington currently devotes the bulk of his scholarship to alternative dispute resolution, not to jurisprudence.

<sup>6</sup> For the sake of convenient nomenclature, I will refer to CRT, LatCrit, and APIA critical studies collectively as CRT.

professors of different genders, races, and sexual orientations has come a loss of community, cohesion, and coherence. But what has been gained has been a more democratic and inclusive community. To believe that academics can again speak with a unified voice is no longer possible. Instead of despairing, legal academics must come to accept a new order in which disagreement is a constant. In this new order, the way in which legal academics choose to disagree will be just as important as the merit of their ideas.

### I. THE MANY FLAVORS OF ACADEMIC KULTURKAMPF

Legal academia's version of the culture wars is getting so shrill that it has become difficult to tell whether one is experiencing an aggressive exchange, colored with some occasional "fit[s] of spite," or whether legal academia is about to become prey to a divisive "Kulturkampf." In the last decade and a half there have been at least four eruptions of academic Kulturkampfs. Each in its own way has left its mark on the further development of scholarship and the individual jurisprudential movements. This Part examines these four eruptions.

#### A. *Vanilla Versus Chocolate: Neo-Traditionalists Versus the Race Crits*

Professors Farber and Sherry's publication in 1997 of *Beyond All Reason*<sup>7</sup> touched off a high profile round between the race crits and the neo-traditionalists. In their book, the authors restate for popular consumption the critiques they had previously published in law review articles. Even though *Beyond All Reason* contains nothing new, this repackaged missive had greater impact, as measured by the frequency with which it has been engaged, having been reviewed by close to a dozen reputable scholars.<sup>8</sup> In addition, it prompted high-profile bashing by prominent judges, reputable news media, and legal commentators.<sup>9</sup> Some reasons as to why Farber and Sherry

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<sup>7</sup> DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

<sup>8</sup> For earlier just as withering critiques of CRT, see generally ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* (1998); Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1159-60 (attacking CRT on the ground that it is not "real" scholarship and does not deal with appropriate legal concerns); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (distinguishing between forms of CRT narratives that are more or less helpful to understanding difficult constitutional dilemmas).

<sup>9</sup> See, e.g., Kathryn Abrams, *How to Have a Culture War*, 65 U. CHI. L. REV. 1091 (1998) (reviewing FARBER & SHERRY, *supra* note 7); Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051 (1998) (same) [hereinafter Delgado, *Book of Manners*];

enjoyed a higher profile than other equally blistering critiques might be that these are liberal scholars, and their criticism was more notable because it comes from quarters where support might have been expected.<sup>10</sup> As well, they are two highly regarded and well-published constitutional law scholars teaching at top law schools.

The attacks unleashed on CRT as a result of the publication of *Beyond All Reason* were scathing. Judge Posner, in his book review essay published in *The New Republic*, took the occasion to call all critical scholars the “lunatic fringe” and critical race scholars “whiners” and the “lunatic core.”<sup>11</sup> In his *New York Times* book review, Judge Alex Kozinski of the Ninth Circuit accused “multiculturalists [of] rais[ing] insuperable barriers to mutual understanding.”<sup>12</sup> *The Wall Street Journal* published an essay asserting that feminist jurisprudence and CRT were “antithetical to the very notion of law” and warning lawyers to be wary of the “mediocre legal scholars” now inhabiting law schools who teach that “American society is

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Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L.J. 1 (1998); Roderick M. Hills, Jr., *Truth or Consequences? The Inadequacy of Consequentialist Arguments Against Multicultural Relativism*, 15 CONST. COMMENT. 185 (1998) (reviewing FARBER & SHERRY, *supra* note 7); Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1998); Deborah C. Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST. L.J. 915 (1998) (responding to Farber and Sherry's thesis that CRT is anti-Semitic); Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109 (1997) (reviewing FARBER & SHERRY, *supra* note 7); Francis G. Mootz, III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605 (1998) (same); Daria Roithmayr, *Guerrillas in Our Midst: The Assault on Radicals in American Law*, 96 MICH. L. REV. 1658 (1998) (same); Edward Rubin, *Jews, Truth, and Critical Race Theory*, 93 NW. U. L. REV. 525 (1998) (same); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40 (same).

<sup>10</sup> Accord Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 668 (1993) (characterizing Farber and Sherry otherwise as “serious and careful commentators” and “well-intentioned” and therefore regarding the task of correcting their “thematic” errors as a necessary one).

<sup>11</sup> See Posner, *The Skin Trade*, *supra* note 9, at 40; see also *id.* at 43 (“[C]ritical race theorists come across as whiners and wolf-criers.”); *id.* at 42 (“[C]ritical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group.”). Tellingly, Professor Posner's most in-depth analysis of critical race theory is his twenty-two page discussion of Patricia Williams' narratives in *Alchemy of Race and Rights* in his almost 600-page opus, *Overcoming Law*. See RICHARD A. POSNER, *OVERCOMING LAW* 368–84 (1996) (discussing PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* (1991)).

<sup>12</sup> See Alex Kozinski, *Bending the Law: Are Radical Multiculturalists Poisoning Young Legal Minds*, N.Y. TIMES, Nov. 2, 1997, at 46 (reviewing FARBER & SHERRY, *supra* note 7). Kozinski also accuses critical race theorists of conspiring in the “judicial appointments” “game” of “picking judges who will enshrine the right policy into the Constitution.” *Id.*

pathologically racist and sexist . . . .”<sup>13</sup> In *The New Republic*, Jeffrey Rosen argued that Johnnie Cochran was an example of an “applied critical race theorist” when he “shameful[ly]” played the “race card” in the O.J. Simpson trial.<sup>14</sup>

These critiques are characterized by their highly combustible quality. Informed accounts in the popular press of the debate between the new crits and the neo-traditionalists were rare to nonexistent. I could only locate one article in the major newspapers that attempted to present both sides of the debate.<sup>15</sup> Most of the popular press articles carried inflammatory titles, such as *Law’s Racial Academics Get Thrashing They Deserve*,<sup>16</sup> *An Academic Theory Threatens the Foundations of the Law*,<sup>17</sup> and *Danger: Critical Race Theory Approaching from the South*.<sup>18</sup>

Not surprisingly, these high-profile barbs sparked a series of counter-volleys. In a 1999 *Minnesota Law Review* symposium, “Essays in Response to *Beyond All Reason*,” critical race scholars Jerome Culp and John Calmore charged that Farber and Sherry lacked good faith and had mischaracterized CRT.<sup>19</sup> But each went further. Professor

<sup>13</sup> Heather MacDonald, *Rule of Law: Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A21.

<sup>14</sup> Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27.

<sup>15</sup> See, e.g., Neil A. Lewis, *Black Scholars View Society with Prism of Race*, N.Y. TIMES, May 5, 1997, at A11 (interviewing or quoting Jeffrey Rosen, Dan Farber, and Suzanna Sherry as well as Tanya Lovell Banks, Anthony Cook, and Patricia Williams).

<sup>16</sup> Michael Skube, *Law’s Radical Academics Get Thrashing They Deserve*, ATLANTA J. & CONST., Nov. 16, 1997, at 12L (commenting that CRT “retail[s] absurdities”).

<sup>17</sup> William Domarski, *An Academic Theory Threatens the Foundations of the Law*, 143 CHICAGO DAILY L. BULL., Oct. 21, 1997, at 3 (praising Farber and Sherry for “taking us away” from the “Alice in Wonderland” world of the radical multiculturalists).

<sup>18</sup> Heather Mallick, *Danger: Critical Race Theory Approaching from the South*, TORONTO SUN, Feb. 16, 1997, at C10 (describing CRT as “overblown and foolish” and the “product of cheap shots and blind prejudice”); see also Shawn Mitchell, *Critical Race Theory: A Legal Argument to Radically Alter Rights in U.S.*, ROCKY MOUNTAIN NEWS, July 25, 1993, at 9A (arguing that CRT solutions are “impractical, unconstitutional . . . and make race relations much, much worse”); George F. Will, Editorial, *Playing the Race Card*, PORTLAND OREGONIAN, Nov. 29, 1996, at B8 (accusing critical race theorists of “playing the race card”); *Legal Mumbo Jumbo Law Professors’ Jokes*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Nov. 20, 1995, at B4 (reporting that law professors “play jokes on students called CRT and feminist jurisprudence”).

<sup>19</sup> John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry*, 83 MINN. L. REV. 1589, 1617 (1999) (“[The] most troubling [thing] about the Farber-Sherry view is that I do not see good faith there. . . . [T]here is just too much bad, ‘unavoidable conclusion’ stuff . . . .”); Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1654–55 (1999) (asking, almost rhetorically, how the author’s work regarding minority assimilation could have been misread, and connecting Farber and Sherry’s mischaracterization of his work to attacks in the national media characterizing CRT as having an “ugly streak”).

Calmore accused Farber and Sherry of “dehumaniz[ing]” CRT scholars by playing into negative racial stereotypes,<sup>20</sup> of “hav[ing] written quite the officious and condescending book . . . [which] should really be buried,”<sup>21</sup> and of “act[ing] as secret agents of a very right-wing racial project” describing the attacks as “not friendly fire at all, but, rather, enemy fire . . . a command for the critical race theorists to ‘shut up’ and ‘stay in your place.’”<sup>22</sup> Finally, Professor Calmore posited that Farber and Sherry’s “racism represents a bias *for* people of color, but only *as long as people of color stay in our place.*”<sup>23</sup> Professor Culp charged that Farber and Sherry wrote a book that “appeases the conservative thirst to smite infidels” and “has only the barest pretensions of the objectivity or the thoroughness that they require of others.”<sup>24</sup> He connected Farber and Sherry’s uncharitable mischaracterization of his work to attacks on CRT by the national media.<sup>25</sup>

CRT theorists were not the only ones that charged that Farber and Sherry’s critique was excessive and unhelpful. Feminist scholar Kathryn Abrams detailed at length her countercharge that Farber and Sherry uncharitably abbreviated feminist and critical race scholars’ works, painting feminists and critical race theorists to be extreme and nonsensical.<sup>26</sup> Professor Edward Rubin as well was critical of Farber and Sherry’s overbroad arguments, seeing critics more as the current heirs of postmodern continental philosophy, than as a “threat” to traditional academic values.<sup>27</sup> Professor Deborah Malamud countered Farber and Sherry’s charge that critical race scholarship is anti-Semitic, arguing that this argument is both overbroad and overly simplistic, and fails to take into account the unique socioeconomic situation of Eastern European Jewish

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<sup>20</sup> Calmore, *supra* note 19, at 1598. Professor Calmore further explains that, “[i]n many ways, Farber and Sherry have taken the humanity out of critical race theory and linked it to the racial grotesque.” *Id.*

<sup>21</sup> *Id.* at 1591.

<sup>22</sup> *Id.* at 1605.

<sup>23</sup> *Id.* at 1606.

<sup>24</sup> Culp, *supra* note 19, at 1638, 1655.

<sup>25</sup> *Id.* at 1654–55. For other critical race theorists’ critiques, see generally Delgado, *Book of Manners*, *supra* note 9, at 1059 (drawing parallels between Farber and Sherry’s work and white imperial scholarship and arguing that this kind of thrust drowns out the works of young critical scholars who might have something new and innovative to say); Roithmayr, *supra* note 9, at 1658 (suggesting that Farber and Sherry seem to imagine that a handful of “angry radical scholars, dark-skinned fanatics in their Che Berets” might take over legal academia).

<sup>26</sup> Abrams, *supra* note 9, at 1091.

<sup>27</sup> See Rubin, *supra* note 9, at 532.

emigrants at the turn of the century.<sup>28</sup>

Farber and Sherry responded by cataloging the “insults [that] flow freely in the law reviews” and accusing these critical theorists of using charges of racism to avoid valid criticisms.<sup>29</sup> The titles of two other essays in the *Minnesota Law Review* symposium further illustrate the “gloves off,” “no-prisoners” approach that characterized this important debate. For example, Matthew Finkin’s contribution was entitled “*QUATSCH!*,” colloquial German for “nonsense.”<sup>30</sup> Professor Subotnik used the not too subtle acronym “CRAT,” which comes close to “crap,” to describe CRT.<sup>31</sup> Steven Gey was only a tad more polite, entitling his essay *Why Rubbish Matters*.<sup>32</sup>

Amazingly, Farber and Sherry maintain that they wish to “encourage dialogue.”<sup>33</sup> The problem, as they see it, is with “the most radical forms of deconstruction.”<sup>34</sup> Yet, it is difficult to see how this strident rhetoric, only briefly captured here, can ever possibly lead to intellectual engagement.<sup>35</sup> Not only is this debate more shrill than illuminative, it also comes through as a very personal fight for everyone involved.<sup>36</sup>

The Farber and Sherry attacks are now over a decade old.<sup>37</sup> They did encourage virulent and unfair attacks in the media on CRT and its practitioners. Notwithstanding, CRT is still firmly lodged within

<sup>28</sup> See Malamud, *supra* note 9, at 921–40; see also Hills, *supra* note 9, at 185 (criticizing Farber and Sherry’s overuse of consequentialist arguments).

<sup>29</sup> See Daniel A. Farber & Suzanna Sherry, *Beyond All Criticism?*, 83 MINN. L. REV. 1735, 1738–40 nn.6–24 (1999).

<sup>30</sup> Matthew W. Finkin, *QUATSCH!*, 83 MINN. L. REV. 1681 (1999). Finkin believes that CRT is comparable to fascism. *Id.* at 1700.

<sup>31</sup> See Daniel Subotnik, *What’s Wrong with Critical Race Theory?: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL’Y 681, 682 n.4 (1998) (“I use this acronym to distinguish race theorists from CRITs.”).

<sup>32</sup> Steven G. Gey, *Why Rubbish Matters: The Neoconservative Underpinnings of Social Constructionist Theory*, 83 MINN. L. REV. 1707 (1999).

<sup>33</sup> FARBER & SHERRY, *supra* note 7, at 141.

<sup>34</sup> *Id.* at 140. This may be an attempt perhaps on their part to not include in their attacks certain genres of CRT that they do respect, particularly feminist scholarship, in which Professor Sherry sees herself participating.

<sup>35</sup> Accord AUSTIN, *supra* note 8, at 199 (“A plea for a friendly dialogue is seemingly incongruous in the face of the heated exchanges . . . .”); Anne M. Coughlin, *C’est Moi*, 83 MINN. L. REV. 1619, 1630 (1999) (finding it “harder than ever to imagine the two schools meeting”).

<sup>36</sup> See, e.g., *infra* notes 135–37 and accompanying text; Abrams, *supra* note 9, at 1112 n.38 (interjecting that she takes her Jewish identity seriously and finding unseemly charges that the “multiculturalists” are anti-Semitic); see also *supra* note 19 (providing responses of Professors Calmore and Culp to Farber and Sherry).

<sup>37</sup> In their book, *Beyond all Reason*, *supra* note 7, the authors reconfigure their criticism initially published in Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STANFORD L. REV. 807 (1993).

legal academia, and is arguably doing well.<sup>38</sup> There is at least one CRT scholar at most of the elite law schools, CRT workshops and conferences continue in one form or another, and the second generation CRT movements such as LatCrit and APIA (Asian/Pacific Islander American) critical scholarship are doing well within legal academia. CRT's influence has expanded beyond legal scholarship, as there are now anthologies in education, sociology, and religious ethics.<sup>39</sup>

*B. Java, Mocha, or Coffee?: Randall Kennedy and the Dispute over a "Voice of Color"*

Predating this row came a very high-profile challenge to CRT by Professor Randall Kennedy in his *Racial Critiques of Legal Academia*.<sup>40</sup> This Kulturkampf never approached the combustible quality of the *Beyond All Reason* exchanges, and unlike the *Beyond All Reason* exchange, it has had a far greater positive impact on the development of critical race scholarship. Professor Kennedy, in an article published just before he made tenure at Harvard Law School, critiqued critical race theorists Derrick Bell, Richard Delgado, and Mari Matsuda,<sup>41</sup> arguing that critical race scholars exhibit "a tendency to evade or suppress complications that render their conclusions problematic . . . [because] [t]hey fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars

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<sup>38</sup> For some the jury is still out; see, for example, POSNER, *OVERCOMING LAW*, *supra* note 11, at 105 ("[A] dislocation of the settled ways of thinking could improve the field. Law and economics has had this effect, and feminist legal scholarship as well. Maybe minority scholarship will too."). But Professor Jeffrey Stempel notes that "substantial . . . acceptance" is all that is necessary for outsider jurisprudence to take a hold in legal academia. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *BROOK. L. REV.* 659, 697 n.137 (1993). Stempel cites as evidence that feminism, CLS, and law and economics, in spite of initial strident objections, obtained substantial acceptance in academe within a few years. *Id.*

<sup>39</sup> See, e.g., PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION* (1999) (providing a study by a historian applying theoretical work by Williams and others to studying how race was "reconstructed" during the post-Civil War era); RACE IS—RACE ISN'T: *CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION* (Laurence Parker et al. eds., 1996) (performing series of studies that apply work by Williams, Delgado, and Bell to race conflicts in primary education); SHARON D. WELCH, *SWEET DREAMS IN AMERICA: MAKING ETHICS AND SPIRITUALITY WORK* (1999) (applying Williams' and other CRT theoretical approaches to rethinking a religious ethic of progressive social change and current issues of multiculturalism).

<sup>40</sup> Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 *HARV. L. REV.* 1745 (1989) [hereinafter Kennedy, *Racial Critiques*].

<sup>41</sup> *Id.* at 1781–84. Kennedy's critique is often cited with Stephen Carter's, another Harvard Law School professor. See Stephen L. Carter, *The Best Black, and Other Tales*, *RECONSTRUCTION*, Winter 1990, at 6.

of color produce a racially distinctive brand of valuable scholarship.”<sup>42</sup> Professor Kennedy contended that these critical minority scholars placed too much emphasis on an experienced commonality of “oppression,” and in particular, that Professors Delgado and Bell overstated the relative influence of racial prejudice.<sup>43</sup> In a passage that was close to getting personal, Professor Kennedy confronted Professor Derrick Bell’s ongoing one-man crusade against Harvard Law School, which had failed to hire any African American women faculty for almost three decades.<sup>44</sup> Kennedy asserted that Bell failed to engage competing hypotheses to explain the small number of professors of color in elite law schools.<sup>45</sup> In critiquing Professor Mari Matsuda’s work, Professor Kennedy asserted that she overstated the values of a “special” or “distinct” minority legal scholarship and by making that argument stigmatized other minority scholars by claiming that they speak as “victims of racial oppression.”<sup>46</sup>

The Kennedy critique occasioned great consternation among critical race and liberal scholars. Randall Kennedy’s high visibility position within legal academia, as one of two African American male professors who had succeeded Derrick Bell at Harvard Law School, played a critical role in the notice that his attack received. Interestingly, Randall Kennedy styles himself a “race relations” scholar,<sup>47</sup> and has written extensively, albeit primarily from an individualistic perspective, about the (mis)treatment and (mis)characterizations of African Americans in the law.<sup>48</sup>

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<sup>42</sup> Kennedy, *Racial Critiques*, *supra* note 40, at 1749.

<sup>43</sup> *Id.* at 1770, 1776.

<sup>44</sup> DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR (1994). The relationship, as depicted in published writings, between Professors Kennedy and Bell can be currently characterized as highly personal and acrimonious. Compare Derrick Bell, *The Strange Career of Randall Kennedy*, NEW POLITICS, Summer 1998, at 55 (describing Kennedy as “quite willing to take his differences with black people public in ways that—whether intended or not—serve to comfort many whites and distress blacks” and that “render him an apologist [for] aspects of [a] . . . system that are less overtly racist than in earlier times but no less ominous in the threat they pose for all blacks”), with Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985, 2001–04 (2000) (responding to Bell’s critique and arguing that Bell is overly certain of what is the “correct” civil rights position on controversial race relations issues) [hereinafter Kennedy, *Race Relations Law*].

<sup>45</sup> Kennedy, *Racial Critiques*, *supra* note 40, at 1764.

<sup>46</sup> *Id.* at 1778.

<sup>47</sup> See Kennedy, *Race Relations Law*, *supra* note 44, at 1985–2010 (arguing that race relations law should be taught as a standard part of a law school’s curriculum).

<sup>48</sup> See, e.g., RANDALL L. KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003); RANDALL L. KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002); RANDALL L. KENNEDY, RACE, CRIME, AND THE LAW

The response by critical race scholars was published in a symposium issue of the *Harvard Law Review*.<sup>49</sup> Perhaps the most perceptive counter-critique was Dean Alex M. Johnson's *The New Voice of Color*.<sup>50</sup> In his analysis, Dean Johnson argued that Bell, Matsuda, and Delgado speak from a communalistic perspective and from egalitarian ideology, while on the other hand, Kennedy's interpretation of racial experience is individualistic and meritocratic.<sup>51</sup> Further, Kennedy does not make claims for the entire community of racial minorities; rather, he insists that the individual voice of African American conservatives and neo-conservatives be given as much weight as the voices of egalitarian progressives such as Bell, Delgado, and Matsuda.<sup>52</sup> By contrast, Johnson characterized Matsuda, Bell, and Delgado as wishing to improve the circumstances of those in minority communities who are most disadvantaged and as believing that responsibility for alleviating this wrong lies in the white male community which historically has been advantaged by such social hierarchies.<sup>53</sup>

At the time, the Kennedy versus Bell–Delgado–Matsuda controversy was believed to be divisive among minority legal scholars, and some criticized Kennedy privately for making his critique so pointed and public. Randall Kennedy's *Racial Critiques of Legal Academia*, a symposium response appearing in the *Minnesota Law Review*, Professor Alex Johnson's friendly comment, and other well-written and influential commentary by Professors Duncan Kennedy<sup>54</sup> and Richard Delgado<sup>55</sup> helped to highlight that at the heart of this

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(1997). For an extensive discussion of Kennedy's views on interracial adoption, see Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421 (2004).

<sup>49</sup> Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844, 1844–86 (1990) (presenting commentary by Scott Brewer, Milner S. Ball, Robin D. Barnes, Richard Delgado, and Leslie G. Espinoza); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1884–86 (1990) (arguing that minority works express the profound effect of racism and recognize the manifestations of racial exclusion).

<sup>50</sup> See Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2008–11 (1991).

<sup>51</sup> *Id.* at 2036, 2040–42.

<sup>52</sup> *Id.* at 2047.

<sup>53</sup> *Id.* at 2040, 2045–47.

<sup>54</sup> See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (criticizing Randall Kennedy from a CLS perspective).

<sup>55</sup> See, e.g., Richard Delgado, *Enormous Anomaly? Left–Right Parallels in Recent Writings About Race*, 91 COLUM. L. REV. 1547 (1991) (identifying the gap between “neo-conservatives” and “crits” as resulting from different emphases on individual agency and volition, use of history, and whether the key to racial oppression is individual acts of discrimination or systemic societal forces); Richard Delgado,

controversy was a genuine and deep difference of opinion as to what a minority perspective might be, its potential value to legal scholarship, how prevalent and endemic racism was rooted in American society and elite institutions, and what methodologies should be used in analyzing racial issues. These are fundamental differences that go to the heart of the CRT enterprise, and continue to divide scholars, both within CRT and without. The issues of anti-essentialism and the problematic use of terms like “subordination,” which simultaneously disempowers even as it identifies a systemic inequality, broached by Professor Kennedy, remain important and his critique helped CRT recognize, at a very initial point, that there would be ongoing disagreements as to the value of CRT or “Black scholarship.”<sup>56</sup> Professor Kennedy remains outside of the CRT movement, but remains committed to continue to explore “the depth, complexity, and pervasiveness of racial controversies in the United States.”<sup>57</sup> He has recently called for law schools to do a better job educating young lawyers in the complexities of race relations; to fail to do so, he intimates is the equivalent of educational malpractice.<sup>58</sup> This is a position that CRT scholars would enthusiastically endorse.

*C. Lemons or Lemonade?: APIA Crits and the Call for a New Legal Movement*

A very similar split occurred in an exchange that featured Jim Chen, Farber and Sherry’s then-colleague at the University of Minnesota Law School, and eight critical race and liberal scholars. Professor Chen launched the first strike in *Unloving*,<sup>59</sup> a short essay

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Rodrigo’s *Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) (addressing Randall Kennedy’s essentialism critique).

<sup>56</sup> For example, Delgado’s collection on critical race theory includes Randall Kennedy’s critique as well as Leslie Espinoza’s rebuttal. See CRITICAL RACE THEORY: THE CUTTING EDGE 431–57 (Richard Delgado ed., 1995) [hereinafter DELGADO, CRT: THE CUTTING EDGE]. In a section entitled, “Criticism and Self-analysis,” Delgado acknowledges Kennedy’s contribution to CRT: “[S]ometimes a movement’s themes and distinctive contours will emerge most clearly in the crucible of criticism.” *Id.* at 431. As well, Professors Jerome Culp and Alex Johnson underscore points of agreement between their CRT perspective and Kennedy’s, yet both maintain that Kennedy’s “race relations” approach is unpersuasive. See Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 103; Johnson, *supra* note 50, at 2040.

<sup>57</sup> Kennedy, *Race Relations Law*, *supra* note 44, at 1986.

<sup>58</sup> See *id.*

<sup>59</sup> Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994). For the only commentary on this debate, see Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535 (2001).

that criticized Professor Robert Chang's declaration of an "Asian American Moment" propitious for launching a new critical Asian American legal scholarship.<sup>60</sup> Professor Chang was hearkening back to the 1980s when a group of critical scholars had declared a key "moment" for critical race theory.<sup>61</sup> Chen's objection to Chang's rally call centered around what he characterized as "racial fundamentalism,"<sup>62</sup> a mode of racial thinking that he boiled down to the tenet, "dark skin good, white skin bad."<sup>63</sup> Chen argued that Chang's "racial fundamentalism" opposed assimilation,<sup>64</sup> ignoring the reality of what Chen viewed as inevitable "creolization"—by which Chen meant interbreeding—of America,<sup>65</sup> and fostered segregation and isolation of racial and ethnic minorities.<sup>66</sup> Moreover, Chen argued that Chang condemned the "creolization" of America.<sup>67</sup> As support, Chen pointed to a Chang footnote in which he bemoans that his "future children and their future children will always be Asian Americans."<sup>68</sup> From this remark, Chen concluded that Chang "certainly seems as though he positively wants his descendants to have naught but Asian blood."<sup>69</sup>

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<sup>60</sup> See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1314 (1993) ("The time has come to announce once again an Asian American Moment. With it comes an Asian American Legal Scholarship . . ."); see also ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 48 (1999) ("A critical Asian American legal studies is needed to change the current racial paradigm, which is inadequate to support a more complete discourse on race and the law.")

<sup>61</sup> See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xvi–xix (Kimberlè Crenshaw et al. eds., 1995); Culp, *supra* note 56, at 40 (announcing "an African-American Moment, when different and blacker voices will speak new words and remake old legal doctrines").

<sup>62</sup> Chen describes racial fundamentalism as proposing,

(1) that white racism has always thwarted and will always thwart equality for nonwhites in America, (2) that nonwhites will always be at a disadvantage within white-dominated society, and (3) that nonwhites should therefore celebrate their own isolation rather than take part in the self-abnegation that is assimilation.

Chen, *supra* note 59, at 158–59.

<sup>63</sup> *Id.* at 156.

<sup>64</sup> *Id.* at 158 ("Chang has plainly rejected the goal of integration through multiracial assimilation and adaptation."). *But see infra* note 74 (rebutting this reading of Chang's work).

<sup>65</sup> Chen, *supra* note 59, at 150, 152 ("I regard the United States of America as the Creole Republic. . . . Crossbreeding in the Creole fashion . . . extends to the bedroom. Sexuality, like water and money, seeks its own level.") (footnotes omitted).

<sup>66</sup> *Id.* at 161–62.

<sup>67</sup> *Id.* at 155 ("What I call 'racial fundamentalism' rejects . . . the rise of the Creole Republic.")

<sup>68</sup> *Id.* at 158 (citing Chang, *supra* note 60, at 1318–19 n.403).

<sup>69</sup> *Id.* at 159.

Eight scholars responded to Chen in the Iowa Law Review's subsequent symposium on *Unloving*.<sup>70</sup> As in the prior symposium counter-critiquing Professor Randall Kennedy, many articulated broader themes highlighting once again that at the core of this debate are fundamental differences in perspectives on race relations in America.<sup>71</sup> Several argued that Chen's optimistic claims of the inevitable American "creolization" are neither persuasive, nor backed by either history or the current politics of majority-minority relations.<sup>72</sup> Chen's view that Americans of all ethnicities and race would eventually assimilate was viewed by some as unsupported musings.<sup>73</sup> Others rebutted Chen's ungenerous reading of Chang's footnote.<sup>74</sup>

Professor Chen's highly charged personal attack of Professor Chang, however, prompted responses with a personal edge. Several scholars condemned *Unloving* as "backlash scholarship,"<sup>75</sup> "vicious

<sup>70</sup> Colloquy, 81 IOWA L. REV. 1467 (1996) (commentary by Keith Aoki, Margaret Chon, Garret Epps, Frederick Dennis Greene, Neil Gotanda, Natsu Saito Jenga, Peter Kwan, and Alfred Yen).

<sup>71</sup> See, e.g., Margaret Chon, *Chon on Chen and Chang*, 81 IOWA L. REV. 1535, 1536 (1996) (describing how the disagreement can be traced to modernist and postmodernist modes of knowing); Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1589-90 (1996) (arguing that Chen fails to recognize that the category "Asian American" is contested and complex, unlike Chang); Natsu Saito Jenga, *Unconscious: The "Just Say No" Response to Racism*, 81 IOWA L. REV. 1503, 1504-06 (1996) (noting that Chang and Chen differ as to whether color blindness is a solution to racism); Peter Kwan, *Unconvincing*, 81 IOWA L. REV. 1557, 1559-60 (1996) (finding that interracial mixing is an aspiration from critical race theory perspective and not a current social reality, which is Chen's starting point); Alfred C. Yen, *Unhelpful*, 81 IOWA L. REV. 1573, 1578-79 (1996) (noting that Chang and Chen differ as to whether oppression occasions a shared group perspective).

<sup>72</sup> See, e.g., Gotanda, *supra* note 71, at 1588-89 (arguing that Chen wrongly uses older racial science, ignoring a century of evolving scientific contentions of biological descent).

<sup>73</sup> See, e.g., Chon, *supra* note 71, at 1540-54 (contending that Chang fails to make the case for inevitable minority assimilation); Jenga, *supra* note 71, at 1518 ("Creating interracial families cannot, on its own, eliminate racism. . . . [Rather it] almost guarantees that one will not be able to proceed in a 'colorblind' manner . . . [because] [i]nterracial couples face heightened scrutiny by both the general public and their family, friends and acquaintances.")

<sup>74</sup> See, e.g., Garret Epps, *What's Loving Got to Do with It?*, 81 IOWA L. REV. 1489, 1491-92 (1996) (arguing that Chang's footnote is a "slender reed" and Chen only offers anecdotes from his own personal experience to rebut Chang's careful analysis); Jenga, *supra* note 71, at 1511 (contending that Chang did not say his children could not have other heritages, rather it is Chen who "forces" racial categories onto mixed-race offspring); Yen, *supra* note 71, at 1576 (rebutting Chen's argument that Chang requires Asian Americans to think monolithically about race and scorn whites).

<sup>75</sup> Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L.

sarcasm,<sup>76</sup> “verbal violence,”<sup>77</sup> “character assassination and attempt to silence another,”<sup>78</sup> and “an attack ad with academic pretensions.”<sup>79</sup> Professor Greene’s *Gunga Din*<sup>80</sup> used an imaginary dialogue between minority students who interviewed Professor Chen on campus to make the point that within some law faculties, Professor Chen was being interviewed as a “minority” who could not be as competent as the white candidates. For example, one imaginary student described Chen as a “poster child for the model minority”<sup>81</sup> who plays into conservative backlash politics.<sup>82</sup> Professor Greene’s imaginary student continued by stating, “minority conservatism is driven by self-interest, self-hate, and greed.”<sup>83</sup>

Chen responded by being “unrepentant” and accusing the “Unloving Eight” of being “bitter and vindictive,” and wanting to “houn[d] him out of law teaching altogether.”<sup>84</sup> Chen went on to write a series of essays against affirmative action prior to tenure. But after being voted tenure at Minnesota,<sup>85</sup> Professor Chen has stayed largely out of racial issues, concentrating his scholarly energies on administrative law, agricultural law, and federalism issues.

Meanwhile, Professor Robert Chang’s call to begin the self-conscious development of APIA critical scholarship has been heeded. Not only has there been a robust work product by many of the contributors to the response to the *Unloving* symposium, APIA scholars have had an ongoing series of workshops where serious scholarship is presented and young scholars are mentored in their projects.

*D. Cracking Coconuts: LatCrit and the First Generation CRT Founders*

The most recent missive in the academic literature involves one of the founders of critical race theory, Professor Richard Delgado,

REV. 1467, 1482 (1996).

<sup>76</sup> Chon, *supra* note 71, at 1549.

<sup>77</sup> Gotanda, *supra* note 71, at 1586.

<sup>78</sup> Epps, *supra* note 74, at 1491.

<sup>79</sup> Yen, *supra* note 71, at 1574.

<sup>80</sup> Frederick Dennis Greene, *The Resurrection of Gunga Din*, 81 IOWA L. REV. 1521 (1996). A “Gunga Din” is an Indian who foolishly takes a bullet for the white English imperialists. Such persons pursue “success . . . predicated on undermining the social and political progress of their communities.” *Id.* at 1528.

<sup>81</sup> *Id.* at 1525.

<sup>82</sup> *Id.* at 1526.

<sup>83</sup> *Id.* at 1529.

<sup>84</sup> Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609, 1625 (1996).

<sup>85</sup> Two of the votes would have belonged to Professors Farber and Sherry.

and the LatCrit movement, which he calls “the new generation of critical theorists.”<sup>86</sup> The vehicle for Professor Delgado’s critique is his detailed book review<sup>87</sup> of the anthology, *Crossroads, Directions, and a New Critical Race Theory*, edited by critical race and LatCrit theorists Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris.<sup>88</sup> The crux of Professor Delgado’s critique is that LatCrit has strayed from a materialist analysis of race that focuses on power, history, and similar material determinants of minority-group oppression.<sup>89</sup> CRT, Delgado laments, has become too focused on “text, discourse, and mindset”<sup>90</sup> and has largely neglected the important ongoing challenges to the civil rights of minorities.<sup>91</sup>

Richard Delgado and Derrick Bell, also a pioneer of CRT, emphasize the class and political components of racial discrimination. Bell’s racial realism,<sup>92</sup> and Delgado’s thesis that “racism is as inherent in Americans as DNA,”<sup>93</sup> share the premise that racial oppression is endemic to American society. Both have applied neo-Marxist concepts of class struggle to racial conflict.<sup>94</sup> There are three corollaries to this perspective that racial oppression is deeply

<sup>86</sup> Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 125 (2003-2004) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)) [hereinafter Delgado, *Blind Alleys*].

<sup>87</sup> *Id.*

<sup>88</sup> CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) (hereinafter CROSSROADS). The volume consists primarily of papers and speeches presented at the Critical Race Theory Conference at Yale Law School in 1997.

<sup>89</sup> See Delgado, *Blind Alleys*, *supra* note 86, at 125

<sup>90</sup> *Id.*; see also *id.* at 123–24 (“An ‘idealist’ school holds that race and discrimination are largely functions of attitude and social formation. . . . In recent years, idealist approaches and discourse analysis have moved to the fore.”).

<sup>91</sup> *Id.* at 138 (citing the loss of civil rights of Muslims in the war against terrorism as a necessary area of inquiry that LatCrit has neglected). Professor Delgado explains, “The little attention progressive writers have devoted to today’s situation has consisted of examining the predictable issues of rhetoric, mindset, and image . . . .” *Id.* He queries “how critical race theorists would see the current situation facing this country in its struggle against terrorism and for the loyalties of democratic, modernizing elements in the Muslim world.” *Id.* at 137.

<sup>92</sup> See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter BELL, SAVED]; DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992) [hereinafter BELL, FACES].

<sup>93</sup> See Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 373 (1998) (arguing that racism is inherent and intractable, like DNA); see also DELGADO, CRT: THE CUTTING EDGE, *supra* note 56, at xiv (contending that racism is inherent).

<sup>94</sup> Bell emphasizes, in particular, how slavery was condoned and interwoven into our Constitution. See BELL, SAVED, *supra* note 92, at 26–42 (examining constitutional provisions sanctioning slavery).

rooted in American society. First, American society is not a unified whole, but rather is fragmented and divided. Second, race relations in America are better described as an ongoing struggle, where one group wins out, not because of the inherent worthiness of their ideas, but because they are in a position of power. Third, political structures, as well as legal institutions, maintain racial divisions. Bell, Delgado, and other key writers have substantiated their view of race relations with a close study of American history.<sup>95</sup> Professor Delgado has dedicated his academic life to understanding how systemic racial oppression permeates American society, and how the law has ignored the justice claims of racial minorities by framing such issues in formalist legal formulations.<sup>96</sup>

From the beginning, CRT has drawn on the wealth of psychological and sociological literature on racial attitudes to demonstrate how unconscious racial attitudes are deeply ingrained in America's psyche and social habits.<sup>97</sup> Gunnar Myrdal's classic, the *American Dilemma*,<sup>98</sup> written almost half a century ago, is a psychological and sociological treatise on America's deeply rooted race problem. Richard Delgado recognized, obliquely, that cognitive theories and conflict theories—based on interdisciplinary insights—have merit and are an important part of CRT.<sup>99</sup> The question and the critique, however, is about how much emphasis on non-materialist theories is useful when a legal movement is dedicated to the promotion of racial justice. Delgado's essay puts it this way: "Nothing is wrong with working to improve racial attitudes, conscious or subconscious. Yet, we should not be overly sanguine about the

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<sup>95</sup> See, e.g., *id.* (examining constitutional provisions sanctioning slavery); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—And Denial—Of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (documenting segregation and discriminatory practices against racial and ethnic minorities in Colorado).

<sup>96</sup> Professor Delgado's body of work is substantial and influential. His key contributions include: RICHARD DELGADO, *THE COMING RACE WAR?: AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* (1996); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 1999); DELGADO, *CRT: THE CUTTING EDGE*, *supra* note 56; RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1996); MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

<sup>97</sup> See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

<sup>98</sup> GUNNAR MYRDAL, *THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (20th anniversary ed. 1962).

<sup>99</sup> See Delgado, *Blind Alleys*, *supra* note 86, at 127 (discussing Charles Lawrence's cognitive theories and unconscious racism).

possibilities for change through this avenue alone.”<sup>100</sup> Angela Harris reminded us that, in critical race theory and other identity movements, there is an ongoing tension between idealist–liberal perspectives and deterministic–materialist analyses.<sup>101</sup>

Richard Delgado is concerned that LatCrit may be “fracturing” CRT. In his view, not enough emphasis is being placed within LatCrit on the important new cutting edge questions. He admonishes that more attention should be paid to the tension between the war on terrorism and the civil rights of racial minorities.<sup>102</sup> Delgado urged that close attention should be paid to the impact of “the extraordinary growth of the Latino population” in the last decade and a half.<sup>103</sup> Immigration, Delgado mused, may be “the new civil rights issue of the century.”<sup>104</sup> Finally, Delgado encouraged greater attention be given to the role of racial minorities in our country’s two-party political system.<sup>105</sup>

Delgado’s admonitions are well taken. LatCrit scholars have been busy working on the very questions he raises, as Dean Kevin Johnson responded in his rejoinder to Delgado.<sup>106</sup> My own work is currently preoccupied with what Delgado calls “the extraordinary growth of the Latino population.”<sup>107</sup> The LatCrit VIII symposium paid major attention to the cutting edge issue of Latino and APIA voting issues beyond 2000.<sup>108</sup> Victor Romero, Eric Yamamoto, Kevin Johnson, Bill Ong Hing, Berta Hernandez-Truyol, and Raquel Aldana and others have written extensively about how the war on terrorism is jeopardizing the civil rights of racial minorities.<sup>109</sup>

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<sup>100</sup> *Id.* at 143–44.

<sup>101</sup> See Angela P. Harris, *Foreward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 749–60 (1994).

<sup>102</sup> Delgado, *Blind Alleys*, *supra* note 86, at 151.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Kevin R. Johnson, *Roll over Beethoven: “A Critical Examination of Recent Writing About Race”*, 82 TEX. L. REV. 717 (2004).

<sup>107</sup> Delgado, *Blind Alleys*, *supra* note 86, at 151. My own view on this “extraordinary growth” can be found in SYLVIA R. LAZOS VARGAS, *CAMBIO DE COLORES* (2002). For an additional take on this population explosion and its effects on the American workplace, see Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303 (2004).

<sup>108</sup> See, e.g., Kathay Feng et al., *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849 (2002); Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917 (2002); Sylvia R. Lazos Vargas, *Latina/o and APIA Vote Post-2000: What Does It Mean to Move Beyond “Black and White” Politics?*, 81 OR. L. REV. 783 (2002); see also Keith Aoki et al., *Race and the 2000 California Recall*, 16 BERKELEY LA RAZA L.J. (forthcoming June 2005).

<sup>109</sup> See, e.g., Raquel Aldana-Pindell, *The 9/11 “National Security” Cases: Three*

LatCrit is now a mature movement that coexists with other second-generation CRT jurisprudential movements. The *Crossroads* anthology, Delgado's critique, and Kevin Johnson's response are signs that LatCrit is a healthy scholarly movement. Professor Minow observed that, "[t]o be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism."<sup>110</sup> CRT is healthy enough to have reproduced.<sup>111</sup> Delgado and his CRT first-generation contemporaries spawned a second-generation movement, LatCrit, which is healthy, unruly, contentious, and ambitious, but yet fits within the key tenets of CRT with its own styled emphasis. Just as CRT grew from Professor Randall Kennedy's critique, so LatCrit will benefit from Professor Delgado's challenge.

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*Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985, 1032–33 (2002) (describing the detention of noncitizens after September 11 largely on the basis of race); Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2002) (analyzing consequences of the "war on terror" for Latinos); Berta E. Hernández-Truyol, *Glocalizing Terror*, 81 OR. L. REV. 941, 960–61 (2002) (examining the treatment of Latinos post-September 11); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002) (describing the ostracism of "Muslims, Middle Easterners, and South Asians in the United States in the wake of September 11" as a "de-Americanization process"); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 863–64 (2003) (examining the threat to civil rights and increased local involvement in immigration enforcement); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 39–41 (2002) (analyzing racial profiling and the "racially unbalanced compromises in civil liberties" post-September 11); Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 794–95 (2002) (arguing that increased local involvement in immigration enforcement could undermine community relationships and cause an increase in racial profiling); Peggy Nagae, *Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity*, 81 OR. L. REV. 1133 (2002) (analyzing impacts on racial minorities of heightened security measures); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1125 (2002) (noting the effects of the USA PATRIOT Act on Arab American and South-Asian American communities); Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 747 (2003) (suggesting that the "war on terror" may create opportunities for political coalitions among racial minorities); Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269 (2003) (discussing implications of the "war on terror" for the quest for racial justice).

<sup>110</sup> See Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, 115–16.

<sup>111</sup> Nancy Ehrenreich has frequently made this point at various LatCrit conferences and retreats.

## II. IDENTIFYING THE GREAT DIVIDES IN THE ACADEMIC KULTURKAMPFS

The many splits in legal academia could lead one to despair, hide one's head in the sand, or conclude that meaningful intellectual engagement, the advance of race relations, and civil academic disagreement are not possible.<sup>112</sup> This Part further analyzes the causes of the ruptures in the academic Kulturkampf and points to strategies that might be useful in dampening these culture wars.

### A. *Outsider Critiques: To What Black Hole Does the Many-Headed Hydra of CRT Lead?*

Farber and Sherry and the many outsider critics make the following claims: (1) that law scholars can ascertain a truth that is verifiable; (2) that law can fashion "objective" standards; and (3) that practitioners of law, regardless of their philosophic bent or identity, can clearly discern what is reasonable.<sup>113</sup>

Professors Hills,<sup>114</sup> Levit,<sup>115</sup> Mootz,<sup>116</sup> and Rubin<sup>117</sup> have noted that Farber and Sherry's modernist claim is out of sync with this century's philosophical developments regarding objectivity and truth.<sup>118</sup> The last century of developments in philosophical thought and social science, particularly postmodern philosophy, have undermined the notion of a unitary truth.<sup>119</sup> Instead, this body of work, which has

<sup>112</sup> See Lee, *supra* note 59, at 539 (describing CRT Kulturkampf as having a particular ugly edge).

<sup>113</sup> FARBER & SHERRY, *supra* note 7, at 760.

<sup>114</sup> Hills, *supra* note 9.

<sup>115</sup> Levit, *supra* note 9.

<sup>116</sup> Mootz, *supra* note 9.

<sup>117</sup> See Rubin, *supra* note 9, at 535–37 (chiding Farber and Sherry for failing to acknowledge that CRT is a derivative of continental postmodern philosophy and neo-Marxist thought).

<sup>118</sup> Professors Roderick Hills and Edward Rubin focus their critique on this point. Professor Hills argues that Farber and Sherry's "enlightened liberalism" is "astoundingly anemic" because Farber and Sherry do no more than claim that their truth is superior. Hills, *supra* note 9, at 192–93. Professor Rubin faults Farber and Sherry for failing to address the forceful CRT insight that classes who hold power in society are in a position to construct what truth and objectivity means, and thus legitimize their superior power and class status. See Rubin, *supra* note 9, at 537–38 (observing "that society's assertions about the objectivity or truth of socially contingent systems, such as merit and law, reveals [sic] a basic defect in its underlying conception of truth"). Professor Rubin explains that "critical race theory thus reveals the political and manipulative nature of our society's prevailing concept of objectivity, or truth." *Id.* at 538. This fundamental insight, Professor Rubin notes, is derivative of continental critical theory; thus, CRT can be viewed as part of this larger critique of modernist premises. *Id.* at 535–36.

<sup>119</sup> See, e.g., PAUL KAHN, *THE CULTURAL STUDY OF LAW* (1999); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* (1996).

been particularly influential in the social sciences, posits that objectivity cannot be independent of a claimant's culture or world viewpoint.<sup>120</sup> Scholarship based on the premise that "truth" is socially constructed asserts that the cognitive schemas that we carry in our heads and our cultural preconditioning influence what we believe to be the "objective" "truth."<sup>121</sup> Another line of scholarship explains that what we have come to call "reason" has the potential to exclude women and minorities because of the manner in which they have been socialized to express themselves.<sup>122</sup>

As Professor Farber and Judge Posner, another harsh critic of CRT, demonstrate in their own work, "postmodern" premises have greatly influenced legal thinking. In the *Problems of Jurisprudence*, Judge Posner asserts that most American lawyers are legal pragmatists; that is, American law as practiced is more interested in solving legal problems contextually than it is in asserting stable unitary meta-principles.<sup>123</sup> Moreover, Judge Posner rejects unitary, objective truth; "[t]here is knowledge if not ultimate truth."<sup>124</sup> He champions a form of legal pragmatism that looks at problems with full awareness of "limitations of human . . . knowledge, the difficulty

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<sup>120</sup> The classical claim to this position is made by anthropologist Clifford Geertz in *The Interpretation of Cultures*. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 30 (1973) (positing that to study a culture we should examine shared realities, myths, social identity, ethnicity, status, and "attempts by particular peoples to place these things in some sort of comprehensible, meaningful frame"). See also RENALDO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 202 (2d ed. 1993) ("The temptation to dress one's own 'local knowledge' of either the folk or professional variety in garb at once 'universal' and 'culturally invisible' to itself seems to be overwhelming."). For another view of this classical claim, see RAYMONDE CARROLL, *CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE* 125-26 (Carol Volk trans., 1988), in which the author urges us to accept that "my truth is precisely that, 'my' truth." She continues, "I must become able to conceive that the 'aberrant' behavior that wounds me . . . may be informed . . . by the truth of the . . . other. . . ." *Id.*

<sup>121</sup> See *supra* note 120. See also Lawrence, *supra* note 97 (arguing that unconscious discrimination is so pervasive that it requires a more far-reaching contextual analysis of discrimination cases); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1211 (1995) (describing stereotypes as a subset of the "vast array" of structures that comprise human cognition and concluding that discrimination therefore occurs not impulsively but as the result of an accumulation of subtle distortions in perceiving objective data).

<sup>122</sup> See Jane Mansbridge, *Feminism and Democracy*, *AM. PROSPECT*, Spring 1990, at 126, 127 ("Subordinate groups sometimes cannot find the right voice or words to express their thoughts, and when they do, they discover they are not heard. . . . [They] are silenced, encouraged to keep their wants inchoate, and heard to say 'yes' when they mean 'no.'").

<sup>123</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26-28 (1990).

<sup>124</sup> *Id.* at 466.

of translations between cultures, the unattainability of ‘truth,’ the consequent importance of keeping diverse paths of inquiry open, and the dependence of inquiry on culture and social institutions . . . .”<sup>125</sup>

In several law review articles, Professor Farber attacks legal formalism. In one, he praises Grant Gilmore’s attack on Langdellian formalism, quoting Gilmore’s statement that “the body of the law, at any time or place, is an unstable mass in precarious equilibrium . . . .”<sup>126</sup> In another article, he argues for a form of practical reasoning in which judges exercise their experience to fine “tune their [cognitive] schemata to the specifics of the case.”<sup>127</sup> He contends that judges must eschew “naive” formalism and hew a middle road between “excessive confidence in the power of the ‘word’” and “unguided discretion.”<sup>128</sup>

Likewise, Suzanna Sherry wrote a controversial law review article, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, in which she argued that “modern men and women, in general, have distinctly different perspectives on the world . . . .”<sup>129</sup> The male perspective paralleled pluralistic liberal theory, the approach that currently dominates constitutional interpretation.<sup>130</sup> She further argued that a feminine style of jurisprudence, which more closely resembled communitarian norms, might be more adaptive for modern society.<sup>131</sup>

The premise of a subjective truth, then, one could argue, is not at the root of what these critics find troublesome in critical scholarship. These critics have accepted the premise that there is no absolute truth, and that differing cultural and gender perspectives affect how different groups interpret truth.<sup>132</sup> Instead, what these critics find disturbing is critical scholarship’s powerful combination

<sup>125</sup> *Id.* at 465; *see also id.* (arguing that judges must adopt awareness of “translations” between cultures).

<sup>126</sup> Daniel A. Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 93–94 (1995).

<sup>127</sup> Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 556 (1992).

<sup>128</sup> *Id.* at 559.

<sup>129</sup> Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543 (1986).

<sup>130</sup> *Id.* at 543–44.

<sup>131</sup> *Id.* at 544.

<sup>132</sup> *See* Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 106 (1995) (“Undeniably, pluralization, or postmodernization . . . comes at a certain . . . price, . . . the comfortable, self-assured determinacy afforded by homogeneity. But this determinacy was always illusory . . .”).

of the postmodern perspective of truth with structuralist analysis. For critical theorists who are influenced by postmodernism, power permeates all social structures and relationships. The truth and norms that will be viewed as “objective” and “neutral” are those that reflect the perspective of the dominant classes. Farber and Sherry understand the implications of critical theory when they admonish: “Don’t let the isms fool you . . . the basic theory is . . . reality is socially constructed by the powerful in order to perpetuate their own hegemony.”<sup>133</sup>

Farber and Sherry’s work is useful in discerning the principal concerns of traditional scholars, because they so exhaustively, candidly, and somewhat emotionally, articulate the ways in which they find critical thinking disturbing, or in their words, “beyond all reason.”<sup>134</sup> Farber and Sherry reveal that they also have an emotional-identity stake in this debate by the manner in which they derisively refer to critical scholars,<sup>135</sup> engage in not too subtle name calling,<sup>136</sup> and charge that CRT scholars are not really intellectual.<sup>137</sup>

Critical scholarship intertwines structuralist insights and discourse analysis with identity politics, making for a powerful and volatile combination. It is folly to think that these issues are abstract and removed; rather, they are immediate and personal. In a critique of Farber and Sherry by Professor Ann Coughlin, who has criticized CRT, she explained why CRT and its progeny touch a raw nerve:

[T]he radical project attacks the political and ethical foundations of the work that traditional legal scholars do and, thereby, calls into question the kind of people who we believe we are. To put it mildly, it is more than a bit distressing for legal scholars . . . to hear that their entire professional enterprise has been enlisted in support of a racist, sexist, and homophobic status quo, let alone to read that they themselves are racist-sexist-homophobic bigots.<sup>138</sup>

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<sup>133</sup> FARBER & SHERRY, *supra* note 7, at 23.

<sup>134</sup> *Id.*, tit.

<sup>135</sup> *Id.* at 101 (claiming that the radicals are sloppy scholars).

<sup>136</sup> *Id.* at 142 (alleging that the critical scholars are “paranoid [in] style and rigi[d]”).

<sup>137</sup> See, e.g., *id.* at 9 (asserting that the radicals “have relatively little interest in the nuances of philosophical theories”). It is this aspect of Farber and Sherry’s work that has led Culp to accuse them of exercising white privilege “to the bone.” Culp, *supra* note 19, at 1639. Calmore likewise makes the case that Farber and Sherry have fallen prey to demeaning stereotypes of racial minorities. See Calmore, *supra* note 19, at 1598.

<sup>138</sup> Coughlin, *supra* note 35, at 1622. See, e.g., Abrams, *supra* note 9, at 1111–13 (interjecting that the author takes her Jewish identity seriously and finding unseemly charges that the “multiculturalists” are anti-Semitic); see also *supra* note 19 (citing Calmore’s and Culp’s responses to Farber and Sherry).

The personal/emotional concerns that are at the bottom of the critics' discomfort can be reduced to the following three issues. First, do whites, men, and straights oppress minorities, women, gay men, and lesbians? Second, is oppression so endemic that racism, sexism, and homophobia are permanent fixtures of American society? Third, how does one make judgments of others in a world where neutrality and objectivity are suspect? Let us explore each of these issues in turn.

1. Agency: Do Whites, Men, and Straights Oppress Minorities, Women, and Homosexuals?

As to the issue of agency, Farber and Sherry criticize what they call the "social construction" thesis that "objective knowledge is a power relation, one category of people benefiting at the expense of another category of people."<sup>139</sup> They locate the agency for "this covert oppression" of women, minorities, and gay and lesbians in "straight white males. . . . Everyone else is either a victim, a collaborator, or an unwitting dupe."<sup>140</sup>

In modernist thinking, someone must exercise power when there is a power relationship. Moreover, there is intentionality between cause and effect because when one group benefits over another, that relationship exists only because someone willed or caused it. If one can make the claim that this dominant-subordinate relationship is unjust, then the actor in the dominant position has moral culpability. Peter Margulies, a Farber and Sherry critic, put it this way: Farber and Sherry believe that the problem with replacing the Enlightenment commitment to "reason and cognition" with appeals to "rhetoric and emotion" is that "the monsters of our unreasoning imagination," that is "anti-Semitism, Holocaust revisionism, and religious fanaticism" will take center stage.<sup>141</sup>

Yet, structuralism generally does not attach motivation to the structure of inequality.<sup>142</sup> Neither does it make moral judgments about those who benefit from structures of power.<sup>143</sup> Instead, structuralism limits itself to describing structures of discourse and knowledge and how these structures construct dominant-subordinate

<sup>139</sup> FARBER & SHERRY, *supra* note 7, at 24.

<sup>140</sup> *Id.*

<sup>141</sup> See Margulies, *supra* note 9, at 1126-27.

<sup>142</sup> Foucault, for example, refused to locate structures of power, arguing instead that power infuses *every* social relationship. MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 221 (1977).

<sup>143</sup> The criticism can be made that this body of thought is amoral, since its main thrust is to debunk the liberal premise of individual independence and autonomy.

relationships and ideologies.<sup>144</sup>

Critical race theorists could perhaps diffuse the anxiety that majority scholars feel when they read this scholarship by perhaps using more precise vocabulary when they describe structures of racism and oppression. Of course, this would do nothing to diffuse anxiety that would be raised just because one is addressing these issues.

Farber and Sherry have it right when they complain that critical scholars spend almost all their effort in ferreting out racism, sexism, and homophobia in legal practices that on the surface appear neutral. When critical scholars describe the social, cultural, and political dynamics that account for such endemic biases they generally refer to these systemic constructions as “oppression” and “subordination.”<sup>145</sup> In the last decade, critical scholarship and LatCrit theory have begun to distinguish among the various forms of oppression and subordination and work through the implications of various dynamics. For example, there is an important distinction between blatant Bull Connor racism,<sup>146</sup> unconscious stereotyping,<sup>147</sup> and benefiting from social assumptions because one is a member of a dominant group.<sup>148</sup> The law reflects as well that these are not uniform acts of discrimination.<sup>149</sup> Those who are conscious that they

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<sup>144</sup> Antonio Gramsci, a neo-Marxist, found oppression to be a function of the oppressed classes’ “false consciousness.” Gramsci’s concept of hegemony involved “false consciousness,” consent by the great masses, and the coercive apparatus of state power. See generally SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

<sup>145</sup> See, e.g., MARILYN FRYE, THE POLITICS OF REALITY 1–16 (1983).

<sup>146</sup> Bull Connor was the Alabama police commissioner who most of us have seen on TV clubbing and hosing down the freedom riders of the Civil Rights era. “Bull Connor” racism refers to such blatant forms of racism. For the most part, such racism seems remote; it is conduct that most Americans condemn, but they also view it as mainly “engaged in only by other (uneducated, mostly Southern, and morally reprehensible) whites.” Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1524 (1998).

<sup>147</sup> See Lawrence, *supra* note 97; Krieger, *supra* note 121.

<sup>148</sup> The literature refers to this as “privilege.” See STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 969–71 (1993). Jody Armour argues that whites can become conscious of their racial stereotypes, and break “habits or automatic processes” that might cause them to act in a biased manner toward racial minorities. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 755–58 (1995).

<sup>149</sup> In Title VII, the doctrinal tool used to differentiate among different types of discrimination is the intent requirement. See generally Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415

are engaging in acts of prejudice or stereotyping are more legally accountable than individuals who benefit unconsciously from cultural assumptions.

Also, the concepts of white/male/heterosexual “privilege” developed in the literature imply no active agency. Rather, privilege describes benefits that accrue to members of a dominant class because of their group membership. Social structures and cultural assumptions cause the dominant group to be viewed as possessing characteristics that mark them as superior to, and more able than, those who are members of the relational “other.”<sup>150</sup> For example, men are leaders and active, while women seek cooperation and are passive. In addition, members of the dominant group will benefit when society incorporates that group’s norms and viewpoint as the default standard for the entire society.<sup>151</sup> For example, in the business environment, it has usually been the case that aggressive leadership style—a norm favored by men—is more valued, and therefore more often rewarded than a cooperative enabling style—a norm favored by women. In exercising privilege, the dominant group “goes along” with these advantages, choosing not to see them. Privilege then is an “invisible” aspect of gender, racial, and sexual orientation difference. In the minds of those who hold privilege there are no racist thoughts. Neither do they view themselves as agents of the oppression of minorities. At play are both a lack of consciousness and a lack of willingness to question the sources of many advantages that these

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(2000).

<sup>150</sup> Martha Minow writes:

[A]ttribution of difference . . . locates the problem in the person who does not fit in rather than in relationships between people and social institutions. The attribution of difference hides the power of those who classify and of the institutional arrangements that enshrine one type of person as the norm, and then treat classification of difference as inherent and natural while debasing those who are different. . . . When public or private actors label any groups as different it disguises the power of the namers, who simultaneously assign names and deny their relationships with and power over the named. Naming another as different seems natural and obvious when . . . social practice, and communal attitudes reinforce that view.

MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 111 (1990).

<sup>151</sup> Professor Iris Marion Young describes the process as follows:

Cultural imperialism involves the universalization of a dominant group’s experience and culture, and its establishment as the norm. . . . The culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialized are stamped with an essence.

IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

members enjoy because they are white, male, or heterosexual.

A more nuanced approach to describing the various forms of discrimination could help to bridge the existing paradigm gap, and might help to make the discourse seem less accusatory. Moreover, a more nuanced approach is more descriptively accurate. If critical scholars are to argue for laws that change the social and cultural background that constructs race, gender, and sexual orientation, then they must also describe more cogently those situations under which the law should hold actors individually accountable. A second implication is that critical scholars should endeavor to use terms that more accurately describe the forms of subordination that they are trying to capture. To indiscriminately use terms like “racism,” “oppression,” and “prejudice,” lends itself to confusion about what critical scholars are actually attempting to describe and theorize. Finally, critical scholars should not lose sight that these labels continue to be loaded terms. While it may be too much to indiscriminately proscribe such terminology because it allegedly is a “conversation stopper,” critical scholars should nonetheless recognize that these terms have a powerful effect. To use the term “racism” in a universalistic sense has the potential to desensitize the legal community to this term. A more nuanced approach could mean that the critical project may become less threatening to those scholars who perceive themselves to be in the group of “privileged” beneficiaries that critical scholarship indicts. Such moderation in tone, and not in substance, could help to further engagement.

## 2. Are Racism, Sexism, and Homophobia So Endemic as to Be Permanent Fixtures of American Society?

CRT in its fatalistic form<sup>152</sup> is deeply troubling and difficult to accept. Farber and Sherry disapprovingly quote Delgado’s assertion that “[r]acism is natural and normal—the ordinary state of affairs . . . .”<sup>153</sup> They also retell with unveiled dismay Derrick Bell’s *Space Traders* hypothetical that depicts white Americans as willing to bargain with aliens who will take all American blacks away in exchange for saving

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<sup>152</sup> This is my own description of Bell and Delgado’s view that racism is endemic to American society. Both Bell and Delgado contest the description of their theories as fatalistic. Delgado argues that his premise that racism is endemic should encourage us to be vigilant and not surrender. Delgado & Farber, *supra* note 93, at 372. Bell argues that his “racism is permanent” thesis is addressed to members of racial communities and functions to admonish them not to be overly confident in civil rights remedies and to become more self-reliant. See BELL, *SAVED*, *supra* note 92, at 12; see also *infra* notes 158–61 and accompanying text.

<sup>153</sup> FARBER & SHERRY, *supra* note 7, at 24.

the rest of the world.<sup>154</sup> Farber and Sherry cite these passages to show that critical theory is extreme, making three assertions in support of that point. First, they assert that CRT only seeks to “expose” such “pathologies.”<sup>155</sup> Second, they contend that CRT posits that “[r]eason is a political entity,” designed to ensconce racism, sexism, and homophobia.<sup>156</sup> Third, they argue that CRT contends that justice is merely a “rhetorical device.”<sup>157</sup>

This is a strong medicine for anyone, particularly for liberal whites who see themselves as champions of racial and social justice. While the proposition that racism is endemic may be discomforting to whites, it is a fact of life for minorities. Bell describes that, when he retells the *Space Traders* parable, African American audiences instinctively grasp the racial truth behind it and nod their heads in assent and recognition. The Farber and Sherry skepticism contrasts with this resonance that Bell achieves with black audiences.<sup>158</sup>

Professor Bell is brutally honest about how he sees race operating in this country. He encourages both racial minorities and whites to take an honest look at race relations and ask several hard questions. First, what does it say about whites’ moral makeup that whites participated for so long in the gruesome system of slavery and accepted its indirect and direct benefits?<sup>159</sup> Second, why do a majority of whites refuse to vote for policies that would relieve the suffering of poor people, many of whom are racial minorities?<sup>160</sup> Third, why do whites appear to be unconcerned that there continues to be ongoing discrimination against racial minorities, even if it is unconscious?<sup>161</sup> Fourth, why are whites not bothered when there are so few racial minorities among society’s elites, as CEOs of corporations, influential politicians, and leading educators?<sup>162</sup> Finally, do whites target racial minorities as scapegoats in order to imagine their status to be better

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<sup>154</sup> *Id.* at 25.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 24–25 (citing Derrick Bell, *Radical Realism*, 24 CONN. L. REV. 363, 364 (1992), for the proposition that law and courts are “instruments for preserving the status quo and only periodically and unpredictably serve as a refuge of oppressed people”) (internal quotation marks omitted).

<sup>158</sup> See Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 903 (recounting that most white audiences react to this story with denial and disbelief, while black audiences find the story plausible).

<sup>159</sup> See BELL, *FACES*, *supra* note 92, at 6–8.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

off than it really is, and in order to identify with privileged elites?<sup>163</sup> The answer for Bell is that whites are only too willing to look away from racial problems and racial minorities' plight. Whites will advocate changes to social and political systems that relieve blacks' racial oppression only when it benefits them.<sup>164</sup> Bell concludes:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as an act of submission, but as an act of ultimate defiance.<sup>165</sup>

What is at play here is a fundamental schism in the interpretation of American history, the American legal and political system, and the nature of race relations. It is what Thomas Kuhn describes in his *The Structure of Scientific Revolutions* as an irresolvable paradigm gap.<sup>166</sup> The proponents of the racial realist paradigm cannot convert the defenders of the traditional paradigm, and vice versa. One could view this as a form of the irresolvable "half empty/half full" debate. Bell and Delgado both take a backward perspective that emphasizes what Bell calls America's holocaust—slavery. Most traditional liberal theorists, like most white Americans, take a forward-looking perspective that emphasizes the 1960s civil rights transformation of American race relations. Yet another perspective on this schism is to note that Bell and Delgado are

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<sup>163</sup> *Id.*

<sup>164</sup> This is Bell's "interest convergence" theory. See generally Bell, *supra* note 157; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>165</sup> BELL, *FACES*, *supra* note 92, at 12.

<sup>166</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10–11 (3d ed. 1996). I acknowledge Professor Stempel's critique that the concept of paradigms and paradigm gaps is overused in scholarly literature. See Stempel, *supra* note 38, at 696 (criticizing overuse of the concept of paradigms among legal scholars but applying it to the field of dispute resolution). Further, Professor Stempel makes a very cogent argument that Kuhn's concept of how knowledge evolves does not fit well with respect to legal thought. See *id.* at 695–705. Legal theory does not undergo dramatic jumps forward, as have the sciences. *Id.* at 696. Law is moored to traditional concepts, in large part because of common-law methodology. Finally, law is not "scientific," but mirrors social thinking and reflects the ongoing changes in social science, philosophy and moral thought. *Id.* at 738. In sum, there are no sudden transformations, just slow plodding. Nonetheless, I will use these concepts because they are useful to explain why well-meaning white liberal scholars, like Farber and Sherry, are unable to accept much of what CRT scholars are trying to say, and because Kuhn's concept of engagement is at the core of how I believe legal knowledge evolves.

addressing minority communities. Both believe that unflinching honesty with respect to American liberal democratic politics is essential for minority members to avoid being lulled into false comfort. Racial realism frees minorities from false hope and enables them to renew their pursuit of racial justice with “ultimate defiance.”<sup>167</sup> When critics listen in, however, they hear a dialogue that appears to condemn all white Americans.<sup>168</sup>

Kuhn’s key insight is that disciplinary knowledge is as much a social construct as it is a scientific undertaking.<sup>169</sup> Disciplinary norms and practices can constrain what practitioners can observe and even understand.<sup>170</sup> When groups function from fundamentally distinct knowledge assumptions, both opponents and proponents talk past each other. Each group uses its own sets of assumptions and principles to argue that their “paradigm” is superior.<sup>171</sup> What results is circularity because neither group can convince the other that its arguments have merit.<sup>172</sup> Moreover, because these groups function from a distinct set of assumptions, often the very terms that they use will not have the same meanings.<sup>173</sup>

Racial realism is fundamentally unsettling. Most white scholars, as is the case with many critical race scholars, find it difficult to reconcile their legal work with a perspective that asserts that law is incapable of solving racial and gender injustice. Racial realism’s main attribute—its unflinching willingness to look at the ugliness of America’s racial past and present—also accounts for why racial realism has managed to swallow up much of the current debate. Its fatalism seems to question everything that is familiar, including whether Americans are capable of transforming themselves into less prejudiced individuals. While this is a powerful insight, it is unsettling to many scholars, who write because they believe they can persuade legal actors to reconsider how they interpret legal principles.

Further, CRT is threatening to whites’ sense of a fair and

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<sup>167</sup> See BELL, *FACES*, *supra* note 92, at 12.

<sup>168</sup> See George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 689–92 (1999) (describing how whites and minorities do not share the same conceptual framework and arguing that CRT narratives are largely addressed to minority communities which share a common life experience).

<sup>169</sup> See KUHN, *supra* note 166, at 160–91

<sup>170</sup> *Id.* at 151.

<sup>171</sup> *Id.* (“Each group uses its own paradigm to argue in that paradigm’s defense . . .”).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 202.

innocent self.<sup>174</sup> With uncanny prescience, Bell foretold that the questions raised by racial realism are “easier to reject than refute . . . .”<sup>175</sup> As Kuhn and Bell would have predicted, the (white) critics have strenuously rejected the (nonwhite) view of race relations. *No CRT critic*<sup>176</sup> has attempted to respond to the hard questions raised by Bell and Delgado. Yet, many of these same critics claim to be just as committed as critical theorists to the goal of racial equality.

In the case of such an irreconcilable gap, Thomas Kuhn recommends engagement.<sup>177</sup> Kuhn advocates that insiders and outsiders not stop talking to each other, and that they attempt to find common ground on which to continue a dialogue.<sup>178</sup> It is engagement by both sides of the divide, so to speak, that eventually leads to “scientific revolutions.”

There is a sliver of common ground between the CRT theorists and the critics. It is hopeful that in a debate between Richard Delgado and Dan Farber, Professor Farber asserts that he has a great deal in common with Delgado because he believes that “racial inequality” is “central and requir[es] the most serious possible attention.”<sup>179</sup> Similarly, Mark Tushnet, in his exchange with critical race theorists, also reiterated his commitment to racial equality, and acknowledged that the CRT scholarship he is critiquing “substantially enhance[s] my understanding of the law.”<sup>180</sup>

Critical scholars should take these academics at their word. They should refuse to be distracted by rhetorical debates as to whether racial realism is “paranoid.”<sup>181</sup> There can be common

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<sup>174</sup> Lazos Vargas, *supra* note 146, at 1524–26 (describing white racial innocence as an essential attribute of white American identity); *see also* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (explaining that the affirmative action debate is framed in the rhetoric of “white innocence” and that this avoids dealing with problems of unconscious racism). Ross observes that “by repressing our unconscious racism we make coherent our self-conception of innocence and make sensible the question of the actual victimization of blacks.” *Id.* at 312.

<sup>175</sup> *See* BELL, *FACES*, *supra* note 92, at 12.

<sup>176</sup> *See* authors cited *supra*, note 9.

<sup>177</sup> BELL, *FACES*, *supra* note 92, at 12.

<sup>178</sup> KUHN, *supra* note 166, at 161–90.

<sup>179</sup> Delgado & Farber, *supra* note 93, at 374. In reality, Professor Delgado and I share a great deal in our views of law and American society. Both of us see the issue of racial inequality as being central and requiring the most serious possible attention. Both of us reject the conservative dogma of color blindness, and both of us believe that there is an imperative need for dialogue and discussion of this topic.

<sup>180</sup> *See* Tushnet, *supra* note 8, at 259 n.32. Professor Tushnet’s critique can be understood as urging that CRT narrative scholarship be more precise so that it can be better understood (or heard) by mainstream constitutional scholars. *Id.* at 259.

<sup>181</sup> *See supra* note 136 and accompanying text.

ground. The debate has to be refocused by asking how the law can fulfill its commitment to racial and gender equality.

3. How Do Whites, Men, and Heterosexuals Evaluate Minorities Without Risking Being Called “Racist,” “Sexist,” or “Homophobic”?

Critical scholars’ attack on merit and objectivity can be interpreted at a deeply personal level. Farber and Sherry reveal this when they pose the following rhetorical question: “If objectivity is a myth, and knowledge and merit are socially constructed, where does that leave those who cling to traditional . . . aspirations? The answer: *at some risk of being labeled racists and bigots.*”<sup>182</sup> They further allege that critical scholars believe that “all current merit standards are infected by racial or gender bias.”<sup>183</sup> Farber and Sherry capture critical scholars’ attack on merit when they observe that critical scholars reduce merit to mere “mindset,” the “bundles of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”<sup>184</sup> Randall Kennedy’s critique of Bell, Delgado, and Matsuda is also based on his own belief that structures of merit in institutions function well enough, and that a black scholar could be judged fairly.<sup>185</sup>

Merit, as an institutional practice, impacts on both critics and critical scholars directly. Critics, like Farber, Sherry, Tushnet, and Posner, have attained positions of influence in legal academia. They make decisions as to who will enter the ranks of legal academia, vote on the tenure of colleagues, and serve on the editorial boards of university presses and peer-reviewed journals.<sup>186</sup> On the other hand, critical scholars, many of whom are junior, are vulnerable to criteria

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<sup>182</sup> FARBER & SHERRY, *supra* note 7, at 33 (emphasis added).

<sup>183</sup> Farber & Sherry, *supra* note 29, at 1748.

<sup>184</sup> FARBER & SHERRY, *supra* note 7, at 29 (internal quotation marks omitted).

<sup>185</sup> *Cf.* Kennedy, *Racial Critiques*, *supra* note 40, at 1762–64 (urging CRT scholars to undertake more academic rigor in their critiques). *See also* Duncan Kennedy, *supra* note 54, at 712–17 (pointing out that part of the gap between Randy Kennedy and CRT scholars revolves around whether there can be a neutral assessment of merit in legal academia, which is dominated by white elites).

<sup>186</sup> *See* Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1095 (1992). Professor Culp believes that “a disproportionate number of blacks will not make tenure” if tenure standards are the same as for white professors. *Id.* Making a similar point but coming from a completely different viewpoint, Judge Posner also believes that “a disproportionate number of blacks will be turned down” for tenure. However, because this will be “awkward” for mostly white academic institutions, Posner asks rhetorically, “are there to be two tracks . . . [with a second tier] affirmative action track . . . limited to blacks?” POSNER, *OVERCOMING LAW*, *supra* note 11, at 105.

that cause their work to be viewed as unmeritorious because these traditional scholars have already come to the conclusion that critical scholarship is “paranoid,”<sup>187</sup> “lunatic,”<sup>188</sup> or dangerously anti-foundational,<sup>189</sup> charges that have been legitimized because high-profile scholars and the media have reified them.<sup>190</sup>

In this case, bridging the paradigm gap has immediate and important implications. Critical scholarship is a jurisprudence that challenges not only traditional perspectives, but also confronts the personal, intellectual, and emotional comfort of traditional scholars. These traditional scholars are the same colleagues who sit in judgment at tenure time.

Tenure is supposed to be awarded on the basis of merit, but is it? Critical race scholars have attacked the premise that merit is a neutral concept. Such a critique does not lead to the conclusion that critical scholars reject merit altogether. Rather, critical race scholars advocate reconceptualizing merit in ways that take into account the potential for cultural biases, whether such biases be based on race, gender, or sexual orientation. Lani Guinier advises that standards of merit must be carefully scrutinized in order to ensure that subjectivity is minimized, and that “objective” standards do not implicitly favor one group over another.<sup>191</sup> The critique of merit is not unfamiliar. Farber and Sherry themselves acknowledge that “merit” as an institutional practice has been imperfect, tending towards elitism and self-replication.<sup>192</sup>

The continued inclusion of critical scholars within legal academia is important. The Supreme Court in *Grutter v. Bollinger*<sup>193</sup> explained that diversity of viewpoints and perspectives in elite institutions whose very purpose is the construction of knowledge is an

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<sup>187</sup> See *supra* note 136 and accompanying text.

<sup>188</sup> See *supra* note 11 and accompanying text.

<sup>189</sup> See generally FARBER & SHERRY, *supra* note 7.

<sup>190</sup> See *supra* notes 13–18 (citing to popular press commentary attacking CRT, echoing what journalists understood critics to be saying).

<sup>191</sup> See, e.g., Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968–97 (1996).

<sup>192</sup> Farber and Sherry capture critical scholars’ attack on merit. “Judgments about . . . academic merit . . . reflect the ‘mindset’ of the dominant social groups . . . their ‘bundles of presuppositions, received wisdoms, and shared understandings.’” FARBER & SHERRY, *supra* note 7, at 52. They go on to argue that because Jewish and Asian American scholars have been able to succeed in academic institutions, their success “proves” that the standards that have benefited them are not fundamentally flawed. See *id.* at 57–59.

<sup>193</sup> 539 U.S. 306 (2003).

essential project to a stable democracy.<sup>194</sup> Legal jurisprudence has evolved because the legal academy has been sufficiently pluralistic to include those who defend comfortable notions and those who challenge them. Legal knowledge is not unitary. No single jurisprudential outlook dominates. Instead, there is a multiplicity of approaches, with no single jurisprudential view ever being able to confidently claim preeminence.<sup>195</sup> It is important that legal knowledge remain a pluralistic enterprise. This dictates that a healthy academic environment be one where various jurisprudential outlooks can be aired, are engaged, and where each is in competition with the other. Yet legal academia is also a social institution, so there are social forces at play that push legal academics towards uniformity, conformance, self-duplication, and “dumbing down” through the bureaucratization of legal institutions any ideas and practices that may threaten the status quo.

For legal scholarship to remain a dynamic and pluralistic enterprise, the tendency towards uniformity and conformance must be consciously resisted. Each individual legal scholar who is tenured will be making decisions as to who can gain entry into the legal academy through the process of voting on tenure. If traditional scholars as individuals allow their discomfort with the ideas of critical race scholarship to temper their judgment as to the professional merit of critical race scholars who are up for tenure, then the consequence will be that fewer critical scholars will be part of legal academia. No one would win in the long run with such results. Academics must strive to judge those who make them uncomfortable in as “neutral” a manner as possible, by which I mean first, that those who judge must become aware of their emotions and not allow them to color the outcome, and second, that the judgment of merit not become a quarrel about world perspectives on race or gender. Professor Edward Rubin has argued that critical scholarship can be judged fairly by majority scholars. In particular, he has argued that

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<sup>194</sup> *Id.* at 330 (agreeing with the district court that the “[diversity] policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races” and that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds”) (internal quotation marks omitted) (second alteration in original). See generally Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. (forthcoming May 2005).

<sup>195</sup> Although this is not the thrust of Professor Minda’s recompilation of legal movements, his book makes this point nicely. See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* (1995).

CRT and other outsider scholarship should be evaluated phenomenologically, according to criteria of coherence, persuasiveness, significance, and applicability.<sup>196</sup> Professor Rubin argues that the doubt and anxiety that CRT scholarship triggers in majority scholars by CRT's challenge to core beliefs can be put to good use.<sup>197</sup> Doubt and anxiety can be redirected such that one becomes more self-critical about one's own philosophical and epistemological position. It is through the process of being challenged and formulating responses to those challenges<sup>198</sup> that legal scholarship can advance. Scholarship, both majority and CRT, becomes more precise, more reflective, and more balanced through this process of critique and counter-critique.

Rubin's approach hearkens back to Kuhn's observation that the key to the evolution of disciplinary knowledge is intellectual engagement rather than agreement.<sup>199</sup> Although insiders may come to understand what outsiders are arguing, they will likely remain unpersuaded that the outsider paradigm is superior to theirs.<sup>200</sup> Through continuous engagement and explication the outsider paradigm gains greater acceptance as an increasing number of participants becomes familiar with the ideas and comes to accept its premises.<sup>201</sup> As Kuhn explains, there are important pitfalls in the process of engaging a competing knowledge community. Outsiders must recognize that there is a fundamental communications gap between insiders and outsiders. They must become "translators" of their views.<sup>202</sup> For example, confusion and dissension may be caused when the same vocabulary is used in different ways.<sup>203</sup> Such fundamental misunderstanding can be avoided by more careful explication of terminology and fundamental assumptions. Challengers can communicate their views and assumptions through "share[d] everyday vocabularies."<sup>204</sup> By using common concepts and principles, supporters of the outside paradigm can "translate" their

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<sup>196</sup> See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 *passim* (1992).

<sup>197</sup> *Id.* at 946.

<sup>198</sup> Rubin advises that "the very process of formulating counter-arguments, which is a mechanism for outright rejection of the author's work when uncritically performed, becomes a datum for assessing that work's quality in the context of a more disciplined evaluative theory." *Id.*

<sup>199</sup> KUHN, *supra* note 166, at 203.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 153, 201-04.

<sup>202</sup> *Id.* at 202.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

own theories to the established group, and better depict the fundamental ways in which their view differs and the consequences of that difference. Finally, supporters can “develop . . . hardheaded arguments”<sup>205</sup> and show with “concrete results”<sup>206</sup> that their “paradigm” better explains certain kinds of difficult problems that the established paradigm has been unable to address.<sup>207</sup>

In sum, academic Kulturkamps are distressing at one level, because they signal that outsiders and insiders are talking past each other and unwilling to consider what the other has to offer. However, both Rubin and Kuhn have been helpful in their observations that an academic ethic of engagement can help bridge the gap. The goal is not agreement, but that each side develop non-emotional and hard-headed approaches to explaining their own positions and be willing to be open to the others’ basic premises and challenges.

*B. Insider Critiques: Coping with a Many-Headed Hydra*

As Professor Francisco Valdés underscores, LatCrit’s principal analytical methodology evidences a multidimensional analysis.<sup>208</sup> Because he believes the dynamics of subordination—race, gender, class, culture, history, social group formation—are too complex to be captured in one or two dimensions or “intersectionalities,”<sup>209</sup> Valdés urges “multidimensional critique . . . [as] another step toward helping the LatCrit community better visualize and understand the nature of . . . critical legal theory and praxis.”<sup>210</sup> Professor Lisa Iglesias has noted that this methodology enables LatCrit to “tak[e] a stance against all forms of subordination.”<sup>211</sup> In addition, LatCrit has strived to be inclusive of multiple perspectives and groups in order to break through artificial structures and classifications that might impede the exploration of how to attain antisubordination goals.

Such flexibility and inclusiveness can also be a source of tension,

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<sup>205</sup> *Id.* at 153.

<sup>206</sup> *Id.* at 203.

<sup>207</sup> *Id.*

<sup>208</sup> See Francisco Valdes, *Piercing Webs of Power: Identity, Resistance, and Hope In LatCrit Theory and Praxis*, 33 U.C. DAVIS L. REV. 897, 899 (2000).

<sup>209</sup> Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>210</sup> Valdes, *supra* note 208, at 899.

<sup>211</sup> See Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Legal Theory*, 40 B.C. L. REV. 349, 358 (1998).

which can be grouped around two clusters. The first cluster asks, who defines the discipline of CRT? The second cluster inquires whether or not CRT foments non-assimilation.

1. The Power of Framing and Naming: Who Defines a Movement?

Professor Delgado's critique of LatCrit is based on his observation that LatCrit has strayed from its CRT materialist roots. In his view, LatCrit has "lost its focus" after a promising beginning.<sup>212</sup> Getting back to basics, or becoming more rigorous analysts, is what Professor Delgado believes is needed.

Sociologist Pierre Bourdieu has written extensively about legal academia as a social institution. He notes that the production of knowledge by academics is a forum of contestation and power.<sup>213</sup> Bourdieu observes that academics, as producers of cultural knowledge, have an interest in what kind of knowledge is produced.<sup>214</sup> That interest may be a larger group interest, such as the CRT interest in racial justice, or it could be personal, such as a researcher's personal desire for status within her profession.<sup>215</sup> People who are able to define a discipline and a movement can also situate their own accomplishments within the discipline,<sup>216</sup> or they can delegitimize an entire legal movement. Over a decade ago, Professor Jerome Culp accused Judge Posner of seeking to delegitimize critical race theory by framing and naming:

[M]y criticism is that Judge Posner wants to control the assumptions of the debate. . . . He demands the right to control those assumptions without dealing with alternative assumptions proposed by black scholars. This demand to control the assumptions underlying the discourse is at the heart of the dispute . . . . White scholars often ask black scholars to jump through some appropriate hoop before they will be listened to by "real" scholars. If black scholars are doing some mode of analysis in legal scholarship improperly, then Judge Posner should demonstrate how.<sup>217</sup>

All critiques involve framing and naming. What Bourdieu calls for is not that ongoing critiques cease, but rather that the scholar

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<sup>212</sup> See Delgado, *Blind Alleys*, *supra* note 86, at 123–24.

<sup>213</sup> See PIERRE BOURDIEU, *HOMO ACADEMICUS* 1–25 (Peter Collier trans., Stanford Univ. Press 1988).

<sup>214</sup> *See id.*

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at 24–25.

<sup>217</sup> Culp, *supra* note 186, at 1098–99 (footnote omitted).

understand the social motivations and interests that are involved in her intellectual practice.<sup>218</sup>

There will always be difficulties when insiders try to define valid methodologies and the core subject matter of a movement, as Professor Richard Delgado tried to do in *Blind Alleys*, or what is meritorious scholarship, as Professor Randall Kennedy did in his *Critique of Minority Academia*. LatCrit's key strength is that the definition of the movement has been a collective affair. The very structure of the LatCrit symposia is open, allowing those who have already attained a standing within the LatCrit academy, like Richard Delgado, to contribute in symposia and anthologies alongside those who are just entering the profession. The practice of composing forewords, afterwords, and cluster introductions in LatCrit symposia among rotating CRT scholars from various disciplines is designed to import different individual and disciplinary perspectives. This is a self-conscious effort to rethink and re-situate LatCrit within its own growth dynamic and in the larger context of legal knowledge.

For this reason, the definition of LatCrit is a moving target. This is a good thing, but for some it is an unfamiliar practice that is too uncertain. The principal tenets continue to be hammered out in LatCrit symposia. The expectation is that the movement will grow and redefine itself as new members contribute to legal knowledge, and as the social and political context changes. For example, responding to the increased governmental powers and policies after 9/11, which disproportionately impact citizens of color and noncitizens, is now a major part of the LatCrit enterprise. As LatCrit grows and responds to new pressures it may appear to lose its focus, but these may just be the growing pains and the cost of commitment to a "no star" system that ensures the inclusion of all contributors.

## 2. Does Critical Race Theory Encourage Non-Assimilation and Separatism?

The assimilation-separatist debate is at the heart of the role of minorities/outside in America, where the assimilationist ethic is very strong. The debate between Professors Robert Chang and Jim Chen is partly about very different views about minorities in the civic polity. Professor Chen, as "an American of Taiwanese decent,"<sup>219</sup> reacted to Chang's proposal for an APIA legal movement as evidence

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<sup>218</sup> See BOURDIEU, *supra* note 213, at 6-7 (observing that "[t]here is no object that does not imply a viewpoint, even if it is an object produced with the intention of abolishing one's viewpoint").

<sup>219</sup> See Chen, *supra* note 59, at 146.

of “racial fundamentalism.”<sup>220</sup> By using this term, Professor Chen intended to recall other religious fundamentalist movements, which are illiberal, absolutist, and separatist.<sup>221</sup> Chen carried the “racial fundamentalism” argument into the personal realm, accusing Chang of advocating in a footnote<sup>222</sup> a perspective of racial authenticity that is deeply coercive—that members of minority groups should marry and adopt only their own.<sup>223</sup>

The Chen–Chang debate has played out before in the Randall Kennedy–Bell–Delgado–Matsuda rift. These public schisms show that minority “communities” are diverse and can be contentious. While individuals may feel pressure to conform to what they believe might be a “politically correct” view, they actually do not. And there is not sufficient solidarity about what is a racial perspective that would prevent any single minority from expressing his or her own individual view about the significance of racial experience in America. This is part of the reason that identity issues and racial narratives seem to crowd out the scholarly discourse, as Professor Delgado has complained.<sup>224</sup> Everyone can weigh in with some legitimacy.

Foremost, the Chen–Chang debate raises the familiar melting-pot/assimilationist dilemma and the issue of how individual racial identity weighs into how one views that tension. The dominant cultural paradigm in the United States has been the notion of a “melting pot” by which immigrants become assimilated into American culture.<sup>225</sup> However, melting-pot assimilation requires that the majority be willing to accept the new entrant groups as equals. Chang’s call for a more sustained analysis of the experience of Asian Americans is based on his view that discrimination and oppression experienced by Asian Americans has been hostile and aggressive.<sup>226</sup> Such racism is manifested in different ways, such as the perceived “foreignness” of Asian Americans and the recurring belief that they

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<sup>220</sup> *Id.* at 155; *see also supra* Part I.C.

<sup>221</sup> *See supra* notes 62–63 and accompanying text.

<sup>222</sup> *See supra* note 68 and accompanying text.

<sup>223</sup> *See supra* note 69 and accompanying text; *see also* Chen, *supra* note 59, at 155–67.

<sup>224</sup> *Cf.* Delgado, *Blind Alleys*, *supra* note 86, at 131 (critiquing compilation of essays in *CROSSROADS*, *supra* note 88, dealing with racial identity as not attaining a “unique voice of color” but rather as overindulging the personal emotional tribulations connected with being a minority in legal academia).

<sup>225</sup> *See* Lazos Vargas, *supra* note 146, at 1531–34 (discussing the cultural mandate of the “‘melting pot’ myth”); *see also* Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997).

<sup>226</sup> *See* Chang, *supra* note 60, at 1286–1303.

are not sufficiently loyal to the American nation.<sup>227</sup> Under Professor Jim Chen's alternative view, racial attitudes are changing. Racial/ethnic minority individuals, particularly those who have achieved upper and middle class status, can find increasingly less resistance to integration, assimilation, and acculturation. This provides opportunities for individual minorities to assimilate in melting pot fashion.

These two perspectives are not necessarily mutually exclusive. As the earlier Kennedy debate showed, individual minorities interpret their own minority racial experience very differently.<sup>228</sup> Chen and Chang disagree on facts and theory, but mostly they differ on how they conceive their own racial identity in a society where discrimination against racial minorities is real and ongoing.

LatCrit and APIA scholarship has defined race as a complex historical, cultural, phenomenological, and psychological social dynamic. Racial/ethnic communities incorporate diverse cultural traditions, and may encourage assimilation. Regional histories are another important differentiator. In the case of Asian Americans, their racial oppression was most acute in California, the Northwest, and Hawaii, where Japanese Americans experienced forced internment during World War II. These are areas where we would expect the boundaries of race to be at their most inflexible and unforgiving.

With such variability, it follows that an individual's interpretation of his or her racial experience will also be highly varied. Jim Chen does not feel or view himself as an outsider minority scholar, and he prominently protested the possibility that a fellow scholar of Asian decent might view him as such.<sup>229</sup> To make this "choice" so publicly and trenchantly seems an odd sort of theater. Nonetheless, Professor Chen's racial identity "choice" is as legitimate as Bob Chang's racial identity "choice."

However, all things are not equal. These competing narratives of racial experience were received differently. Jim Chen's perspective validated many of the beliefs held by white academics, among them those who are hostile to CRT. Chen's narrative was embraced as

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<sup>227</sup> BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 28–50 (2003).

<sup>228</sup> See *supra* note 51 and accompanying text.

<sup>229</sup> Chen protested what he perceived as the presumptuousness of Chang's declaration of an "Asian American Moment." See Chen, *supra* note 59, at 145. He makes a point of calling himself an "American of Taiwanese descent," *id.* at 146, who resists Chang's "secessionist manifesto," and his call for "racial segregation." *Id.* at 145.

validation of a hostile view of the precepts of CRT. On the other hand, Chang, from the very beginning, meant to challenge established legal academia. His public announcement of his racial perspective and his aim to challenge legal academia by calling for a moment of APIA critical scholarship made white academics uncomfortable. Chang's path was by far the riskier.

#### CONCLUSION

Legal academia has gone through various Kulturkamps, with CRT having gone through more than its share. The question is not whether there will be more in the future because undoubtedly there will be. The gaps are based in knowledge and perspective, but what seems to impede the dialogue most is how identity and ego get in the way of a healthy dialogue.

Critical theorists can help bridge the gap. First, they must reclaim the prerogative to define the critical project. In a movement like LatCrit the challenge of framing the movement is inherently difficult because LatCrit is self-consciously inclusive, elastic, and dynamic. Critical scholars, however, should constantly articulate what they stand for and should resist the temptation, put forth by critics, to simplify the contours and content of critical scholarship. Some may argue that complexity and contradiction might weaken the voice of critical scholarship. However, the insider Kulturkamps show that anti-essentialism and complexity more accurately capture what CRT is and may be able to minimize controversy and confusion.

The critical question is not whether there will be ongoing Kulturkamps, but whether there can be an ongoing ethic of engagement. Both sides must continuously explain how it is that they differ and the basis for their differences. Both sides must seek to establish a common language so that there can be some progression of understanding of our human condition and how the law affects it.

In sum, what is required is that both critical theorists and the critics exhibit patience with each other and attempt to acknowledge their knowledge gaps. In addition, both sides need to probe beyond the distracting rhetoric and earnestly identify where there is common ground. There is one practice that unifies legal academics. Justice is a value that is neither outmoded nor suspect.