ARTICLES

CRITICAL RACE THEORY, ARCHIE SHEPP, AND FIRE MUSIC: SECURING AN AUTHENTIC INTELLECTUAL LIFE IN A MULTICULTURAL WORLD*

JOHN O. CALMORE**

If you ever find
yourself, some where
lost and surrounded
by enemies
who won't let you
speak in your own language
who destroy your statues
& instruments, who ban
your omm bomm ba boom
then you are in trouble
they ban your

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** Associate Professor of Law, Loyola Law School, Los Angeles. B.A. 1967, Stanford; J.D. 1971, Harvard Law School. This project was supported with a 1990 Loyola Law School summer research grant. I owe a significant debt of gratitude to the following people, who provided constructive criticism of earlier drafts of the Article: Robin Barnes, Kimberlé Crenshaw, Neil Gotanda, Linda Greene, Charles Jones, Mari Matsuda, Stephanie Phillips, John Powell, Jon Sylvester, and Kendall Thomas. Finally, I am grateful for the long-standing support of Derrick Bell, who induced me to enter law teaching and who inspires me to speak in my own words. Professor Bell’s teaching and scholarly approach, which I share, are summed up in these words:

When I entered teaching after a dozen years in civil rights work, I determined that I would try to bring to my classrooms and my scholarship both my legal skills and my experience and perspective as a Black man in this country. In my view, neither the students, nor my life-long commitment to the racial struggle, would be well served if I simply sought to emulate the teaching approach and the scholarly outlook of my white counterparts.

I. INTRODUCTION

A. ORIENTATION PRINCIPLES: OPPOSITIONAL CULTURAL PRACTICE, FUNDAMENTAL CRITICISM, AND BORDER CROSSINGS

This Article addresses the matters of race and culture. As suggested by the Baraka headnote, it reacts against assumptions similar to Gunnar Myrdal’s that “it is to the advantage of American Negroes as individuals and as a group to become assimilated into American culture, to acquire the traits held in esteem by dominant Americans.” This

promise of social mobility is made in opposition to the idea that blacks and whites in the United States are inevitably tied to distinctly separate cultures. While I do not believe that distinct cultural division is inevitable, it is a persistent fact of life. Moreover, normatively I do not believe this is necessarily a bad thing.

As many whites experience competitive advantage and relative prosperity over blacks, they are encouraged to believe in an imagined cultural superiority that, in turn, reinforces their conviction—like that of nineteenth-century missionaries—that our blackness is a condition from which we must be liberated.\(^4\) In retreat briefly during the 1960s, this conviction is once again salient. This Article examines its underlying assumptions and value judgments against a background in which the nation's meanings of race and social justice are being contested within a context of the increasingly complex dynamics of an evolving multicultural society, as non-European outside others press for a reinterpretation of America's common ground, shared values, and rules of the game.\(^5\)

These new challenges have stimulated and provoked quite a conversation. Marilyn Berlin Snell asserts, "At this pass our plural culture seems more confused about how to resolve its differences than it ever was . . . A common culture whose elites are disproportionately white . . . even a common culture that works for the vast majority in the middle—cannot be defended."\(^6\) Against this view, Arthur Schlesinger, Jr., cites


\(^5\) During the 1960s, black nationalism relied on a positive, autonomous African-American culture to counter integrationists who sought to direct the civil rights movement primarily toward increasing significant access to white society and cultural enrichment. Manning Marable has summarized the characteristics of black nationalism to include the following:

- a strong personal pride in one's black cultural and ethnic heritage, an advocacy of separate black economic and social institutions within black communities, a rejection of the tactics and principles of integrationist black leaders, a commitment to struggle against white authority, oppression and racism, and an approach to the world from a cultural frame of reference reflecting positively upon the black human experience.

MANNING MARABLE, FROM THE GRASSROOTS: SOCIAL AND POLITICAL ESSAYS TOWARD AFRO-AMERICAN LIBERATION 2 (1980). While my ideological orientation is rooted in black nationalism, it branches beyond. As Marable has advised, "In the pursuit of an ideological consensus, a new black common sense of liberation, it is crucial that the positive elements of integration be merged with the activist tradition of black nationalism." Id. at 15. In this Article, I am trying to reflect this critical balance and tension with the objective of contributing to the articulation of this "new common sense of liberation."

\(^6\) Marilyn Berlin Snell, Comment: Notes from the Nation of Immigrants, 8 New Persp. Q., Summer 1991, at 2, 2-3. There are many excellent new writings on multiculturalism and diversity. See LAWRENCE H. FUCHS, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (1990); LAW AND THE ORDER OF CULTURE (Robert Post ed., 1991); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); RACE,
ethnicity emphasis and race consciousness as diverting attention from real needs and worsening problems, declaring that this multicultural orientation is that of a "cult . . . [that] exaggerates differences, intensifies resentments and antagonisms, drives ever deeper the awful wedges between race and nationalities. The end game is self-pity and self-ghettoization." Finally, Todd Gitlin correctly identifies the intense controversy over "political correctness" as reflecting "the surface of a deeper fault line—a trauma in American cultural identity." We must recognize that America's cultural identity, values, and meanings cannot be separated from its past and present social relations of domination and power. It is here that I want to enter the conversation.

Important segments of our society now recognize multicultural diversity positively. Nevertheless, the actual development of that diversity in a way that would further social justice and the more equitable distribution of power, privileges, and resources proceeds against the odds. Undaunted, I write this Article in the hope that it will provide a cultural sharing and an opportunity to explore diverse mutualities.

African-American jazz music relates to my quest here. Cornel West makes a number of points about jazz appreciation that I believe reflect

Writing, and Difference (Henry Gates ed., 1986); Iris Young, Justice and the Politics of Difference (1990).


10. John Brenkman, Culture and Domination (1987). Sometimes race gets lost in these conversations. Hence bell hooks observes:

Anyone witnessing the current cultural and academic focus on race has to note the new way race is being talked about, as though it were in no way linked to cultural practices that reinforce and perpetuate racism, creating a gap between attitudes and actions. There is even a new terminology to signal the shift in direction: the buzz words are difference, the Other, hegemony, ethnography. It's not that these words were not always around, but that they now are in style. Words like Other and difference are taking the place of commonly known words deemed uncool or too simplistic, words like oppression, exploitation, and domination. Black and white in some circles are becoming definite no-nos, perpetuating what some folks see as stale and meaningless binary oppositions. Separated from a political and historical context, ethnicity is being reconstituted as the new frontier, accessible to all, no passes or permits necessary, where attention can now be focused on the production of a privileged . . . discourse in which race becomes synonymous with culture. There would be no need, however, for any unruly radical black folks to raise critical objections to the phenomenon if all this passionate focus on race were not so neatly divorced from a recognition of racism, of the continuing domination of blacks by whites, and (to use some of those out-of-date, uncool terms) of the continued suffering and pain in black life.

Bell Hooks, Yearning: Race, Gender & Cultural Politics 51-52 (1990). I think that an antisubjugation principle that opposes racism, sexism, homophobia, and economic subjugation is necessarily linked to multiculturalism and the value of diversity. These values of rights and social justice are not simply closely associated, but rather they are necessarily of benefit to each other.
upon how the art form inspires my approach to scholarship to the point that I place so much jazz stuff in a law review article. According to West:

One of the reasons jazz is so appealing to large numbers of white Americans is precisely because they feel in this black musical tradition, not just black musicians but black humanity is being asserted by artists who do not look at themselves in relation to whites or engage in self-pity or white put-down.

Jazz is the middle road between invisibility and anger. It is where self-confident creativity resides. Black music is paradigmatic of how black persons have best dealt with their humanity, their complexity—their good and bad, negative and positive aspects, without being excessively preoccupied with whites. Duke Ellington, Louis Armstrong, and Coltrane were just being themselves.11

Of course, while neither black jazz artists nor critical race scholars are excessively preoccupied with white people or personal put-down, white people are quite relevant, and many aspects of the status-quo dominant whiteness are subject to quite critical interpretation.12

Just as jazz reflects ensemble improvisations, this Article seems to do the same. Each of its major parts could read as a separate article, but they are not; they form an ensemble piece that unfortunately must be read sequentially instead of heard at once. Moreover, this Article is a "conversation" in the sense that conversational talk is "an unrehearsed intellectual adventure,"13 which, like jazz, employs "language that is broad and novel enough to bridge conflicting perceptions of the world yet sufficiently genuine to withstand the later pounding of the subscribing parties."14 As explained in Part II, I have taken from jazz an idea of reconceptualization and reformulation akin to Benjamin Barber's "strong democratic talk,"15 which takes the forms of "clarifying the

11. Cornel West, Charlie Parker Didn't Give a Damn, 8 New Persp. Q., Summer 1991, at 60, 63.
12. A dominant belief is that America is a white country and that African Americans constitute a group that has no right to the same concerns, resources, commitment, and empathy that are due similarly situated white people. According to Derrick Bell:

It is not that the white majority is rigidly opposed to enjoyment by blacks of rights and opportunities which whites accept as a matter of course; it is rather that for a complex of racial reasons, whites are not willing to alter traditional policies and conduct which effectively deprive blacks of these rights and opportunities.

Derrick Bell, Race, Racism and American Law 3 (2d ed. 1980).
15. According to Barber, the nine functions of such talk are as follows:
unspoken past; challenging the paradigmatic present; and envisioning the uncreated future.”

Unavoidably, there are some hard lines drawn in this piece. In this regard, for example, Cornel West characterizes certain expressions of African-American music as “countercultural practice” that grows out of black religious transcendence and political opposition. Archie Shepp’s saxophone music grew from that transcendence and opposition, so “fire music” is here a metaphor for oppositional cultural practice. Moreover, Archie Shepp the man is a personification of an authentic creative and critical intellectual.

I. The articulation of interests; bargaining and exchange; 2. persuasion; 3. agenda-setting; 4. exploring mutuality; 5. affiliation and affection; 6. maintaining autonomy; 7. witness and self-expression; 8. reformulation and reconceptualization; 9. community-building as the creation of public interests, common goods, and active citizens.

17. CORNEL WEST, PROPHETIC FRAGMENTS 177 (1988).
18. According to Baraka:

The Black artist, in this context, is desperately needed to change the images his people identify with, by asserting Black feeling, Black mind, Black judgment. The Black intellectual, in this same context, is needed to change the interpretation of facts toward the Black Man’s best interests, instead of merely tagging along reciting white judgments of the world.

LERoi JONES, HOME 248 (1968) (Jones later changed his name to Amiri Baraka). In the context of academic endeavor, Maria de la Luz Reyes and John J. Halcon’s discussion of the “brown-on-brown” research taboo illustrates oppositional cultural practice:

As Hispanic academics, our research interests often stem from a recognition that we have endured racial discrimination and from a compelling need to lend a dimension of authenticity to the prevailing theories about our communities. Said another way, we want to provide our own perspectives regarding prevailing negative assumptions about our values, culture, and language. . . . Our interest in these research areas is also motivated by a concern for assisting our community in improving its second-rate status in the educational, economic, and political arenas. Tired of reading about ourselves in the social science literature written by non-minorities, we want to speak for ourselves, to define, label, describe, and interpret our own condition from the “inside out.” We feel strongly about providing a balance to the existing literature and research on Chicanos.

19. In 1981, Bill Shoemaker observed:

Archie Shepp was the moralist, as Coltrane was the spiritualist, of the new black music that emerged in the sixties, a stature that was buttressed by his background as a poet and playwright. At an essential level, Shepp’s ethics and aesthetics were, and are, synonymous,
Although jazz music and critical race scholarship may appear disconnected, this Article links them to illustrate a common tradition of African-American culture that speaks of a perspective structured by emphatic declarations of dissent from dominant norms. That tradition of dissent, particularly since the 1960s, has taken the form of what Amitai Etzioni calls "fundamental criticism," which he sees as being directed toward challenging the prevailing set of assumptions that the members of a society share to establish the context for their view of the world and themselves. Etzioni argues that as an elite group—legal scholars, for instance—comes to monopolize either the production of knowledge in a particular field or access to an elite group of decision makers, members of the knowledge elite grow less effective in their "reality-testing." Moreover, a group's various communities of assumptions

as he made his forceful, articulate critiques of American social realities a central organ of his work. He did more than blow the saxophone—he blew the whistle. And took a lot of heat from the jazz establishment because of it. Shepp's ethicsformed the rhetorical basis of his contemporary folk language, reconnecting a referential network from which the traditional aesthetics could vitally reassert themselves. Thus, Shepp depolarized the styles of Rollins and Coltrane, evoked such lesser known names as Paul Gonsalves and Ernie Henry, and investigated pre-bop stylings. As Shepp's work became accepted and, more recently, venerated, the populist concerns that lynchpinned his activity gradually assumed an august presence. Now, facilitated in part by his residency at the University of Massachusetts, Shepp has become a radical scholar and educator in the tradition of W.E.B. DuBois.

Bill Shoemaker, Liner Notes for Archie Shepp, I Know About the Life (Sackville 1981). Among Shepp's awards are the Down Beat “Artist Deserving of Wider Recognition (New Star)” Award (1965) and the Down Beat Critics' Poll (1982) for Best Tenor Sax.

Jazz was born in rebellion against traditional forms and institutions, and this contributed to its exclusion from the music curriculum in higher education through the early 1970s: "Some conservatories had warnings posted in their practice rooms that students caught playing jazz would be expelled. Jazz, teachers said, would ruin the ability of students to play 'legitimate,' classical music." David L. Wheeler, Jazz and Academe: From Hostility to Harmony, Chron. Higher Educ., Mar. 11, 1992, at A5. For other illustrations of the tradition of dissent, see Robert Allen, Black Awakening in Capitalist America (1972); Houston A. Baker, Blues, Ideology and Afro-American Literature (1984); Bernard R. Boxill, Blacks and Social Justice (1984); Samuel Charters, The Legacy of the Blues (1975); Theodore Draper, The Rediscovery of Black Nationalism (1970); Joe R. Feagin & Harlan Hahn, Ghetto Revolts (1973); Michael Haralambos, Right On: From Blues to Soul in Black America (1974); George Kent, Blackness and the Adventure of Western Culture (1972); Thomas Kochman, Black and White Styles in Conflict (1981); Lawrence W. Levine, Black Culture and Black Consciousness (1977); Eric Lincoln, The Black Muslims in America (1973); Doug McAdam, Political Process and the Development of Black Insurgency, 1930-1970 (1982); The Death of White Sociology (Joyce A. Ladner ed., 1973); Gayraud S. Wilmore, Black Religion and Black Radicalism (1972).

22. Id. at 178.
are embraced in a way that usually causes its members to fail to recognize the hypothetical nature of these context-setting assumptions.\textsuperscript{23}

Much of the conflict over race and multiculturalism is a conflict over the communities of assumptions that dominant institutions adopt subject to certain claims by outsiders and marginalized insiders that those assumptions must be revised. This is not simply about enlarging the exchange patterns in the so-called marketplace of ideas. The process through which new orientations are introduced and interpreted is a political matter. According to Etzioni, contextuating ideas per se lack societal power, and therefore those challenging the prevailing communities of assumptions must assume a mobilizing role that accompanies the symbolic-interpretative role.\textsuperscript{24}

One of the reasons critical race theory could threaten the academic and practice aspects of law is its potentially effective employment of fundamental criticism, rather than just "bit criticism."\textsuperscript{25} Etzioni distinguishes these approaches by explaining:

\begin{quote}
Fundamental criticism is the function of those sub-units whose task is to overview the communities-of-assumptions and challenge them when they become detached from reality. Since such criticism challenges not
\end{quote}

\textsuperscript{23} Id. at 179. Dwight Greene makes a related point in discussing "pluralistic ignorance," particularly as it is manifested in the American federal judiciary. Dwight Greene, Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers, 39 Buff. L. Rev. 737 (1991). According to Greene:

\begin{quote}
The likelihood that the judiciary is misapprehending the claims being presented to it is increased under conditions where pluralistic ignorance can go unchallenged. Pluralistic ignorance refers to the false social knowledge shared by one group regarding one or more other groups. For example, when nontrivial discrepancies emerge between beliefs shared among judges about what other groups are doing and thinking and what those other groups are in fact doing and thinking, pluralistic ignorance exists. It refers to patterns of intergroup false beliefs and usually occurs unnoticed and unintended, but nevertheless acts as an influential and often decisive component in defining social actions. Pluralistic ignorance is a particularly insidious form of inaccurate intergroup ignorance because there is not only incorrect knowledge, but it is shared and believed to be shared with others in the group. This has the effect of increasing the ingroup's confidence in the incorrect information and enhances the likelihood that the error will go unrecognized. Pluralistic ignorance is shared self-reinforcing group bias, without doubt.

As applied to the American judiciary, pluralistic ignorance can be defined as a group of privileged, mostly affluent white males talking amongst themselves about what are the reasonable choices for poor people of color to be making in situations virtually none of the judges have ever been in. Pluralistic ignorance affects the courts' methodology and the doctrine they espouse.
\end{quote}

\textsuperscript{24} ETZIONI, supra note 21, at 180-81.

\textsuperscript{25} Id. at 181.
bits—which could be changed within the existing community-of-assumptions—but the context, we refer to it as fundamental criticism ("radical" criticism would also be an appropriate term). The function of bit-criticism differs from that of fundamental criticism: When the disparity between reality and a community-of-assumptions is not great, bit-criticism enhances reality-testing within the limits of a community-of-assumptions and, thus, strengthens the community in the sense that the "same" context is shown capable of adaptation. When the community's detachment from reality is considerable, however, bit-criticism is dysfunctional because it tends to conceal the disparity and to delay overdue transformation.26

In the mid-1960s, Archie Shepp took his "fundamentally critical" tenor saxophone and stepped outside the commercially laden mainstream's musical community of assumptions and voiced his dissent beyond the ways it would be tolerated within the constraints of conventional jazz. Twenty-five or so years later, some legal scholars of color, including myself, are voicing our dissent from many of the law's underlying assumptions. It is critical race theory's basic move from bit criticism to fundamental criticism that authenticates us as intellectuals of color and legitimatizes us as exemplars of oppositional cultural practice. We are grounding critical race scholarship in a sense of reality that reflects our distinctive experiences as people of color. Race-conscious experience is a springboard from which we engage in fundamental criticism.

Linked to these notions of oppositional cultural practice and fundamental criticism is the notion of cultural "border crossings."27 In contrast to the traditional view of culture as a coherently patterned and self-contained whole, Renato Rosaldo presents culture "as a more porous array of intersections where distinct processes crisscross from within and beyond its borders."28 These heterogeneous processes often develop from such differences as age, gender, class, race, and sexual orientation. At the borders of different experience, perception, and understanding, our lives gain significance as culture selects from and organizes these components of living. To Rosaldo, then, culture "refers broadly to the

26. Id. Race-conscious fundamental criticism is uniquely difficult because the American marketplace of ideas is predicated on the racial inferiority of nonwhites: "[R]acism makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas." Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 468.


28. Id.
forms through which people make sense of their lives, rather than more narrowly to the opera or art museums."\textsuperscript{29}

For those people of color seeking new pathways through a multicultural world, our transgressive analysis—like Archie Shepp's fire music—moves us away from dominant society's cultural patterns, because these patterns de-emphasize the processes of change that are evidenced by internal contradictions, inconsistencies, and conflicts. If culture is too narrowly defined as patterns of shared meanings, then classic analytical norms raise difficulties in considering difference within and between cultures. Cultural borderlands are reduced to "annoying exceptions rather than central areas for inquiry."\textsuperscript{30} Critical race theory reacts to this by "recentering" the inquiry from the borders. To those who are comfortably situated within the mainstream, or those who aspire to be, this border-crossing mess is disconcerting.\textsuperscript{31} In moving life at the cultural borderlands from margin to center, issues of conflict, change, and inequality reorient our thinking and feeling to address matters of human difference. As Rosaldo concludes, "[T]he debate has to do with competing research programs that differ in their aims, what they want to know and, not simply in their methods, how they come to know what they know."\textsuperscript{32}

\textsuperscript{29.} Id. at 26.


\textsuperscript{32.} ROSALDO, \textit{supra} note 27, at 227. See also CLIFFORD GEERTZ, \textit{LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY} 3 (1983) (discussing "intellectual deprovincialization"); \textit{id.} at 34 (discussing the blurring of intellectual genres as the refiguration of social theory—"a sea change in our notion not so much of what knowledge is but of what it is we want to know"). Critical race theory's emphasis on race consciousness makes this debate particularly problematic. Alex Aleinikoff observes:

\textquote{Deeply imbedded race-consciousness has a distressing effect on discourse between the races. In many ways, whites and blacks talk past each other. The stories that African-Americans tell about America—stories of racism and exclusion, brutality and mendacity—simply do not ring true to the white mind. Whites have not been trained to hear it, and to credit such accounts would be to ask whites to give up too much of what they "know" about the world. It would also argue in favor of social programs and an alteration in power relations that would fundamentally change the status quo. White versions of substantial progress on racial attitudes are also likely to ring hollow for many blacks. One might see an equality of missed communication here. But there is actually a great inequality because it is the white version that becomes the "official story" in the dominant culture.}
B. Scope of the Article

Oriented by oppositional cultural practice, fundamental criticism, and cultural border crossings, this writing is inspired by the work of Paulo Freire, who has embodied the humanizing vocation of the intellectual, where the power of thought can overcome accepted limits and direct our way to a better, fuller future. My inspiration was reinforced and extended by participating in the Second Annual Workshop on Critical Race Theory, held at the State University of New York at Buffalo School of Law in June 1990. As we attempted to situate our scholarship within clear theoretical parameters, we considered the theme of “Intellectuals, Race, and Power.” In analyzing the role of contemporary academic intellectuals of color, the participants addressed a variety of

T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 Colum. L. Rev. 1060, 1069 (1991). Border-crossing social analysis thus represents a critical strategy of defamiliarization by epistemological critique: “going out to the periphery of the Euro-centric world where conditions are supposed to be most alien and profoundly revising the way we normally think about things in order to come to grips with what in European terms are exotica.” George E. Marcus & Michael M.J. Fischer, Anthropology as Cultural Critique 137-38 (1986).

Marcus and Fischer characterize some critical legal studies work as having adopted a de facto ethnographic approach “to the understanding of cultural hegemony, the construction of authoritative meanings, and processes by which they might be contested.” Id. at 154. Relatedly, critical race theory’s reliance on our experiences of colored marginality tries to apply the method of defamiliarization by epistemological critique “to bring the insights gained on the periphery back to the center to raise havoc with... settled ways of thinking and conceptualization.” Id. at 138. This critique serves as a springboard for a more sustained inquiry into the reconstruction of the forms and circumstances of social justice.

33. Richard Shull, Foreword to Paulo Freire, The Pedagogy of the Oppressed 12 (1989). See Derrick Bell et al., Racial Reflections: Dialogues in the Direction of Liberation, 37 UCLA L. Rev. 1037 (1990). Inspiration is much needed. At American law schools, tokenism remains the order of the day. As of the 1986-87 academic year, among 149 reporting schools that belong to the 174-member American Association of Law Schools (AALS), one third had no African Americans on the faculty, another third had just one, and less than 10% had more than three. Richard Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537, 539-48 (1988). It must be remembered that the presence of colored law professors at white legal academies is a relatively new development. These institutions, moreover, seldom provide any encouragement or support for people of color to live out the inspiration I have associated with Freire. As Richard Delgado explains:

Beginning in the early 1970s, law schools began taking measures to increase the small number of minorities of color teaching law. Yet, after a few years of growth, this increase stagnated. The overall numbers remain nearly constant; most law schools have zero or one minority faculty member. While the number remains the same, the turnover rate is high. Over forty-three percent of professors of color left teaching in a recent six-year period. Most law faculties purport to be troubled by figures like these. They would like to hire more women and minorities, yet something always seems to get in the way: The pool is so small; minority candidates are rarely available when you want them; they have so many opportunities elsewhere.

questions: What are the implications of dominant professional conceptions of intellectual work with regard to scholars of color? How are we harmed as intellectuals by racism, and what are the manifestations of such injuries? As relatively privileged people of color who are professionally dependent on white institutional support, how can we guard against institutional co-optation that socializes us away from our identities, responsibilities, and value systems, which are historically grounded in a culture of color and a community life of color? With these seminar considerations as points of departure, I attempt in this writing to provide some understanding of the predicament of the contemporary critical African-American intellectual teaching in the predominantly white legal academy.34 I hope that this understanding will encourage and enlarge conversations that reveal suggested avenues toward the academies' more genuine reception of us and toward enhancing our own role in furthering social justice.

Confronted with isolation, insulation, and marginality, I argue that authentic, constructive responses by critically conscious black intellectuals must establish an identity that relies on a racially distinctive, experiential perspective and cultural orientation. As Cornel West advises, our basic objectives are to expand critical space and insurgent activity.35


Indeed, the very existence of black law schools is in jeopardy. See United States v. Louisiana, 718 F. Supp. 499 (E.D. La. 1989). In this case, a panel of three federal judges ordered the merger of the law schools at Southern University and Louisiana State University, in effect abolishing the former. The court's ruling has disturbing implications for distinctly African-American institutions that maintain any semblance of a uniquely black mission. The court reviewed past activities under a prior consent decree and stated:

The more troubling implication is that PBIs [predominantly black institutions], while requesting additional money for enhancement, may be more intent on preserving their mission of serving black students than on expanding opportunities for white students. The experience of the consent decree confirms that enhancement of PBIs without more simply makes PBIs more attractive to black students, without attracting white students. The focus of the Court's remedial plan, however, must be on improving the ability of PBIs to educate both black and white students. Preserving Southern and Grambling for their educational importance means preserving them as institutions for all Louisiana citizens, not just for black students.


Along this front, a primary function of a critical intellectual is to present "symbolic formulations for the cultural construction of reality." In this effort lies the potential for reconstituting a conception not only of one's self, but also of one's society. The potential of critical intellectuals to induce social, political, and cultural change has been a theme recognized by many. One of the most emphatic endorsements was written in the late 1950s by C. Wright Mills. The intellectual orientation suggested by Mills would implore critical race theorists to connect politics and culture, to offer alternative definitions of reality to which a just law ought to respond, and to be activists in our lives, in our direct action, and in the immediate context of our work.

Critical theory is not wedded to one overriding doctrine or unified world view but rather "is a set of basic insights and perspectives which

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INTELLECTUAL LIFE (1991) (elaborating on the roles of black men and women as critical oppositional and transgressive intellectuals). By "insurgent activity" I mean activity that challenges the established order of things, nonconformist challenges that reorient the dominant status quo so that it is more inclusive and less subordinating of those different from the majority of society. See also id. at 39, where West discusses "thick" opposition to the society's maldistribution of wealth. In an earlier draft, I had described this activity as "nonbelligerent," prompting a comment from Prof. Linda Greene, which in turn persuaded me to drop the qualifier. She declares:

Belligerency may constitute decisive, unqualified statements about the inadequacy of the existing order. Some might say belligerency is obvious bitterness about "allegations" of racial injustice. Some place black anger off limits in legal discourse while they welcome a discussion of white innocence. Is belligerence unapologetic insistence? Do we therefore reject Rap's (no, not M.C. or Ice T but H. Rap) contribution to our consciousness and embrace only King's "I Have a Dream"? Are pleas acceptable; demands, not?


In our present situation of the impoverished mind and lack of political will, United States intellectuals, it seems to me, have a unique opportunity to make a new beginning. If we want to, we can be independent craftsmen. To suggest programs for men who work cultur-ally is not the same as for any other group. In the West it is precisely the character and position of many intellectuals and artists—and to some extent, still, of many scientists—that they are free to decide what they will or will not do in their working life. They are still free to consider the political decisions that they are making by their work. No other group of men is as free in just these ways; no other group, just now, is as strategically placed for possible innovation as those whose work joins them to the cultural apparatus; to the means of information and knowledge; to the means by which realities are defined, by which pro-grams and politics are elaborated and presented to publics.

Id. at 231-32.
39. Id. at 232.
undermine existing ‘truths’ even as they foster the need for a theory of society that remains to be completed."  

We know that the worlds in which people live are largely “socially constructed” because reality, as perceived and experienced, is socially and differentially situated in society.  

Basic to the human world, then, is socially constructed meaning. Social justice and legitimation, therefore, must be analyzed in light of the terms that we associate with society’s changing definitions of reality and truth.  

Consider some existing dominant societal “truths” on the matter of color. Currently, the so-called American dilemma—the increasing gap between the nation’s egalitarian ideals and its actual practices—is conveniently resolved by “white America” by rejecting the terms of racist domination and oppression and referring instead to African-American inability or disinclination to take advantage of the true equality of opportunities the nation offers. Black America’s sorry state, the story goes, is

42. Within the body of critical race scholarship this theme is much discussed. See Richard Delgado, When a Story is Just a Story: Does Voice Really Matter?, 76 VA. L. REV. 95 (1990); Patricia J. Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 MICH. L. REV. 2128, 2132 (1989) (“[A]n accurate understanding of critical theory requires recognition of the way the concept of ‘indeterminacy’ questions the authority of definitional cases; it is not ‘nihilism,’ but a challenge to contextualize, by improving community standards and the democratization of interpretation.”).  
43. Myrdal, supra note 3 (examining the disparity between ideals of individual dignity and equality and the failure of African Americans to achieve them because of racial discrimination). See also Walter Jackson, Gunnar Myrdal and America's Conscience: Social Engineering and Racial Liberalism, 1938-1987 (1990) (analyzing Myrdal’s work in the context of American social history). Many now question whether this represents a dilemma or simply racist business as usual. Thus, I characterize the dilemma as “so-called.” See Bell et al., supra note 33, at 1051-52 (discussing a critique of the Myrdal “anomaly thesis” in Jennifer Hochschild, The New American Dilemma (1984); Alan Freeman, Antidiscrimination Law: The View from 1989, 64 TUL. L. REV. 1407, 1439 (1990) (arguing that racism persists at a deeper level than the one represented by Myrdal in that it is “an unconscious, culturally transmitted, and seemingly intractable feature of American life”).  
44. The term “white America” is problematic. I do not mean to imply that whites are a monolithic body. The term refers precisely, however, to dominant values, ideologies, and power configurations that benefit whites and subordinate others. In this sense, “white America” is politically conservative, if not reactionary, with respect to racial justice. See, e.g., Andrew Hacker, The New Civil War, N.Y. REV. BOOKS, Apr. 23, 1992, at 30 (“[T]he nation’s two major races live largely in different worlds, ill at ease with each other when not outwardly inimical.”). Frances Ansley's characterization of “white supremacy” captures what I refer to here as “white America.” She observes:

By “white supremacy” I do not mean to allude only to the self-conscious racism of white supremacist hate groups. I refer instead to a political, economic and cultural system in
a direct product of its collectively defective character and culture, which manifest a disabling array of values, mores, and behaviors.\textsuperscript{45} Proper criteria of merit, when objectively applied, too often reveal that blacks simply cannot compete on dominant societal terms.\textsuperscript{46} Indeed, from the U.S. Supreme Court to the man on the street, the historical legacy of racism and its current perpetuation are blithely ignored or understated in the name of comforting color blindness; neither group-based affirmative action nor diversity (read deviance) is to be tolerated further in practice, gesture, or even lip service.\textsuperscript{47} In sum, dominant America’s present variation on a now-historic theme is a boomeranglike racism that hurls African-American claims of racism, like transmuted white rocks, back into which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.

A few years ago I probably would have called this system “institutionalized racism.” Today, however, in an era of so-called “color blindness,” when “racism” can mean the disfavoring of a white person for the most transitory and isolated purpose, I believe white supremacy to be the more helpful and accurate term. While not denying that a system of black supremacy is conceivable in the abstract, the term “white supremacy” reminds us that the institutional racism of our place and epoch (our planet?) has been a racism of white over black. To my mind, any jurisprudence or politics of racial justice that fails to recognize and incorporate this overwhelming reality has missed the boat.


I differ slightly from Prof. Ansley in that I do not separate institutional racism from white supremacy as strictly as she does. I would link them as Charles Lawrence has:

The goal of white supremacy is not achieved by individual acts or even by the cumulative acts of a group, but rather it is achieved by the institutionalization of the ideas of white supremacy. The institutionalization of white supremacy within our culture has created conduct on the societal level that is greater than the sum of individual racist acts. The racist acts of millions of individuals are mutually reinforcing and cumulative because the status quo of institutionalized white supremacy remains long after deliberate racist actions subside.

Lawrence, supra note 26, at 443. See John O. Calmore, \textit{Exploring the Significance of Race and Class in Representing the Black Poor}, 61 OR. L. REV. 201, 208-10 (1982).


\textsc{Calmore, supra note 44, at 207; Richard Fallon, Jr., \textit{To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination}, 60 B.U. L. REV. 815 (1980).}

the bloodied face of the claimants, who are characterized as perpetrating reverse discrimination against a world of innocent white victims.  

As we track the evolution of African-American identity and institutions, the notion of culturally directed and socially constructed reality is particularly pertinent. Although the world of black Americans since slavery has been an integral part of American society, the worlds of blacks and whites have been intensely separate. Inevitably, this has resulted in distinctive histories and features of African-American culture, institutions, and society. It is, therefore, no surprise that blacks and whites so often see quite different realities at both the perceptual and experiential levels. Moreover, many widely shared American tenets are ideologically tied to dominant cultural myths, expressions, habits, and symbols, which in turn are cited as ethical principles and justifications for political action. Thus, it is important to examine the various ways culture serves to mediate not only political and social meaning, but also legal meaning. Accordingly, critical race theory organically connects intellectual, cultural, and existential orientations. The attitude and stance behind its scholarship, moreover, are as important to its understanding as are the meanings of its texts.  

 remain reluctant to accept the measures necessary to eliminate the injustice." Thomas Pettigrew, The Mental Health Impact, in IMPACTS OF RACISM ON WHITE AMERICANS 97, 115 (Benjamin P. Bowser & Raymond G. Hunt eds., 1981) [hereinafter IMPACTS OF RACISM].  
51. When people of color rely on an experiential, distinctive voice orientation, we develop our scholarship in light of certain empirical ideas that are attributable to unique cultural circumstances. Attitude and stance, "presentment," if you will, represent thought perfected at its most empirical level. Here, Baraka's consideration of music relates to this concept:  

Thought is largely conditioned by reference; it is the result of consideration or speculation against reference, which is largely arbitrary. There is no one way of thinking, since reference (hence value) is as scattered and dissimilar as men themselves. . . Negro music can be seen to be the result of certain attitudes, certain specific ways of thinking about the world (and only ultimately about the ways in which music can be made) . . . [The] Negro's music changed as he changed, reflecting shifting attitudes or (and this is equally important) consistent attitudes within changed contexts. And it is why the music changed that seems most important to me.
The symbolic reference to Archie Shepp as personifying the creative intellectual's oppositional cultural practice is an example of critical race theory's radical assessment orientation. This orientation depends heavily on an existential grounding. While activist practice must be directed toward transforming the concrete situations that give rise to oppression, it is also valuable for intellectuals to intervene critically in confronting the culture of domination and the system and process of laws that support and maintain it. As I see it, critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it.\(^5\) As so well put by A. Sivanandan:

That assessment, that revolutionary perspective, by virtue of his historical situation, is provided by the black man. For it is with the cultural manifestations of racism in his daily life that he must contend. Racial prejudice and discrimination, he recognizes, are not a matter of individual attitudes, but a sickness of a whole society carried in its culture. And his survival as a black man in white society requires that he constantly questions and challenges every aspect of white life even as he meets it. White speech, white schooling, white law, white work, white religion, white love, even white lies—they are all measured on the touchstone of his experience. He discovers, for instance, that white schools make for white superiority, that white law equals one law for the white and another for the black, that white work relegates him to the worst jobs irrespective of skill, that even white Jesus and white Marx who are supposed to save him are really not in the same street, so to speak, as black Gandhi and black Cabral. In his everyday life he fights the particulars of white cultural superiority, in his conceptual life he fights the ideology of white cultural hegemony. In the process he engenders not perhaps a revolutionary culture, but certainly a revolutionary practice within that culture.\(^3\)

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\(^52\) See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323, 325-26 (arguing that the colored experience can provide normative insight to such an assessment); id. at 362-97 (discussing reparations as a "critical legalism").

\(^53\) A. Sivanandan, *Alien Gods*, in *COLOUR, CULTURE AND CONSCIOUSNESS* 104, 115 (Bhikhu Parekh ed., 1974). Regarding matters of race, there appears to be a perception gap that stems from the differential reliance on personal experience between blacks and whites. A recent study by People For the American Way found that the views of white youths regarding tough racial issues tended not to be based on their personal experience. Instead, for many whites, anger over affirmative action was based on an abstract concept, and few were able to cite solid evidence of having been affected personally by affirmative action policies: "While excoriating blacks in general as welfare-dependent, white participants in focus groups uniformly described their own black friends as hard working. It seems that many young whites have grown up with negative stereotypes of blacks so potent that they overpower their own positive experiences." Arthur J. Kropp, *Colleges Must Find Ways to Eradicate Racial Division*, *Chron. Higher Educ.*, Apr. 22, 1992, at B3.
Pursuing critical race projects in this light entails a number of very tricky moves, such as impugning the integrity of America for its racist ways without coming across as antiwhite because you reduce all white individuals to fungible parts of a collective evil, injustice, and oppression.

Inducing white guilt is not really the objective. If radical assessment of dominant American ethos and themes is to further reconstruction of a genuine commonwealth, it must build on a style and content that more justly connect dominant societal perspectives, understandings, and cultural habits with those of people of color. This bridge is essential to a future society that genuinely embraces multicultural pluralism, that truly respects autonomous difference, and that honestly values our nation's racial diversity. However harsh my critique or radical my assessment, the intent is to remain true to the reconstructive spirit I have indicated here.

Thus introduced, Part II discusses the artistry and intellect of Archie Shepp as approximating critical race theory's experiential grounding, oppositional expressions, and transformative aspirations. Part III addresses the themes, perspectives, and directions of critical race theory as an important discourse and orientation that can provide intellectual authenticity to people of color. Part III goes on to discuss how liberating praxis is tied to a cultural orientation of racial distinctiveness and autonomy, exploring the meaning of culture in the African-American context of shifting symbolic boundaries and marginality. I also examine how culture can direct an ideological orientation that counters dominant cultural imperatives and hegemony. From this consideration, Part IV provides a general assessment of the African-American legal scholar's search for authenticity, examining the views of black intellectuals E. Franklin Frazier, Harold Cruse, and Cornel West. Here, particular issues of integration, co-optation, and community responsibility are explored.

Parts V and VI elaborate on the critical race theme of condition-directed redress. In Part V, I look conceptually at the condition of oppression and suggest how critical intervention by colored intellectuals can be responsive to relieving oppression. Part VI focuses on a "future-society" assessment of rights strategies that are tied to (1) social mobilization, (2) resource development, (3) empowerment, and (4) enhanced collective identity as specific responses to claims of the oppressed. Part VI concludes with a discussion of cultural racism as a crucial target of attack by critical race theorists.
II. ARCHIE SHEPP: THE WHO AND WHEREFORE

A. ARCHIE SHEPP—THE CREATIVE INTELLECTUAL AND HIS OPPOSITIONAL CULTURAL PRACTICE

As artistic expression, Archie Shepp’s music reflects much of what critical race theory’s legal scholarship reflects, for art denotes skill in performance, as acquired through experience and observation as well as through study. Although this is an obsolete use, art once meant learning and scholarship. In its most distinct sense, art implies a personal, unanalyzable creative imagination and power. Art is a direct cultural manifestation that synthesizes and refines a lifestyle and world view. Critical race theory’s scholarship, at its best, creates an art style that represents a fulfillment of culture. Not content to imitate white or dominant scholarship’s canons, methods, and analyses, people of color are adding our own distinctly stylized dimensions to legal scholarship.

54. WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 49 (1965).
55. Id.
56. Id.
Albert Murray observes, art stylizes experience: "What it objectifies, embodies, abstracts, expresses, and symbolizes is a sense of life . . . . More specifically, an art style is the assimilation in terms of which a given community, folk, or communion of faith embodies its basic attitudes toward experience."  58

Archie Shepp was born in Fort Lauderdale, Florida, in 1937 and grew up in Philadelphia. He graduated from Goddard College in 1959 with a degree in dramatic literature. 59 Shepp first came to popular attention in this country in the early 1960s. 60 My "association" with Shepp dates back to my junior year of college at Stanford, in 1966, when the university sponsored a jazz weekend and Shepp presented his music. It was one of the most moving and black-reinforcing experiences of my life.

58. ALBERT MURRAY, THE OMNI-AMERICANS: SOME ALTERNATIVES TO THE FOLKLORE OF WHITE SUPREMACY 54 (1983). This Article, too, is stylized against traditional scholarship. To counter the dullness of traditional legal scholarship I have quoted other voices extensively, sometimes as "expert testimony," sometimes as a "confirming chorus," or sometimes simply as a statement of eloquence. Many scholars suggest a dichotomy between description and analysis, but these tasks are complementary. As critical race theory develops, much of its legal scholarship will be descriptive and explanatory. A critical need presently is to define the terminology so that precise understanding is fostered. See Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1331-32 (1991). Thus, this Article is to a large degree definitional. As Geertz has observed:

[A]lthough it is notorious that definitions establish nothing in themselves, they do, if they are carefully enough constructed, provide a useful orientation, or reorientation, of thought, such that an extended unpacking of them can be an effective way of developing and controlling a novel line of inquiry.


Finally, writing nontraditional scholarship, especially from a deliberately black point of view, is somewhat stressful for those of us who are untenured. See Derrick Bell, The Final Report: Harvard's Affirmative Action Allegory, 87 MICH. L. REV. 2382 (1989). Bell notes:

Even outstanding scholarship, if not performed in a traditional format, can disqualify a candidate seeking a position or promotion. Narrow measures of excellence harm many candidates, but tend to exclude disproportionately large numbers of blacks whose approach, voice, or conclusions may depart radically from traditional forms. As a result, the selection process favors blacks who reject or minimize their blackness, exhibit little empathy for or interest in black students, and express views on racial issues that are far removed from positions held by most blacks including—often enough—the groups who pressured for an increased minority presence.

Id. at 2388. I find some solace in this effort, however, in that there is no consensus on what constitutes "good scholarship." Consequently, there is less need to presume an a priori form of acceptable legal writing. See Robert Abrams, Sing Muse: Legal Scholarship for New Law Teachers, 37 J. LEGAL EDUC. 1 (1987); Mary Kay Kane, Some Thoughts on Scholarship for Beginning Teachers, 37 J. LEGAL EDUC. 14 (1987); Mark Tushnet, Legal Scholarship: Its Causes and Cure, 90 YALE L.J. 1205 (1981); Richard Posner, The Present Situation in Legal Scholarship, 90 YALE L.J. 1113 (1981); Aviam Soifer, Musings, 37 J. LEGAL EDUC. 20 (1987). For a variety of colored professors' views, see Nurturing Young Scholars: The Mission of Minority Law Teachers in the 1990s, 10 ST. LOUIS U. PUB. L. REV. 151-229 (1991) (discussing "the scholarly agenda" and "scholarly trends and paradigms" as expounded in papers presented at the 1990 Minority Law Teachers' Conference).

59. LEROI JONES, BLACK MUSIC 146-49 (1967).

60. Id. at 156.
Then as now, black intellect and black culture—black voices, if you will—were greatly misperceived and discounted. In college I was a token representative in what was literally an alien land, and from that position, the psychology of race compelled me to examine how values about differences were formulated and acted upon. Through Archie Shepp’s fire music I came to appreciate how the psychology of race forces us to examine behavior at the personal, interpersonal, and societal levels. Prior to college, growing up in the black northwest community of an otherwise white Pasadena, I had never been forced to undertake such an examination, at least not rigorously, because in my small world being black was not the tight fit it proved to be in Palo Alto.

Archie Shepp entered this foreign, sometimes hostile world and stood as an artistic and intellectual giant who, in no more than two or three hours, presented to me (and the predominantly white audience) a counterdominant difference that simply had to be valued. He played his

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61. In February 1967, some of us Stanford African-American students formed the Black Student Union. According to one commentator who described Stanford at the time: "Black students . . . felt an urgent need to maintain a connection to their people and their heritage in order to survive at a predominantly white and wealthy institution . . . . [C]onsistent contact with one's culture helps sustain an isolated and oppressed people amid hostile surroundings." STEVEN C. PHILLIPS, JUSTICE AND HOPE: PAST REFLECTIONS AND FUTURE VISIONS OF THE STANFORD BLACK STUDENT UNION 1967-1989, at 19 (1990).


At the personal level, a more active examination of . . . values, particularly values about differences, needs to be done. What messages were received which helped define one's worth and self-esteem, both as an individual and as part of a group, however such group was defined? What comparables, messages, and judgments were received about others, particularly those who were different racially and culturally? It means uncovering and examining the parts of oneself and one's experiences which are hidden and run away from because they are considered different.

Probing at the interpersonal level involves a thorough and more minute dissection of what goes on between people, particularly where there are racial, gender, or cultural differences. It involves more understanding of the traits and characteristics of who attracts and repulses an individual. Who is immediately thought to be smart, who isn't. Who has the look of intelligence, who doesn't. What traits, characteristics, and style are acceptable, which ones aren't. When is there tension in a relationship, fear, with whom, and what types of people.

At the societal or global level, one needs a comprehension of the role of race and difference in the world. What understanding do people have of poverty, of the haves and have-nots? Is there any systematic study of racism, of sexism, of presumed superiority and inferiority based on race, or other factors of difference? Does the individual understand elitism and power? Who has it, who doesn't, and why?

Id. at 69.

63. Pasadena, however, was no promised land. Every New Year's Day, millions of Americans view Pasadena's Tournament of Roses Parade and Rose Bowl football game. While television presents the city's image as an idyllic, sunny Southern California suburb of 132,000 people, the northwest section of town presents a very much different picture:

This is the neighborhood where the underclass of Pasadena lives. Predominantly black, northwest Pasadena had about 102 drive-by shootings in 1989. Six people were
horn brilliantly and he articulated, with words like "transmogrification," what his role and artistry were all about.\textsuperscript{64} For me, he was to music what the likes of Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams are to legal scholarship. That is, he personified a positive contrast not only to the musical world of white America, but also to the assimilationist ethic that purportedly had to be embraced and represented in order to "succeed."\textsuperscript{65}

Over the past twenty-five years, I have listened a lot to Archie Shepp to help make sense of my world. At times other voices have intruded. At times I have failed to recognize Shepp's lasting authenticity. My exposure to critical race theory at the First Annual Workshop on the subject, in Madison, Wisconsin, during the summer of 1989, however, killed and 69 injured—many of them innocent bystanders—in shooting incidents, police say.

The neighborhood also has many hard-working homeowners and apartment dwellers, sometimes overwhelmed by the crime around them. "The attitude by the authorities seems to be, as long as it's not blown out of proportion, let it go," one resident said.

"It's a population that's basically a labor population" but "there's not a single smoke-stack in Pasadena," said Ibrahim Naeeem, director of the Pasadena-Foothill Branch of the Los Angeles Urban League.

The result is a vast gap between haves and have-nots. A city commission on youth and families recently compared income levels in a census tract in northwest Pasadena with one in wealthy west Pasadena. They found a $68,170 difference in median family income.

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The Board of City Directors (Pasadena's city council) has tried recently to assuage the restive black community, which constitutes about 25% of the city. Last month, after months of criticism, the board authorized a $100,000 audit of city personnel practices to determine whether city policies have been racist or sexist over the past five years.


\textsuperscript{64} It is difficult to convey the drama and excitement of Shepp's Stanford concert. He was introduced by Ralph Gleason, who later wrote about what many of us experienced that day:

Hearing Archie Shepp was one of the most profound musical experiences of my life. I simply was not prepared for it because I had had nothing like it in my experience before. This is not, really, a question of intensity nor of truth but merely to say that the art of Archie Shepp came at me in a form with which I was not familiar. I had, unknowingly, made up rules that said that music must be thus and so in order to be art. But then Archie Shepp proved I was wrong by doing it. He forced me to come to his art on his terms, not mine. He made me listen. And there is no substitute.


\textsuperscript{65} Archie Shepp transcends music. There may be a number of more important and impressive musicians, but Shepp ranks among the most articulate, politically sophisticated, and intellectual of jazz musicians. As Baraka has observed, "Archie Shepp is one of the most engaged of jazz musicians .... He is critically aware of the social responsibility of the black artist, which, as quiet as it's kept, helps set one's aesthetic stance as well. In this sense, ethics and aesthetics, as Wittgenstein said, are one." \textit{JONES, supra} note 59, at 149. As for the music itself, I agree with Baraka that "[s]ince Lester Young, jazz has become, for the most part, a saxophone music." \textit{JONES, supra} note 51, at 182.
CRITICAL RACE THEORY

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returned me to Shepp and his fire music. This exposure functioned almost as a crucible; I now relate it to my scholarly life of advocacy.

When I was introduced to Shepp's music, I was moved by his unique sextet instrumentation—tenor saxophone, alto saxophone, trumpet, trombone, bass, and drums—that produced the 1965 recordings Fire Music and Further Fire Music. In the liner notes for the former, Nat Hentoff writes:

In this album, Shepp focuses on a need in himself and in the society. It has to do with "social responsibility" in the sense that Archie is working toward a music that will be "popular," but not in the meretricious, mechanical way in which that word usually functions in music. He takes "popular" to mean a music that has relevance to the actual lives of a broad spectrum of people, not just the insular elites..... The word, "popular," has to be re-evaluated, he insists. "What it really means, after all," Archie concludes, "is the people. We have to get into their lives which is one way of saying we have to get more and more into our own lives and know who we are so that we can say all that's on our minds." In many ways, this approach of saying "all that's on our minds" parallels the orientation of critical race theory's legal scholars.

Amiri Baraka has described Shepp's music as "openly agitational art meant to get people hot and make them do something about the ugliness of what is. It was meant to be a revolutionary art, a people's art, fuel for social transformation." Critical race theory, as I see it, finds its finest expression when it, too, serves as "fuel for social transformation."

66. ARCHIE SHEPP, FIRE Music (Impulse Records 1965).
67. ARCHIE SHEPP, FURTHER FIRE Music (Impulse Records 1965).
68. Nat Hentoff, Liner Notes for SHEPP, supra note 66.

This Article was influenced by various Shepp recordings contained in my personal library. From the fire music genre, hear FIRE Music, supra note 66; FURTHER FIRE Music, supra note 67; FOUR FOR TRANE (Impulse Records 1964); KWANZA (Impulse Records 1974) (1960s recordings); MAMA TOO TIGHT (Impulse Records 1966); POEM FOR MALCOLM (Affinity 1982) (1969 recordings, including his classic Rain Forest); THE WAY AHEAD (Impulse Records 1968); YASMINA, A BLACK WOMAN (Bye Records 1969); FOR LOSERS (Impulse Records 1970). For Shepp recordings that depart from fire music, hear BIRD FIRE (Bellaphon Records 1987); LOVER MAN (Timeless Records 1989); ARCHIE SHEPP & CHET BAKER, IN MEMORY OF (L & R Records 1988; MONTREUX ONE (Arista Records 1976) (particularly Strayhorn's Lush Life); SPLASHES (L & R Records 1987); ON BROADWAY (Soul Note Records 1987) (recorded live); ON GREEN DOLPHIN STREET (Nippon Columbia 1984); ARCHIE SHEPP & JASPER VAN'T HOFF, THE FIFTH OF MAY (Optimism 1987); THINGS HAVE GOT TO CHANGE (Marge Productions 1979); ARCHIE SHEPP & HORACE PARLAN, DUO REUNION (L & R Records 1987); TCHANGODEI & ARCHIE SHEPP, GINSENG (Volcanic Records 1983) (Tchangodei is a South African pianist). Archie Shepp's compositions are published under the appropriate name "Dawn of Freedom Music."
In that sense, our efforts must, while directed by critical theory, extend beyond critique and theory and lend support to the struggle to relieve the extraordinary suffering and racist oppression that is commonplace in the life experiences of too many people of color.

John Coltrane, who died on July 17, 1967, is the exemplar of fire music.\textsuperscript{70} After playing with him during the summer of 1965, Shepp said Coltrane "taught . . . people to listen beyond the expected, how to hear themselves and their times in jazz."\textsuperscript{71} Thus, like critical race theory, fire music represented a distinctly African-American approach to cultural expression, heavily influenced by an experiential perspective. The growling, raspy tenor saxophone of Archie Shepp resembled black voices of life and protest.\textsuperscript{72} Frank Kofsky writes, "Nowhere is the indebtedness of the jazz revolution to the vocal patterns of the ghetto more manifest than in the huge, raucous sounds that emerge from the tenor saxophone of Archie Shepp . . . ."\textsuperscript{73} And as Baraka has claimed:

The most expressive [black] music of any given period will be an exact reflection of what the [African American] himself is. It will be a portrait of the [black] in America at that particular time. Who he thinks he is, what he thinks America or the world to be, given the circumstances, prejudices and delights of that particular America.\textsuperscript{74} Shepp has personified the best of this tradition. If we substitute the words "legal scholarship" for "music" in the above quotation, we begin to appreciate the depth and resonance of the current legal writing by so many people of color.

B. THE BEBOP ROOTS OF FIRE MUSIC

Bebop represented a conscious step toward African and African-American music that could not be commercialized by whites. Beboppers began to see themselves as artists rather than entertainers.\textsuperscript{75} Major innovators of this music include Charlie Parker, Dizzy Gillespie, Thelonious Monk, Bud Powell, Max Roach, Kenney Clarke, and Charlie Christian. Many of these musicians played in the big bands of Billy Eckstein.


\textsuperscript{71} Nat Hentoff, \textit{Liner Notes for JOHN COLTRANE & ARCHIE SHEPP, NEW THING AT NEWPORT} (Impulse Records 1965).

\textsuperscript{72} Archie Shepp, for instance, has been described as "an uncompromising enemy of the racial and social status quo." KOFSKY, \textit{supra} note 70, at 141.

\textsuperscript{73} \textit{Id.} at 140.

\textsuperscript{74} \textit{Id.} at 142.

\textsuperscript{75} ROB BACKUS, FIRE MUSIC: A POLITICAL HISTORY OF JAZZ 37-38 (1976).
second line of bebop was formed by such musicians as Miles Davis, Fats Navarro, and Dexter Gordon.

With origins in the blues and the bop era of the 1940s, fire music also represented a reformulation of jazz in terms of a deliberate expression of a black aesthetic that was neither effortless nor achieved instantaneously.\(^6\) In *Blues People*, Baraka explains:

The direction, the initial response, which led to hard bop is more profound than its excesses. It is as much of a "move" within the black psyche as was the move north in the beginning of the [twentieth] century. The idea of the Negro’s having "roots" and that they are a valuable possession, rather than the source of ineradicable shame, is perhaps the profoundest change within the Negro consciousness since the early part of the century. It is a re-evaluation that could only be made possible by the conclusions and redress of attitude that took place in the forties. . . . The form and content of Negro music in the forties re-created, or reinforced, the social and historical alienation of the Negro in America, *but in the Negro's terms* . . . . By the fifties this alienation was seen by many Negro musicians not only as valuable, in the face of whatever ugliness the emptiness of the "general" culture served to emphasize, but as necessary.\(^7\)

Sometime in the 1970s and continuing today, many African Americans lost sight of this. With this point of view and direction, however, Shepp's saxophone has played the fire music toward which African-American

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\(^6\) Kofsky, *supra* note 70, at 100-01.

\(^7\) Jones, *supra* note 51, at 218-19 (emphasis added). Between the bop and hard bop eras, roughly from 1950 to 1954, the jazz style known as "cool jazz" or "West Coast jazz" appeared. Bebop was a nascent movement, killed by the recession following the end of World War II. Cool jazz developed almost completely as a white form of jazz, although the ubiquitous Miles Davis is the salient exception. Those who developed the cool sound include Shelly Manne, Art Rogers, Bud Shank, Bill Evans, Stan Getz, Zoot Sims, Gerry Mulligan, Chet Baker, and Dave Brubeck. Kofsky, *supra* note 70, at 31-33. Cool jazz manifested a severance of jazz from its black roots and its repotting, so to speak, in the world of more "dignified" contemporary Europeanized music. *Id.* at 32-33. Usually this entailed making the music more melodic. Hard bop was ushered in by Davis with his 1954 recording *Walkin* (not "Walking"). According to Davis,

That record was a mother . . . man, with Horace [Silver] laying down that funky piano of his and Art playing them bad rhythms behind us on the drums. It was something else. I wanted to take the music back to the fire and improvisations of bebop, that kind of thing that Diz and Bird had started. But also I wanted to take the music forward into a more funky kind of blues, the kind of thing that Horace would take us to. Davis & Troupe, *supra* note 70, at 177. As Davis explained, "Birth of the Cool had . . . mainly come out of what Duke Ellington and Billy Strayhorn had already done; it just made the music 'whiter,' so that white people could digest it better." *Id.* at 219. While bop was a music of engagement, cool was quintessentially a reflection of individual disengagement. Kofsky, *supra* note 70, at 31. Hard bop in large part was a reaction to cool jazz and a response to the 1950s civil rights protests. *Id.* at 38. It set the stage for the funky soul music that was later popularized in the 1960s by Marvin Gaye, Otis Redding, Wilson Pickett, Aretha Franklin, and James Brown.
legal scholars must, by analogy, now return. At an earlier time, the oppression of the race was more universal, and, because we were in the same boat together, it was easier to know what we were against and what we were for. Now, we must deliberately stand against racist oppression and class subjugation, even though some of us may have sailed into a relatively safe harbor. As Regina Austin admonishes, we must not abandon the experiential and we must be directed by our "life, instincts, sensibility, and politics." Our work must reflect a voice and vision that embody the essence of the culture we have lived and learned: "Imagine, if you can, writing a law review article embodying the spontaneity of jazz, the earthiness of the blues, or the vibrancy of salsa."

Technically, fire music also continued the bebop tradition. That legacy was reflected in the emphasis on contrasting polyrhythms; increased vocalizing through horn playing, particularly the saxophone; a jagged and abrupt melody, suggesting an "endless need for deliberate and agitated rhythmical contrast, most of the melodies being almost extensions of the dominating rhythmical patterns"; and a special "timbre" as a harmonic principle whereby the horn's actual sound, regardless of the notes played, contributed to an "unmeasured harmonic diversity" (or a radical deemphasis of all harmony and chords).

78. Austin, supra note 57, at 542-43.
79. Id. at 543.
80. JONES, supra note 59, at 74.
81. WEST, supra note 17, at 178.
82. JONES, supra note 59, at 74.
83. Id. at 77. Michael Budds has observed:

The sixties was an unusual period in the history of jazz. The existence of the kind of general style uniformity that was present in earlier periods in the history of jazz was not present. The mainstream of jazz performance as inherited from the earlier decade was continued alongside the fundamental re-evaluation of the methods by which that music was produced. This circumstance resulted in the creation of kinds of jazz in which once uncontested procedures or conventions were replaced by new systems of order. The abandonment of the metrical conditions favorable for swing, the popular song as a basis for jazz improvisation, and the distribution of labor within the jazz ensemble required reformers to make basic musical decisions. The products of their efforts differed drastically from the jazz of their contemporaries.

MICHAEL BUDDS, JAZZ IN THE SIXTIES—THE EXPANSION OF MUSICAL RESOURCES AND TECHNIQUES 97 (1978). Joachim Berendt describes jazz innovations in the 1960s to include:

1. A breakthrough into the open space of "free tonality."
2. A new rhythmic conception, characterized by the disintegration of meter, beat, and symmetry.
3. The flow of "world music" into jazz, which was suddenly open to all the great musical cultures—from India to Africa, from Japan to Arabia.
4. An emphasis on intensity unknown to earlier styles of jazz. Jazz had always been superior in intensity to other musical forms of the Western world, but never before had the accent been on intensity in such an ecstatic, orgiastic—sometimes even religious—sense as in free jazz. Many free-jazz musicians actually made a "cult" of intensity.
5. An extension of musical sound into the realm of noise.
Frank Kofsky has analyzed the revolutionary music—the fire music—that came out of the 1960s, and he demonstrates that developments in that music paralleled the developments in the black community, developments that were characterized by black nationalism, the return to African roots, and increasing expressions of militancy. He argues that this music did not evolve in an aesthetic vacuum, but rather it reflected the social history of urban blacks in America. At the time, many of the primary jazz innovators were expressing and anticipating black ghetto moods, emotions, and aspirations. He thus introduced his book with the normative assertion of Archie Shepp: "The Negro musician is a reflection of the Negro people as a social phenomenon. His purpose ought to be to liberate America aesthetically and socially from its inhumanity."

Just as some have questioned the distinctive voice of critical race theory, jazz critics sought to devalue the music of Shepp and other blacks who had departed from the mainstream. These critics argued that jazz is not primarily an African-American art form because anyone can learn to play it; jazz has no particular social content—"specifically, it in no way pertains more closely to black experiences, perceptive modes, sensibilities, and so on, than it does to white."

It is of course true that whites play jazz. Indeed, groups led by Archie Shepp often included important white musicians, such as bassist Charlie Haden and trombonist Russell Rudd. Moreover, many of the most famous and commercially successful jazz musicians have been white: Dave Brubeck, Bob James, Stan Getz, David Sanborn, Bill Evans,

JOACHIM E. BERENDT, THE JAZZ BOOK: FROM RAGTIME TO FUSION AND BEYOND 23 (Günther Huesmann rev., 1992). Finally, according to Len Lyons, the free jazz characteristics included the following:

(a) the liberation of melody from preset chord changes and fixed tempo;
(b) the creation of new song structures, some of which resemble modern classical music more than blues or ballads;
(c) the creation of sound-surfaces by the use of tonal coloration;
(d) the creation of sound-fields by the use of instrumental density and coloration;
(e) the use of new or uncommon instruments—and new uses of traditional instruments—to further (c) and (d); and
(f) group improvisation, composition, and overall interaction (collectivism), revising the previously dominant role of the soloist.


84. KOFSKY, supra note 70.
85. Id. at 9. These same words are quoted in the liner notes to the Fire Music album.
86. Id. at 16. See Panel Discussion, Heretics' Brew—The Jazz Avant Garde, DOWN BEAT'S MUSIC '66, at 110 (1965); Racial Prejudice in Jazz, DOWN BEAT, Mar. 15, 1962, at 20; Racial Prejudice in Jazz: Part II, DOWN BEAT, Mar. 29, 1962, at 22.
Gerry Mulligan, Chet Baker, Benny Goodman, and Stan Kenton come to mind. But the jazz that whites play has historically been very different from that played by blacks. Much jazz innovation has been led by black artists whose music was influenced by their experience of living in a black world segregated from white society. For example, a Langston Hughes poem explains bop music's derivation as follows:

“You must not know where Bop comes from,” said Simple, astonished at my ignorance.
“I do not know,” I said. “Where?”
“From the police,” said Simple.
“What do you mean, from the police?”
“From the police beating Negroes' heads,” said Simple.
“Every time a cop hits a Negro with his billy club, that old club says, 'BOP! BOP! ... BE-BOP! ... MOP! ... BOP!'”
“That Negro hollers, 'Oooool-ya-foo! Ou-o-o!'”
“Old Cop just keeps on, 'MOP! MOP! ... BE-BOP! ... MOP!' That's where Be-Bop came from, beaten right out of some Negro's head into them horns and saxophones and piano keys that plays it....”

The contention that the fire music of the 1960s was either antijazz or devoid of social content is myopic. As Shepp says: “Some of us [jazz musicians] are more bitter about the way things are going. We are only an extension of that entire civil-rights-Black Muslims-black nationalist movement that is taking place in America. That is fundamental to music.” By relying on an identification with urban black America and by rejecting the canons of European culture, Shepp's fire music was distinctively black. And like critical race theory's readership, for many listeners it was an acquired taste. As Kofsky observes:

87. JONES, supra note 51, at 191; KOFSKY, supra note 70, at 23.

After the officers were acquitted on almost all charges, there were four days of unprecedented civil unrest in the city. See Special Report: Understanding the Riots, L.A. TIMES, May 11-15, 1992, § T.

89. KOFSKY, supra note 70, at 63.
Perhaps one must live with [this music] for a prolonged while before it begins to become intelligible. It was, at any rate, only after I had listened to Archie Shepp's most recent recording, *Four for Trane*, for what must have been the tenth time, that the thought struck me: this is simply not European art; it has moved wholly away from the traditional canons of Western music. Once one begins to toy with that seemingly innocent notion, whole new vistas suddenly open up—vistas which reduce the superficially chaotic diversity of [this musical] insurrection to at least a kind of order.  

D. *Archie Shepp and the Element of Creativity in Black Intellectual Life*

Drawing from artistic creativity, one gains insight to some of the stylistic approaches and methods of critical race theory. Artistic creativity produces a new model for experience. The result of creativity should be something new but appropriate, adding something that fits with what already exists; "it is not a creation *ab ovo* but a new way of putting Humpty Dumpty together."  

Through creativity we are able to escape from cliches and habits. As we grow up, we tend to see and feel what we are expected to see and feel because everyone else does. This tendency often supplants our capacity to see and feel what is really there, particularly for those—such as contemporary intellectuals of color—who vacillate between cultures in response to institutional expectations and roles that may tie us to dominant society in ways foreign to our individual group histories. Creativity allows us to break from the conventions of cliched expectations, in effect defeating habit by originality.

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90. *Id.* The *Fire Music* recording, for instance, was a sextet with no piano player. This is one example of the departure from the European paradigm: An immediate and obvious consequence of the departure from diatonicity, of course, is the atrophy of the piano in [these] groups since if one is going to avoid playing in any of the conventional Western modes or scales, then the presence of a piano in the background can only serve as a distraction.  

*Id.* There are exceptions, such as pianists Cecil Taylor and Andrew Hill, who utilized "tonal clusters to give [their] playing an anti-diatonic cast." *Id.* at 133-34.  

91. Meredith Skura, *Creativity: Transgressing the Limits of Consciousness*, 109 *Daedalus* 127 (1980).  

92. *Id.*  

93. *Id.*  

Leonard Meyer, a professor of music at the University of Chicago, asserts that artistic creativity "involves exploiting and extending the possibilities potential in an existing act or principle in order to make a presentational pattern." Meyer criticizes those who overinclusively impose the scientific paradigm of creativity and cultural change on human endeavors. The scientific paradigm implies that the creative act involves transcending limits, falsifying existing theories, and promulgating new ones grounded in "previously unformulated concepts or unimagined relationships." While there is a similar rhetorical objective in critical race theory work, Meyer's notion of exploiting limits typifies the substance of most critical race theory. Thus, for instance, Kimberlé Crenshaw has criticized critical legal studies scholars for failing to address the issue of how to prevent the legitimation resulting from law reform when reliance on reformist discourse may be the only effective challenge to the legitimacy of the social order. Although she recognizes the risks in engaging in dominant discourse, she also recognizes the risks in failing to do so. She concludes that powerless people may often be limited to seeking effective redress when "there is a political or ideological need to restore an image of fairness that has somehow been tarnished. Most efforts to change an oppressive situation are bound to adopt the dominant discourse to some degree."

E. THE BREAK-FREE NATURE OF JAZZ

African-American music at its authentic best is, as Baraka explains, "essentially the expression of an attitude or a collection of attitudes, about the world, and only secondarily an attitude about the way music is made." If we allow it, jazz can be break-free music. Jazz has too

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96. Id. at 177. See also Mary Sanger & Martin Levin, Using Old Stuff in New Ways: Innovation as a Case of Evolutionary Tinkering, 11 J. POL'Y ANALYSIS & MGMT. 88, 89 (1992) ("While academic training emphasizes the value of formal, systematic means to gather data, successful innovators demonstrate the benefits of informal and experimental wandering to generate insights and lessons that can be used to creatively adapt operating programs.").
97. Crenshaw, supra note 45, at 1368.
100. According to Gato Barbieri:
Can an artist make a revolution? No, you can bring revolution into your art, but you can't make a revolution with art. The revolution has to come by political means. But perhaps music, if it's beautiful enough, can help people begin to change a little bit—begin to change their consciousness so that they will be ready to move in other ways, political ways. Perhaps. That's all I can say.
often hung like a skeleton of middle-class black America, locked away in a psychic closet, a sign of running away from our cultural heritage. But now there is a growing appreciation and reappreciation of that heritage. In October 1990 a cover story in Time discussed the renaissance of jazz. Thomas Sancton observed that the public is beginning to realize that jazz is not simply another popular music style, but rather a "major American cultural achievement and a heritage that must not be lost."103

Wynton Marsalis, who is credited with playing a significant role in bringing the public to this recognition, has viewed jazz as a metaphor for democracy. For Marsalis, when jazz is played properly, its democratic expression lies in its demonstration of "how the individual can negotiate the greatest amount of freedom and put it humbly at the service of a group conception."104 Such is also the case with critical race theory when it is "played properly." Thus, this discussion of Shepp and his fire

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Backus, supra note 75, at 92-93.

101. Jones, supra note 59, at 11. Ralph Ellison, although disagreeing with the politics of jazz as characterized by Baraka, makes a similar point, declaring:

Jazz was regarded by most of the respectable Negroes of the town Oklahoma City as a backward, low-class form of expression, and there was a marked difference between those who accepted and lived close to their folk experience and those whose status strivings led them to reject and deny it.

Henry, supra note 50, at 29 (quoting Ralph Ellison, Shadow and Act 232-33 (1966)).


103. Id. Columnist David Broder, moreover, characterizes jazz as "the United States' greatest contribution to 20th century culture." David Broder, Real Jazz, Wash. Post, Aug. 28, 1991, at A23. Broder explains how the Smithsonian American History Museum Director, Roger Kennedy, has caused the museum to take jazz seriously. According to Broder, Kennedy's work has been encouraged by members of Congress who are jazz fans, especially members of the Congressional Black Caucus. Five years ago, a congressional resolution designated jazz as "a rare and valuable national treasure." Id. Although America has a history of misappropriating black style and culture, divorcing it from its colored origins and distinctiveness, presently the nation recognizes the blackness of jazz as well as the universality of its appeal. Hence, David Baker, the head of the jazz program at Indiana University's School of Music, is quoted as declaring that jazz "transcends time and place . . . It crosses all demographic lines. I watch little kids and their parents, old people, black people, white people—they all get it." Id. Fire music, though often misunderstood, comes out of this tradition. As Bill Shoemaker remarks,

Perhaps the most lasting accomplishment of the revolution in jazz during the sixties will be the new sense of tradition it instilled in subsequent generations. If this comes to pass, and indications are that it will, then a large measure of the credit will be Archie Shepp's, as his music has made constantly ardent and overt use of the tradition in the stretching of jazz's established limits. Shepp's overview of the tradition is a tenet of the consensus among the emerging generation of American improvisors that a thorough orientation in the tradition is a prerequisite for mature, creative expression. This overview can be traced throughout the vast Shepp discography, whether the issue at hand is high-voltage r&b, an Ellington ballad, or free improvisation.

Shoemaker, supra note 19.

104. Sancton, supra note 102, at 70. Charles Henry, too, observes that jazz provides a group structure that permits improvisation and freedom, tied, however, to the purposes of the other musicians who are playing in the group. Henry, supra note 50, at 32.
music as a metaphor for the creative intellectual tradition and cultural expression that I associate with critical race theory now segues into a discussion of the theory’s themes, perspectives, and directions.

III. CRITICAL RACE THEORY THEMES, PERSPECTIVES, AND DIRECTIONS

A. AN OVERVIEW OF CRITICAL RACE THEORY

Critical race theory begins with a recognition that “race” is not a fixed term. Instead, “race” is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle. The challenge thus presented is to examine how individual and group identities, under broadly disparate circumstances, as well as the racial institutions and social practices that are linked to those identities, are formed and transformed historically by actors who politically contest the social meanings of race.105

As a form of oppositional scholarship, critical race theory challenges the universality of white experience/judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior.106 As represented by legal scholars, critical race theory

105. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S, at 68-69 (1986). Omi and Winant emphasize “race formation” and “racialization” to elaborate on this political struggle. The former refers to the process whereby social, political, and economic forces shape the content and salience of racial categories, which, in turn, determine racial meanings: “Crucial to this formulation is the treatment of race as a central axis of social relations which cannot be subsumed under or reduced to some broader category or conception.” Id. at 61-62. “Racialization” signifies the spread of racial meanings to a relationship, social practice, or group that was previously unclassified in racial terms. Id. at 64. Much of today’s racialization is coded and covert. Ironically, we have now a policy of what I call “racialized color blindness,” which never explicitly refers to race in talking about cultures of poverty, welfare cheats, inner-city poor or underclass poor, etc. In such instances, the unstated reference is to blacks.

106. Gerald Torres, CRITICAL RACE THEORY: THE DECLINE OF THE UNIVERSALIST IDEAL AND THE HOPE OF PLURAL JUSTICE—SOME OBSERVATIONS AND QUESTIONS OF AN EMERGING PHENOMENON, 75 MINN. L. REV. 993 (1991). See also Crenshaw, supra note 45, at 1387 (arguing for the adoption of “a distinct political thought that is informed by the actual conditions of Black people”); Delgado, supra note 57, at 2439 (arguing that oppositional storytelling by people of color presents a process through which we can militate against “ethnocentrism and the unthinking conviction that our way of seeing the world is the only one—that the way things are is inevitable, natural, just, and best—when it is, for some, full of pain, exclusion, and both petty and major tyranny”); Matsuda, supra note 98, at 2324 (describing an “outsider’s jurisprudence” that “rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena” and law).

In comparison to other disciplines, this oppositional view appears to have arrived somewhat later to the pages of law journals. See, e.g., NICK AARON FORD, BLACK STUDIES: THREAT-OR-CHALLENGE 15-18, 63 (1973) (stating that among black studies’ goals were legitimizing and intellectualizing the black experience through scholarly study and research). Compare Harold Cruse, The
challenges the dominant discourses on race and racism as they relate to law. The task is to identify values and norms that have been disguised and subordinated in the law. As critical race scholars, we thus seek to demonstrate that our experiences as people of color are legitimate, appropriate, and effective bases for analyzing the legal system and racial subordination. This process is vital to our transformative vision. This theory-practice approach, a praxis, if you will, finds a variety of emphases among those who follow it, and the concepts are now rather open and still being explored.\footnote{107. My discussion of critical race theory presents my understanding, incorporation, and emphasis. Richard Delgado refers to critical race scholars in these terms: Whatever label is applied to this loose coalition, its scholarship is characterized by the following themes: (1) an insistence on "naming our own reality"; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform. Delgado, supra note 42, at 95 n.4. See Richard Delgado, Brewer's Plea: Critical Thoughts on Common Cause, 44 VAND. L. REV. 1, 6-7 (1991). Emphasizing a racially distinctive voice, Robin Barnes identifies the following as critical race scholarship's central elements: "a theory of dual consciousness, a keen awareness of the value of theory for the enhancement of practice, and an explanation of how differentiating characteristics usually compound rather than explain or mitigate racial oppression." Robin D. Barnes, Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship, 103 HARV. L. REV. 1864, 1865-66 (1990). One connection I make between African-American music and critical race scholarship is captured in the observation of Elias Blake: In a way, music most clearly etches the conflicts in cultural values that must be resolved if black Americans are to be unrestricted personalities on their own terms. Clearly, musicians of standard training cannot hold to the conventional standards of excellence and embrace the work of some of the greatest Afro-American musicians as excellent. In this context one is raising the issue of the values by which one judges art, music, and literature and how they enlarge life. Elias Blake, Jr., Future Leadership Roles for Predominantly Black Colleges and Universities in American Higher Education, 100 DAEDALUS 745, 762 (1971). Free jazz, for instance, departed from two pillars of conventional jazz rhythm by freeing itself from meter and beat. "Pulse" replaced the former. Meter, treated almost as nonexistent by some free-jazz drummers, became "wide arches of rhythmic tension, built up with an incredible intensity." BERENDT, supra note 83. Reflecting this, Sunny Murray describes traditional drum rhythm as "cliche beats" that resemble "slavery or poverty. Freedom drumming is an aspiration toward a better condition." Id. To me, critical race...}
From this vantage, consider for a moment how law, society, and culture are texts—not so much like a literary work, but rather like the traditional black minister's citation of text as a verse or scripture that would lend authoritative support to the sermon he is about to deliver. Here, texts are not merely random stories; like scripture, they are expressions of authority, preemption, and sanction. People of color increasingly claim that these large texts of law, society, and culture must be subjected to fundamental criticism and reinterpretation.

John Brenkman provides some insight as to what makes critical race theory "critical." Although he focuses on how literary criticism may foster social criticism, his "critical hermeneutics" can be applied to interpreting texts as I have characterized them here. He sees culture as constituting the forms of symbolization, representation, and expression through which a group secures its identity and solidarity. Culture enables a group to situate reciprocal relationships and mutual understandings while simultaneously differentiating itself from other groups with which it is interdependently linked, either as a matter of cooperation or antagonism. Hence there is a tightly woven interplay between social critique, especially as oppositional cultural practice, and experiential interpretation. One's hermeneutical experience, however, does not automatically lend itself to critique. Instead, Brenkman contends that what determines whether our interpretations are socially critical or uncritical is the set of commitments we develop regarding the symbolic theory expresses this tradition of "freedom drumming" as we seek to avoid "cliche beats" that distort the discourse on rights and social justice. As part of a postreform legal ideology, critical race theory unmasks certain themes that dominate mainstream legal discourse, such as formal equality, individualized opportunity, neutrality, objectivity, color blindness, and meritocracy.

There have been four annual critical race theory workshops, the first held at the University of Wisconsin Law School in Madison in July 1989, the second at SUNY Buffalo School of Law in June 1990, the third at the University of Colorado School of Law in Boulder in June 1991, and the fourth at the Yale Law School in June 1992. Additionally, on November 9-10, 1990, a public conference entitled Conference on Critical Race Theory: A Dialogue on the Role of Law in the Maintenance and Elimination of Racial Subordination was held at the University of Wisconsin. I have been actively involved in all of these, but this Article grew out of the second annual workshop and is greatly influenced by initial readings that were suggested by Kendall Thomas. During the third workshop, I benefited further as Jerome Culp presented a draft of this Article and Linda Greene commented on it.

108. BRENKMAN, supra note 10.


110. BRENKMAN, supra note 10, at 51.

111. Id.
and social struggles between the legitimation and the opposition to domination, oppression, and injustice.\textsuperscript{112} So, then, critical race theory can be identified as such not because a random sample of people of color are voicing a position, but rather because certain people of color have deliberately chosen race-conscious orientations and objectives to resolve conflicts of interpretation in acting on the commitment to social justice and antisubordination.\textsuperscript{113}

Drawing again from Brenkman, I contend that critical race theory can be described in part as an expression of critical hermeneutics that reflects what he characterizes as a way of appreciating the dynamics of a "critical-utopian interpretation of cultural practices and traditions."\textsuperscript{114} In grasping the dynamics at play here, he argues that through trying to understand the past while assuming responsibility for the future, we shape our "critical relation" to society as we oppose business as usual. As a result, our orientation moves us in both critical and anticipatory directions. On one hand, we challenge the forms of domination that structure not only culture's production but also its reception. On the other hand, we try to identify and clarify progressive social changes whose needs arise from the symbolic world of culture and whose realization lies in political self-organization and action.\textsuperscript{115} Moreover, to

\textsuperscript{112} Id.\textsuperscript{113} See infra part III.E. In a critical culture, ideology's power is manifested in "collective commitments—ideas with the power to stimulate action." Jeffrey Lehman, To Conceptualize, to Criticize, to Defend, to Improve: Understanding America's Welfare State, 101 YALE L.J. 685, 690 (1991). For most people of color, adapting to dominant norms that reinforce the racial status quo represents a collective commitment that identifies with an overinclusive, and hence wrong, "we." Or else these people simply emphasize individualism to an extent that they aim to transcend color, which invariably is a collective reference to one's group rather than one's individuality. As Charles Henry asserts:

[B]lack culture has empowered blacks to survive oppression and promote a community of interests. It has provided a social vision based on the integration of traditional elements of both black and white culture and as such has something to offer to the wider society. Unfortunately, this vision has been obscured rather than clarified by the rise of a black neoconservatism dominated by extreme individualism.

HENRY, supra note 50, at 96. The underlying theme of this Article tracks recent findings presented by the National Research Council's analysis of black community identity and institutions:

Overall, these findings suggest two main implications. First, most black Americans experience and attach importance to a group cultural identity. Second, an interwoven set of qualities—such as group cohesion, striving, and endurance—and a perceived need to continue to instill such qualities in future generations appear to be key elements of this cultural identity. To the extent that those orientations treat race as an important social characteristic, involve a sense of obligation to blacks, and indicate a commitment to overcoming group disadvantages, these patterns of cultural identity indicate a high degree of race consciousness among black Americans.

A COMMON DESTINY, supra note 49, at 200. \textsuperscript{114} BRENKMAN, supra note 10, at 229. \textsuperscript{115} Id.
advance such a project, we discover the required interpretive proce-
duress—fire music or what have you—at the point where cultural heri-
tages and social critique converge.\textsuperscript{116}

In sum, as critical race theorists confront the texts of America’s
dominant legal, social, and cultural strata, we are critical, fundamentally
so, because we engage these texts in a manner that counters their oppres-
sive and subordinating features. In this endeavor we are not simply in
opposition; we are not rebels without a cause. We are the “new inter-
preters,” who demand of the dominant institutions a new validity, as
described in the following passage from Brenkman:

Insofar as the transmitted text comes to address new interpreters,
it occasions or invites a communicative experience that is no longer
contained within the horizon of the text’s original context or the close
circle of its original audience. As soon as the text comes to address
interpreters who are differently situated historically and socially, its
promise of uncoerced mutual understanding undergoes a change. The
text now makes a claim to validity that was not immanent in its origi-
nal context. The new \textit{claim} to validity comes from the specific, histori-
cally contingent \textit{demands} for validity on the part of the interpreters—
demands shaped by contemporary forms of resistance and opposition
to domination and to the systematic distortions of communication
which legitimate domination.\textsuperscript{117}

Like fire music’s oppositional stance, critical race theory presents
not only a different methodology and grounding, but also a message dif-
ferent from traditional race scholarship, now euphemistically known as
“civil rights” or “antidiscrimination” scholarship.\textsuperscript{118} Critical race theory
recombines and extends existing means of legal redress. Hence, critical

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 233. This describes the background claim I have made in revalidating “fair housing”
to include “spatial equality.” John O. Calmore, \textit{To Make Wrong Right: The Necessary and Proper
Aspirations of Fair Housing, in The State of Black America\textsuperscript{1989}, at 77 (Janet Dewart ed.,
1989).

\textsuperscript{118} Some would argue that both message and method are too preoccupied with race. \textit{See}, e.g.,
Kennedy, \textit{supra} note 2, at 707 n.6 (identifying a weakness of critical race theory as its “tendency to
exaggerate the relative importance of current racism in explaining unjust outcomes, and, by contrast,
to underestimate the relative importance of past racism, and non-race economic and institutional
factors”). Kennedy is simply wrong regarding the underestimation of past racism, although he may
be substantially correct regarding the underestimation of nonrace factors. I find it difficult at pres-
ent, however, to overemphasize race. \textit{See Omi & Winant, supra} note 105, at 66 (arguing that U.S.
history has been significantly shaped by “race,” which is itself a continually evolving concept that
“extend[s] from the shaping of individual identities to the structuring of collective political action”).
race theory is necessarily eclectic, incorporating what appears to be helpful from various disciplines, doctrines, styles, and methods. The theory attempts to extend the narrow world of traditional legal scholarship without indulging in dysfunctional deviance, instead establishing intellectual credibility on one hand and reconciling the elements of effective theory and practice on the other. Explanation arises from the particular and the personal. In contrast to traditional scholarship, the focus is much more extralegal and contextual, less restricted by doctrinal analysis as a controlling center. It is concerned with redressing conditions of oppression and subordination that exist beyond their narrow translation into

119. I owe this insight to Mari Matsuda. Her writing reflects the eclectic quality. See Matsuda, supra note 98, at 2324; Matsuda, supra note 58, at 1330 (explaining how her writing "does several things at once, often seemingly in contradiction . . . [suggesting] revolutionary change, while operating within the doctrinal and ideological world commanded by the rule of law"). Critical race theory's challenge of interpretive perspectives and totalizing styles of knowledge is experimental, provisional. It shares the social science orientation described by George Marcus and Michael Fischer:

A period of experimentation is characterized by eclecticism, the play of ideas free of authoritative paradigms, critical and reflexive views of subject matter, openness to diverse influences embraceing whatever seems to work in practice, and tolerance of uncertainty about a field's direction and of incompleteness in some of its projects.

MARCUS & FISCHER, supra note 32, at 8. Similarly, Archie Shepp's music was eclectic:

Archie is so much his own self that it is finally impossible to name one influence as having been the guiding one. Whole lots of people say they hear Ben Webster, others Sonny Rollins. But the weird lovely thing is that they are really hearing Archie Shepp, and his range of expression is so broad that he seems to take in or to have digested most of the ways of playing tenor saxophone, specific "schools" having really not much to do with it. Archie is playing himself, like many of the other younger musicians around these days, a great many of whom have been moved by Ornette Coleman and Cecil Taylor to investigate deeper wellsprings of emotion, and have come up singing their own songs.

LeRoi Jones, Liner Notes for ARCHIE SHEPP, FOUR FOR TRANE (Impulse Records 1964).


Legal scholars of color are increasingly incorporating autobiographical expression in their discussions. Jerome Culp attributes this use of autobiography by black writers to their "need to justify who they are and to describe where they come from as part of the description of where they want to go." Jerome McCristall Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 VA. L. REV. 539, 541 (1991). In Culp's personal illustration, he says:

I start many of my law school courses with a description of myself. "I am," I say slowly, "the son of a poor coal miner." The reason I do so says much about the difference in how blacks and whites approach the issue of legal scholarship and teaching. Being black I cannot stop, at least in the short run, being an anomaly to many people. I can only hope to shape the way in which that anomaly is understood. I define myself as a poor coal miner's son both to claim a past rooted in the history of my parents' struggle and to define a future rooted in the contrasting nature of a different experience. In the strange times in which we live it is not possible for a black professor to claim a history without creating disbelief among students.

Id. at 539. See Darryl Brown, Note, Race and Race Relations in the University, 76 VA. L. REV. 295, 333-35 (1990).
judicially recognizable claims and relief. Historical discrimination and its legacy merge more definitively and symbiotically with the present to provide the temporal context. While not abandoning a faith in rights strategy, critical race theory recognizes that such a strategy cannot be divorced from the larger economics and politics of things. It recognizes that whatever the specific issues of legal cases and controversies are, the overriding issues of social justice and institutional legitimacy always lurk nearby.

Critical race theory recognizes the inadequacy of disaggregating individual plaintiffs and causes of action from the larger context of social conflict that lies at the heart of a racist regime. Hence, formal, individualized equality of opportunity and objective norms of meritocracy can hardly serve as viable opposition to group inequality and subjective bias. Moreover, societal fault and accountability cannot be reduced to actionable claims only when evidenced by individual responsibility for intentional wrong. Finally, many adherents of critical race theory see an interlocking set of oppressions that extend beyond the singular base of

121. See Eric Schnapper, Perpetuation of Past Discrimination, 96 Harv. L. Rev. 828 (1983). In discussing the U.S. Supreme Court decision City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding unconstitutional the city's minority-business set-aside program), Michael Rosenfeld criticizes it as follows:

_Croson_ achieves its superficial order through a process of decontextualization. As we shall see, such decontextualization takes many forms, including lifting race relations out of their historical setting; treating process as though it were unrelated to any content; "disaggregating" evidence so as to produce the impression that tightly linked and mutually reinforcing facts actually stand apart; and dealing with key conceptual constructs as though they were self-sustaining when actually they are dependent on particular theoretical assumptions and on the existence of certain specified sets of facts.


122. See Crenshaw, supra note 45, at 1367-70.

123. Crenshaw, supra note 2, at 10-12 (discussing the problem of antidiscrimination law's lack of perspective). In discussing social location and the structuring of protest and defiance, Frances Piven and Richard Cloward point out that "people experience deprivation and oppression within a concrete setting, not as the end product of large and abstract processes, and it is the concrete experience that molds their discontent into specific grievances against specific targets." Frances F. Piven & Richard A. Cloward, Poor People's Movements: Why They Succeed, How They Fail 20 (1979).

124. See Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 Harv. L. Rev. 525 (1990); Brooks, supra note 57.

race and include the bases of gender, economic class, and sexual orientation.\textsuperscript{126}

Critical race theory attempts to construct a social reality and direct operation within it. It is a way of finding meaning within legal scholarship through combining language, thought, and experience. Voice is important: how voice is expressed, how voice is informed, how our voice differs from the dominant voice.\textsuperscript{127} Hence, critical race theory's linguistics is experiential and pragmatic, focusing on "the nature of language as a social instrument, an instrument through which human beings create or constitute or stipulate a (social) world they may share, and then . . . 'get things done with words' in that world."\textsuperscript{128} Our voice, as heard in legal scholarship, recounts our perception, experience, and understanding of law in ways that are primarily colored, if you will, by our own unique biography and history. As people of color, we recognize the centrality of race in a social order that is maintained and perpetuated in

\textsuperscript{126} Mari J. Matsuda, Beyond Race Alone: The Intersection of All Forms of Subordination, Plenary Address at the Wisconsin Conference on Critical Race Theory, University of Wisconsin at Madison (Nov. 10, 1990).

\textsuperscript{127} Richard Delgado is the primary proponent explicitly explaining the importance of voice. See, e.g., Delgado, supra note 42; Delgado, supra note 57; Harris, supra note 57, at 581-85. Responses to this thesis by those not associated with critical race theory include articles by Alex Johnson: Alex M. Johnson, Jr., Racial Critiques of Legal Academia: A Reply in Favor of Context, 43 STAN. L. REV. 137 (1990) [hereinafter Johnson, A Reply in Favor of Context]; Alex M. Johnson, Jr., The New Voice of Color 100 YALE L.J. 2007 (1991) [hereinafter Johnson, The New Voice].

\textsuperscript{128} Jerome Brunner, Pragmatics of Language and Language of Pragmatics, 51 SOC. RES. 969 (1984) (quoting JOHN AUSTIN, HOW TO DO THINGS WITH WORDS (1962)). The functional orientation of linguistics, characterized as "sociolinguistics," is discussed in Dell Hymes, Why Linguistics Needs the Sociologist, 51 SOC. RES. 461 (1984). Patricia Williams characterizes "critical interpretation" as "that part of interpretive discourse that explores the limits of meaning, that gives meaning by knowing its bounds." Williams, supra note 42, at 2132. Thus, Angela Harris asserts, "[I]n order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced." Harris, supra note 57, at 615. Richard Delgado eloquently examines how using stories and counterstories can affect the struggle for racial justice. He explains how outgroups, "whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized," use stories to subvert the reality of dominant, ingroup reality. Delgado, supra note 57, at 2412. The outsider/marginalized counterstory is aimed at destroying the prevailing mind-set that enables the dominant group to justify the status quo arrangements of whites on top and people of color at the bottom. \textit{Id.} at 2413. Delgado contends:

\begin{quote}
Stories, parables, chronicles, and narratives are powerful means for destroying mind-set—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression.
\end{quote}

\textit{Id.} at 2413-14. For Delgado stories and counterstories can "stir imagination in ways in which more conventional discourse cannot," in hope of quickening and engaging conscience. \textit{Id.} at 2415.
significant ways by the rule of law. As scholars, our writing acknowledges this centrality that contextualizes our work.

B. AUTHENTICITY AND THE EXISTENTIAL GROUNDING OF CRITICAL RACE THEORY

The power to define ourselves and our world is radical per se. But critical race theory also helps to erect and maintain a sense of authenticity, without which our work will probably fail to connect significantly with our community's agenda of social action. Authenticity implies trustworthiness and good faith in presentment. I associate it quite closely with integrity. According to Robert Terry, by guiding our actions, authenticity characterizes a force in our lives that allows us not only to make sense of our world, but also to act purposefully within it. In this way, authenticity connotes being true to both oneself and one's world.

Terry explains further:

Inauthenticity destroys our groundedness. It substitutes a false foundation for a solid one, and guarantees a false understanding of the

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130. Robert Terry, The Negative Impact on White Values, in IMPACTS OF RACISM, supra note 47, at 119, 121. I am using the term "authenticity" to designate aspirations that, oversimplistically, amount to being yourself as you venture into new contexts, roles, and relationships. Although authenticity is complicated when the personal is also the political, I deem authenticity to be primarily a matter of personal, self-regarding characterization. See MARSHALL BERMAN, THE POLITICS OF AUTHENTICITY xv (1970). Some might take this further and point to "competitive authenticities" within the race. See Joe Wood, Niggers, Negroes, Blacks, Niggaz, and Africans, VILLAGE VOICE, Sept. 17, 1991, at 38. Much of my sense of authenticity is a reflection of individual psychology, captured by Abraham Maslow's interconnected concepts of "self-actualization" and "peak experience," the latter serving as the former's climax:

A peak experience is what you feel and perhaps "know" when you gain authentic elevation as a human being. . . . A peak experience is a coming into the realization that what "ought to be" is, in a way that requires no longing, suggests no straining, to make it so. It tells human beings something about themselves and about the world that is the same truth, and that becomes the pivot value and an ordering principle for the hierarchy of meanings. It is the merging of subject and object, involving no loss of subjectivity but what seems its infinite extension. It is individuality freed of isolation.

Henry Geiger, Introduction to ABRAHAM H. MASLOW, THE FARTHER REACHES OF HUMAN NATURE xvi-xvii (1971). Hence, I am not claiming authenticity is tied to representing the race or reflecting the true experience of people of color. But I am claiming that generally certain avenues are more likely than others to lead one to a personal sense of authenticity. For legal scholars of color, I argue that critical race theory maps those avenues that are constructive and supportive; other paths are fraught with the trap doors of forced conversion and tokenistic entries—heavy tolls that most of us cannot pay and many of us desire not to pay.
world. Thus if I am untrue to myself, I say one thing and do another. Not only do I cease to be trusted by others, but eventually, if not immediately, I cease to know myself as well. I become unrooted, subject to external pressures, and unsure of my direction and my ability to act on my deepest insights about life and myself.

If I am untrue to the world, I lose my grasp on what is happening around and to me and thus make judgments that lead to behaviors that are inappropriate to situations in which I find myself. I distort what is happening to me and, because of this false diagnosis of my situation, continually make erroneous judgments.131

Terry is analyzing racism as a source of inauthenticity in white people, their organizations, and their institutions. He distinguishes the inauthenticity of whites from the alienation of people of color. But racism, particularly in integrated settings (however minimal or token), tends to move people of color from the alienated to the inauthentic. Etzioni’s distinction is helpful here. He observes that an inauthentic relation, institution, or society presents the appearance of responsiveness against the backdrop of an underlying alienating condition.132 While both inauthentic and alienating conditions exclude, inauthentic structures more than alienating ones operate to conceal their contours and to generate a feigned flexibility, or mere appearance of responsiveness.133 Etzioni aptly describes the inauthenticity that so many professors of color must feel:

Subjectively, to be alienated is to experience a sense of not belonging and to feel that one’s efforts are without meaning. To be involved inauthentically is to feel cheated and manipulated. The alienated feel that they have no power; the inauthentic feel that they have pulled a disconnected lever, without quite knowing where and how, so that shadows are confused with reality. The alienated are imprisoned; the inauthentic work at Sisyphean labor.

Authenticity exists where responsiveness exists and is experienced as such. The world responds to the actor’s efforts, and its dynamics are comprehensible. . . . [A]uthenticity requires not only that the actor be conscious, committed, and hold a share of the societal power, but also that the three components of the active orientation be balanced and connected. It is the fate of the inauthentic man that what he knows does not fit what he feels, and what he affects is not what he knows or is committed to do. His world has come apart.134

131. Terry, supra note 130, at 121-22.
132. ETZIONI, supra note 21, at 619.
133. Id. at 619-20.
134. Id. at 620. Hear Coltrane & Shepp, Call Me By My Rightful Name, supra note 71.
Hence, a major theme of critical race theory reflects the colored intellectual's persistent battle to avoid being rendered inauthentic by the pressures of adapting to the white world and to take instead an oppositional stance by relying on one's true existential life, which is rooted in a world of color even though not stuck there. As Leslie Espinoza points out: "Critical Race Scholarship is one vehicle through which minorities in law understand and reconcile the world as predicted, the world as experienced, and the world as dreamed."135 Relatedly, critical race theory calls upon one to adopt a "multiple consciousness," as Mari Matsuda terms it.136 The consciousness that she describes is not the random, ambidextrous perspective that enables us to incorporate all points of view, but rather the consciousness that involves deliberate attempts to view the world through the eyes of the oppressed. Such a view forces us to focus on the concrete particulars of their lives.137 Like fire music, it counters the abstraction and detachment that remove us from the discomfort of direct confrontation with the offensive and shocking reality—in a word, the ugliness—of oppression.

In Matsuda's view, abstraction allows theorists to discuss the liberal aspirations of liberty, property, and rights by first severing them from what those concepts mean in real people's lives. Mainstream intellectual training values abstraction at the expense of detail. However, if scholars of color hold onto a multiple consciousness, we will be able to operate "within the abstractions of standard jurisprudential discourse," but without abandoning or discounting the "details of our own special knowledge."138 Although scholars reflecting critical race theory are for the

135. Leslie A. Espinoza, Masks and Other Disguises: Exposing Legal Academia, 103 Harv. L. Rev. 1878, 1885 (1990). See also Crenshaw, supra note 57, at 160-61 (discussing the tension in authenticity caused by ambivalence among black women about emphasizing their gender when it might conflict with an antiracism agenda).

136. Matsuda, supra note 57.

137. Id. at 8. See Barnes, supra note 107, discussing W.E.B. Du Bois' concept of double consciousness:

After the Egyptian and Indian, the Greek and Roman, the Teuton and Mongolian, the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Id. at 1866 (quoting W.E.B. Du Bois, The Souls of Black Folk 3 (1903)). This classic quotation is often re-presented. See, e.g., Lawrence, supra note 26, at 435 n.21; Steven Hobbs, From the Shoulders of Houston: A Vision for Social and Economic Justice, 32 How. L.J. 505, 506 n.4 (1989).

138. Matsuda, supra note 57, at 9. Similarly, William James has lodged this criticism of what he calls "vicious abstractionism":
most part on faculties at mainstream white law schools, there is a certain "pedagogy of the oppressed" at work here. Like Camus' rebel, there is an attempt to revolt against oppression that is sometimes experienced more empathetically than directly.

As a reflection of authenticity, critical race scholarship also rejects the traditional dictates that implore one to write and study as a detached observer whose work is purportedly objective, neutral, and balanced. In the classic sense of "professing," critical race scholars advocate and defend positions. Fran Olsen points out that traditional scholarship's appearance of balance presupposes a status quo baseline that hinders both understanding and social change. Critical race theory tends, in response, toward very personal expression that allows our experiences and lessons, learned as people of color, to convey the knowledge that we possess in a way that is empowering to us and, it is hoped, ultimately empowering to those on whose behalf we act. Those of us who profess critical race theory are, in simplest terms, trying to be true to ourselves. And in so doing, we quest more for social transformation and self-respect than for social acceptance, scholarly citation, or, in some cases, even tenure. Critical race theory, at bottom, is a matter of existential voice.

Let me give the name of "vicious abstractionism" to a way of using concepts which may be thus described: we conceive of a concrete situation by singling out some salient or important feature in it, and classing it under that; then, instead of adding to its previous characters all the positive consequences which that way of conceiving it may bring, we proceed to use our concept privately; reducing the originally rich phenomenon to the naked suggestions of that name abstractly taken, treating it as a case of "nothing but" the concept, and acting as if all the other characters from out of which the concept is abstracted were expunged. Abstraction, functioning in this way, becomes a means of arrest far more than a means of advance in thought. It mutilates things; it creates difficulties and finds impossibilities. The viciously privative employment of abstract characters and class names is... one of the great original sins of the rationalistic mind.

William James, The Meaning of Truth, in PRAGMATISM 301-02 (1978). In rejecting abstractionism, critical race theorists overcome the tendency of the privileged law professor to become isolated from a "consciousness of kind" that both connects that person to the oppressed and militates against the Cartesian thinking that individualism is one's alpha and omega. This also helps moderate the theory's romanticism.

139. FREIRE, supra note 33.

140. ALBERT CAMUS, THE REBEL (1956). Camus's writing—"I revolt, therefore we are"—moves us beyond the Cartesian epistemological frame of "I think, therefore I am." See also Barber's discussion, supra note 14, at 46-66 (criticizing liberal democracy's reliance on the Cartesian epistemology in which "[t]he knower is cut off from the known, epistemology is isolated from ontology, thought is radically differentiated from action, and fact and value are residents of hostile universes—polarizations that in every case are contrary to experience and political reality").


142. Olsen, supra note 141, at 1177-78.


144. Richard Delgado observes:
As people of color we recognize the centrality of race and write about law—its operation, its social ordering, its history, its values, and its ideological vectors—in a way that reflects our different experience, insight, and views.

To date, the most jarring criticism of critical race scholars’ distinctive voice orientation comes from Randall Kennedy, a black professor at Harvard Law School. Kennedy critiques racial distinctiveness as resting on three questionable beliefs:

(1) that minority scholars, like all people of color in the United States, have experienced racial oppression; (2) that this experience causes minority scholars to view the world with a different perspective than their white colleagues; and (3) that this different perspective displays itself in valuable ways in the work of minority scholars.

Kennedy doubts that there is anything special or distinct about the scholarship of nonwhite legal academics: “Does it differ discernibly in ways attributable to race from work produced by white scholars? If so, in what ways and to what degree is the work of colored intellectuals different from or better than the work of whites?”

WASPS are, for the most part, satisfied with the world; at most it needs fine tuning. We want to change it. Our scholarship strikes majority-race evaluators as impetuous, result-oriented. “It’s a good article, but too emotional. It sounds more like a brief.”

So, when appointments committees look at our writing and make the decision whether to accept one of us, they want to determine whether they like the way we think, whether we and they are on the same wave length. And, in many ways we are not. It is not that our writing is inferior to theirs, or the other way around. It is simply different, and they have defined the difference in their favor.

Delgado, supra note 33, at 639-40.


146. Kennedy, supra note 145, at 1746. Kennedy adopts a rather narrow scope to test a basic tenet of critical race theory. His analysis of critical race theory is admittedly limited to an examination of “the effect of racial difference on the distribution of scholarly influence and prestige in legal academia.” Id. at 1745 (emphasis added). By choosing to test critical race theory in reference to its effect on such a small piece of the world, his conclusions must similarly be narrowed in their relevance and application to critical race scholarship, work that extends far beyond his small compass.

147. Id. at 1778.
Kennedy's critique is primarily a reaction to the writing of Mari Matsuda. He claims that the relationship among thought, experience, and racial status is not as predictable as Matsuda would have it. Matsuda, though, talks about a deliberate choice that people of color can make, based not on their status but on their identity as politically connected to other people of color. What she heavily contextualizes, Kennedy decontextualizes, thereby disconnecting our scholarship as people of color from the world beyond the academy where people of color regularly deal with oppression.

Kennedy mischaracterizes Matsuda's views. She does not claim that all scholars of color suffer similarly significant racial victimization. She has not claimed, as Kennedy alleges, that "racial status and the experience of racial victimization are fastened together inextricably and unambiguously, creating a vestment that comes in one size and is apparently supposed to fit all people of color.” While Matsuda has not sufficiently analyzed class differences within the races, or the differences that

148. Matsuda, supra note 52.
149. Matsuda argues that those who have experienced racial oppression possess distinctive insights that provide a normative source for critical legal scholarship. She emphasizes that this insight is not automatically tied to people of color and entails studying the actual experience of oppression rather than imagining it. Id. at 324-25. While Matsuda argues that the "wrongs of the past cut into the heart of the privileged as well as the suffering," id. at 376, she never equates the suffering of those victimized by race alone with those victimized by the intersection of race and class, or race and gender, or race and any other combination of intersecting oppressive experiences or ascriptions. See Matsuda, supra note 57, at 10. Kennedy does not cite this article. Much of Matsuda's distinctive voice argument is explicitly set forth here, and although the article was published in 1989, it was taken from a talk presented at the Yale Law School Conference on Women of Color and the Law, held Apr. 16, 1988. Thus, because the article represents Matsuda's views prior to Kennedy's critique, it is fair to incorporate this article in replying to Kennedy. For a similar incorporation, see Ball, supra note 145, at 1858 n.25. Indeed, Matsuda claims that Kennedy has insisted on mischaracterizing her position as essentialist, even after the qualifying statements in her article had been called to his attention. Man J. Matsuda, Pragmatism Modified and the False Consciousness Problem, 63 S. CAL. L. REV. 1763, 1775 n.46 (1990). In the article Kennedy analyzes, moreover, Matsuda expressly recognizes that a distinctive voice of color is not a monolithic voice of color. She states:

In attempting a non-white response to CLS, I risk writing about the experiences of other races in ways that may not ring true for some members of that race. Thus it is necessary to state at the outset that I am presenting elements of the non-white perspective gleaned from my reading and my experience for whatever insight the reader chooses to draw. This article is not intended as and cannot be a definitive statement of the minority perspective.

Matsuda, supra note 52, at 331 n.37 (emphasis added).
150. Kennedy, supra note 145, at 1782. Matsuda has actually said just the opposite:

In arguing for multiple consciousness as jurisprudential method, I don't mean to swoop up and thereby diminish the power of many different outside traditions. Our various experiences are not co-extensive. I cannot pretend that I, as a Japanese American, truly know the pain of, say, my Native American sister. But I can pledge to educate myself so that I do not receive her pain in ignorance.

Matsuda, supra note 57, at 10.
separate people of color from each other, her analysis is not flawed to the hyperbolic degree Kennedy suggests in claiming that she equates "the black law professor of middle-class upbringing with a salary of $65,000 and the black, unemployed, uneducated captive of the ghetto." While Kennedy sees class factors as defeating distinctive voice claims, Matsuda sees race factors as supporting distinctive voice claims.

For me, the most troubling aspect of the Kennedy critique is its ascription of certain motives underlying critical race scholarship. Kennedy properly recognizes that racial critiques are rooted in America's history of race relations. Yet, out of all of that history, Kennedy reduces historical reference to two related ideas that he cites as "particularly relevant for understanding the origins of the racial critiques." First, he elevates claims that black people are intellectually inferior to whites to a level of importance that seems passé to many of us who have moved beyond any insecurity on that level and who, at any rate, have rejected the criteria relied upon to support the claims. While historically white supremacist claims regarding black intellect have been part of the oppression suffered, Kennedy assumes more than he can evidence by tracing critical race theory to that origin. What Kennedy's historical analysis fails to see is that he is accepting criteria of evaluation that we reject. While we do claim that our voices are devalued, our claim is broader

151. Kennedy, supra note 145, at 1782. Indeed, Matsuda urges:

The multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed. That world is accessible to all of us. We should know it in its concrete particulars. We should know of our sister carrying buckets of water up five flights of stairs in a welfare hotel, our sister trembling at 3 a.m. in a shelter for battered women, our sisters holding bloodied children in their arms in Cape Town, on the West Bank, and in Nicaragua. The jurisprudence of outsiders teaches that these details and the emotions they evoke are relevant and important as we set out on the road to justice. These details are accessible to all of us, of all genders and colors. We can choose to know the lives of others by reading, studying, listening, and venturing into different places. For lawyers, our pro bono work may be the most effective means of acquiring a broader consciousness of oppression.

Matsuda, supra note 57, at 9. Although Alex Johnson also mistakenly characterizes Matsuda's argument to be that all people of color speak in unison, he correctly observes:

Kennedy's rejoinder may demonstrate that all scholars of color do not speak with a single voice on race-related issues where one would assume they would if a voice of color truly exists. Beyond demonstrating that all scholars of color do not speak with one voice, he challenges the claim that any scholar of color can speak with a voice of color. There is, however, a difference between asserting that every scholar of color speaks with a distinctive voice, and asserting that a particular group of scholars of color speaks with a distinct voice of color—a "chorus" of color. While Kennedy is correct that the voice of color is neither monolithic nor possessed by every scholar of color, it does not follow that no scholar of color speaks with the distinct voice of color.

152. Kennedy, supra note 145, at 1751.
based motivationally than a simple effort to demonstrate that we are as bright as white people.\textsuperscript{153}

How far Kennedy misses the point is revealed in Harlon Dalton's critique of critical legal studies. Professor Dalton generalizes that people of color tend to consider theory as a means of directing and improving practice, while CLS scholars tend to emphasize theory as an abstract project largely divorced from practice.\textsuperscript{154} As a consequence, CLS scholarship fails to give appropriately detailed attention to establishing the program that reflects its variously described transformative visions. This is a central difficulty people of color have in identifying more closely and fully with CLS scholarship.

Some of this theorist-practitioner schism is a result of the different biographies and histories of critical race scholars and critical legal studies scholars, the latter dominated by white males who matriculated at law schools in the late '60s. Dalton cites the paradigm CLS scholar as one who, while growing up, was bookish and lived in a self-consciously intellectual world in which intellectual machismo was encouraged and revered. This is contrasted with typical people of color, who, no matter how bookish we were, could not divorce ourselves from our communities. As a consequence, we attained a strong sense of community. The life of the mind could thus never be an overriding, singular commitment: "Whether out of social concern or self-preservation, we learned from the start to harness our brains to the problems of the day. We felt the freedom to play with mind puzzles only after the practical intellectual work of the day was done."\textsuperscript{155} I sense among critical race scholars a tendency toward Dalton's orientation and an identification with a community of color. This orientation and identification simply do not look to white judgment of intellect, world view, ethics, culture, politics, or life-style. Current critical race scholarship may find its origin historically traceable to many things, but the need to prove ourselves intellectually is not nearly as motivating as Kennedy argues.

\textsuperscript{153} Much of the pressure to conform to majority standards of merit is generated by black responses to the stigmatic assumption, often tied to affirmative action, that we cannot compete intellectually with white people. As more of us come from privileged backgrounds that resemble the white experience of our colleagues, the pressure will increase if one buys into the Kennedy school of thought. See Stephen Carter, The Best Black, and Other Tales, 1 RECONSTRUCTION 6, 8-9 (1990).


\textsuperscript{155} Id. at 440. It is this difference in background that explains in large part why critical legal studies scholars feel no need to articulate a positive program, whereas people of color must have one.
Professor Kennedy's motive analysis also focuses on a second feature of American race relations that he deems to be essential to an understanding of the racial critiques. He refers to "the ongoing effort by intellectuals of color to control the public image of minority groups and to exercise leadership on their own behalf." Kennedy seems to place the present racial critiques in a monolithic historical category: "One reason why many black intellectuals feel moved to assert proprietary claims over the study of race relations and the cultural history of minorities is the perceived need to react defensively to the enhanced ability of whites, because of racial privilege, to exploit popular interest in these subjects." This is simply inaccurate. We do not claim, as Kennedy implies, that "white scholars as 'outsiders' have little or nothing to contribute intellectually to black studies or the study of race relations." We do not claim that they "pose a political danger insofar as their analyses, though flawed, are [more] frequently used by politicians as the basis for public policy."

Kennedy disregards the fact that people of color seem to find significant affinity with some white CLS, feminist, and liberal scholars. Indeed, as I understand the political history and intellectual development of critical race theory, the scholarship actually branches from critical legal studies. White legal scholars, moreover, within and without critical legal studies, are beginning to incorporate critical race theory into their work. One such scholar recently claimed that to understand the history of the critical legal studies movement, one must take into account feminist and minority scholars' critiques of CLS: "Indeed, it is fair to say that the critiques of critical race theory scholars and feminist scholars have effectively reset the agenda of scholarship within the Critical Legal Studies movement."

156. Kennedy, supra note 145, at 1754.
157. Id. at 1758.
158. Id. at 1755.
159. Id.
162. J.M. Balkin, Ideology as Constraint, 43 STAN. L. REV. 1133, 1134 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990)). See also Kennedy, supra note 2, at 706 (characterizing critical race theory articles as representing "the most exciting recent developments in American legal scholarship"). But see Richard Delgado, The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later, 140 U. PA. L. REV. 1349, 1362 (1992) (arguing that insurgent scholars' work is either ignored or treated diffidently).
We attempt to have all of our voices incorporated in the relevant discourses. However silenced we have felt, we are not trying to silence others. Kennedy's suggestion to the contrary is not only unfair but has the potential to stimulate animosity among those who seek solidarity in spite of differences. Compare Kennedy's speculative motive construction with the express words of Harlon Dalton:

We are not unmindful of the fact that there are, within the CLS literature and in practice as well, instances of concern for the needs of people of color, albeit usually without recourse to our own "take" on those needs. Questions of race aside, there is some terrific writing in the now-quite-voluminous CLS literature.

. . . .

. . . I suspect that one of the likely outcomes of this Conference will be a deepening of solidarity between people of color and others in the fellow traveler category, and between people of color and Femcrits. More broadly, I hope that this Conference results in a sense of deepened solidarity among all of us here, regardless of race or gender, who have on occasion felt silenced, or at least stifled, who have felt devalued or undervalued, who have felt a bit manipulated, or at least pulled along in a direction we weren't sure we wanted to follow.163

Professor Kennedy, in summary, has greatly oversimplified Matsuda's argument and overinclusively extended his critique of her work to all of us who claim to rely on our history and biography to speak with a distinctive voice that is different from dominant voices. Moreover, the distinctive voice orientation of critical race theory is incorrectly conceived by Kennedy as an automatic valuation and representation. Instead, it is a deliberate effort to maintain our distinctiveness based on personal history and biography. Beyond this, through our empathy, our work, our politics, and our scholarship, we reflect a distinctiveness that is

163. Dalton, supra note 154, at 107. One white male legal scholar declares:

The reappearance of race consciousness in the scholarly work of critical race theorists in part reflects an attempt to reopen a political discourse that was closed off in the 1960s. It should be the occasion for whites to reconsider our position in the cultural compromise that defined the discourse of race and reform for the past few decades. We should, I think, reinterpret our role in race relations so that we might self-consciously understand ourselves as whites, as having a particular identity that was historically constructed through the economy of race relations. This kind of identification need not mean an interest in racial domination, nor must it mean a paralyzing guilt and self-flagellation. Rather than despise what reveals one as white, and engage in neurotic self-improvement to remove such "biases," a precondition to meaningful negotiation of the terms of our social spaces—whether they are separate or shared—is to recognize that racial cultures form a significant element of what goes into the construction of our social relations.

Peller, supra note 161, at 847.
representative and drawn from our community and culture. This process, in turn, recognizes differences within—some quite marked and conflicting—but still permits us to build upon the larger ground that we share as African Americans, Asian Pacific Americans, Latinos, Native Americans, and others who are not white. We share and build within our own nonwhite groups and among our various nonwhite groups. We see bridges, connections, and extensions where Professor Kennedy sees chasms, gorges, and gulfs. There is nothing automatic about this; in fact, it is very hard work.

C. LINKING SEPARATE AFRICAN-AMERICAN CLASS INTERESTS

Largely as a result of the civil rights movement and the surging economy of the 1960s, the black middle class more than doubled in size by 1970 and constituted twenty-seven percent of all black workers. As institutions of business, industry, and higher learning presented new opportunities to African Americans, class division within the race became more pronounced. Indeed, Morton Wenger argues that dominant America's provision of instant mobility to the black middle class

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164. L. BART LANDRY, THE NEW BLACK MIDDLE CLASS 2-3 (1987) (characterizing the "new middle class" as that emerging during the 1960s). I realize the term "black middle class" is problematical and question begging. See Bob Sipchen, The "Myth" of a Black Middle Class, L.A. TIMES, Dec. 14, 1989, at E8. However defined, the class is a varied and diverse group. I simply observe here that law professors are likely to be so categorized under most classification schemes. Along with Landry's book, representative works tracing the development of the black middle class include BLACK FAMILIES IN CRISIS: THE MIDDLE CLASS (Alice Coner-Edwards & Jeanne Spurlock eds., 1988); Roy L. Brooks, RETHINKING THE AMERICAN RACE PROBLEM 34-66 (1990); JOHN DOL-LARD, CASTE AND CLASS IN A SOUTHERN TOWN (1937); E. FRANKLIN FRAZIER, BLACK BOURGEOISIE (1962); ELI GINZBERG, THE MIDDLE CLASS NEGRO IN THE WHITE MAN'S WORLD (1967); NATHAN HARE, THE BLACK ANGLO-SAXONS (1965).

165. The clearest development of this theme is by William Julius Wilson. See William Julius Wilson, Another Look at the Truly Disadvantaged, 106 POL. SCI. Q. 639 (1991); William Julius Wilson, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987); William Julius Wilson, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS (2d ed. 1980). The issues generated by the intersection of race and class are beyond the scope of this discussion.

These issues become vastly more complex when the factor of conservative versus liberal versus progressive ideological orientation is factored in. See THOMAS D. BOSTON, RACE, CLASS & CONSERVATISM (1988). Boston presents a black class taxonomy that includes categorizing the black middle-class groups as "independent," "dependent," and "new." The independent segment usually stands to the ideological left of its class. Id. at 43. This dwindling group is closely tied to the black community by virtue of its members' occupations or means of livelihood. From this economic foundation, an "interdependence of fate" develops and this class segment "identifies closely with popular political movements within the black community—and [these] are very liberal or even radical on occasions." Id. at 44. At the center of the political and ideological spectrum stands a dependent black middle class that draws simultaneously from the old and new class formations. These blacks maintain close social, organizational, cultural, and political ties to black society, but they depend
reflected an ideological substitution of the new "petite bourgeoisie's" personal achievements for class liberation. This division imposes a risk that the class situation, social orientation, and living space of black intellectuals may remove us from a strong identification with the black poor's values, interests, and needs. Thus, the question becomes: How credible is it for us—as black intellectuals—to speak about the black community, not to mention speaking on its behalf?

Certain facts evidence bridges that enable those of us in white legal academies nonetheless to speak meaningfully about overall community betterment. As recently as 1962, few middle-class children were able to remain in that class during adulthood, and even fewer working-class children succeeded in moving up to the middle class as adults. Bart Landry explains that in the mid-1970s, as a result of increased mobility opportunities, the middle class was “mainly recruited from the sons and economically on white society in significant part. Id. Numerically, this appears to be the predominant segment. According to Boston:

This stratum's close social connection to black society, but alongside its economic dependence upon sources external to that society, most often places it in an intermediate or vacillating position vis-a-vis grass-roots black political activity. While its members will always support nonviolent social change and electoral politics, seldom will they support more radical movements. It is torn between identifying with the needs and demands of the black masses, with whom it has close social connections, and having to pacify the anxieties of white society, which provides its means of economic livelihood. . . . Today's representatives of this stratum include most of the prominent black elected officials as well as the civil rights organizations and their leadership.

There has always been a tug of war for leadership over black society between the dependent [black middle class] and independent . . . strata. This was epitomized by the debate between Booker T. Washington and W.E.B. Du Bois at the turn of the century. Id. at 45. Consistent with Landry's analysis, Boston sees a recently developing new middle class growing out of opportunities presented during the 1960s. Unlike Landry, however, Boston sees this group as assimilated to the degree that its "distinguishing feature . . . is a social, cultural, political and organizational alienation from mainstream black society and black public opinion. Politically, this alienation forces it to the far right of the black middle class and black society in general and has given rise to the new black conservatism." Id. at 46. Members of this group work for the government, major white universities, or conservative foundations or think tanks. As the fortunes of mainstream conservatism swell, this group's ideologues benefit opportunistically and exploit notoriety that is "far out of proportion to their actual influence within black society." Id. See Thomas Boston, Racial Inequality and Class Stratification: A Contribution to a Critique of Black Conservatism, 17 REV. RADICAL POL. ECON. 46 (1985); Charles Lane, Defying the Stereotypes: The New Clout of "Black Conservatives," NEWSWEEK, July 15, 1991, at 18.

Morton G. Wenger, State Responses to Afro-American Rebellion: Internal Neo-Colonialism and the Rise of a New Black Petite Bourgeoisie, 10 INSURGENT SOCIOLOGIST 61, 71 (Fall 1980).

Intragroup linking that militates against extreme class division is crucial. Kenneth Karst argues that improving the citizenship rights of the ghetto's marginalized residents will entail political mobilization, legislative support, self-help, public and private contribution, and, "[m]ost importantly of all, middle-class blacks will be needed to provide leadership and to do the work of cultural and political brokers." KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 146 (1989).
daughters of garbage collectors, assembly line workers, domestics, wait-
ers, taxicab drivers, and farmers.”

Even though during this time the passing of middle-class status from one generation to the next increased, this “recruitment” from the lower classes helps explain why eighty percent of the present middle class is first generation. Most of us have roots extending into the neighborhoods and homes, the communities and families, where poor and working-class blacks still reside.

Additionally, it is now clear that the black middle class still resides within segregated communities even though many of its members no longer live in inner-city ghettos. The large majority of black middle-class households are in close proximity to poor blacks and share neighborhoods with skilled and unskilled numbers of the working class. As Landry points out, “The idea of a black middle class living in forced isolation from the other classes is largely a myth.”

Under these circumstances, intellectual talk of a black community is not necessarily academic. Moreover, the experiential basis of our writing need not defeat our own intragroup diversities; it need not collapse into an absurd essentialism. Professor Austin warns of the dangers of purporting to represent the views of all African Americans in our writings:

> It is imperative that our writing acknowledge and patently reflect that we are not the voices of a monolithic racial/sexual community that does not know class divisions or social and cultural diversity. This recognition should check the basically conservative impulse to rely on generalizations about racism and sexism that are the product of our own experiences. It should also make us vigilant about lapsing into outrageous themes which suggest that black people are united by biological essences that produce in all of us a refined instinctive sense of justice.

While Professor Austin’s point about “biological essences” is valid, I believe she overstates the danger in allowing our experiences to prompt generalizations about racism. Stereotypes must not be reinforced, but valid generalizations, while tricky, must be set forth. In Gordon Allport’s classic study of prejudice, he defines a stereotype, whether positive or negative, as “an exaggerated belief associated with a category. Its

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168. Landry, supra note 164, at 85.
169. Id. at 86.
170. Id.
172. Austin, supra note 57, at 542-43.
function is to justify (rationalize) our conduct in relation to that category." Essentialism and stereotyping are complementary. As suggested by Professor Kennedy's critique of critical race scholarship for its tendency to reinforce stereotypes and Professor Austin's warning to avoid essentialism, people of color who adopt critical race theory walk a thin line between these concepts and valid generalization. Allport points out that distinguishing between a valid generalization and a stereotype is possible "only if we have solid data concerning the existence of (probability of) true group differences." Generally, the life chances, experiences, and styles of blacks and whites, however, are distinctively separate, sufficiently so—indeed extremely so—to provide very different "data" that support certain generalizations.

Although antiessentialist, critical race theory nonetheless emphasizes the commonalities developed from a race consciousness that recognizes, in Patricia Williams' words, that "the simple matter of color of one's skin so profoundly affects the way one is treated, so radically shapes what one is allowed to think and feel about this society, that the decision to generalize from this division is valid." What critical race theory expresses in this way is not a matter of essence, but certainly one of prevalence. It is not a matter of necessary, inevitable expression, but one of deliberate identification and incorporation of data available from colored histories and subjugated narratives, from colored biographies and group identities.

The distinctiveness of colored voices often traces back to an oppositional cultural frame of reference that is shaped by our experiences of racial stratification rather than benign race relations. Of course, African-American culture is rich and extends far beyond reacting to this stratification. However, because of the long history and starkness of black-white stratification, the oppositional cultural frame of reference is a key factor that generates a distinctive voice orientation.

174. Id. at 189.
175. Williams, supra note 120, at 256.
178. Id. at 17-18. For example, Psychiatrist Charles A. Pinderhughes has characterized the black power movement as
When people of color deemphasize an individuality that tries to transcend color—when we attempt, in other words, to express valid generalizations generated out of race consciousness—we challenge the underlying inadequacy of dominant legal discourse, that which Kimberlé Crenshaw has labeled "perspectivelessness." This position of perspectivelessness holds that legal analysis is possible without taking into account various conflicts of individual values, experiences, and world views. According to Crenshaw, by stripping away the analysis of any particular cultural, political, or class characteristic, this perspectivelessness is presented as the objective, neutral legal discourse, with a corollary of "color blindness," used to reduce conflict and devalue the relevance of our particular perspectives.

D. THE CONCEPT OF CULTURE AND THE SIGNIFICANCE OF CULTURAL ANALYSIS

Since Edward Taylor's original definition of "culture," the term has taken on a great deal of ambiguity. Provisionally defined for now, culture is the "symbolic-expressive aspect of human behavior." An elaboration on this definition that I adopt is Clifford Geertz's definition of culture as a "historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms..."
by means of which [people] communicate, perpetuate, and develop their knowledge about attitudes toward life. 183

A subordinate group’s cultural heritage reflects both internal and external traits and patterns that are mediated through a distinctive institutional life within its subsocietal structure. Internal traits and patterns derive directly from a shared history and value system and go to the core of the culture. External traits and patterns represent the “historical vicissitudes” of a group’s adaptation of response to its immediate environment. 184 The evolution of a subordinated culture’s external traits and patterns often reflects a reaction to cultural containment. 185

The issue of cultural containment manifests strange dynamics. Through marginalized experiences and perspectives, people of color who choose to do so can move, literally and figuratively, from one cultural realm to the next. Historically, African-American cultural life has experienced a tension between an emphasis on maintaining and experiencing a unique self-identity and an emphasis on fully participating in American society by relying on universalistic, rather than racially distinct, orientations. This dialectical tension is a fundamental duality in African-American life. 186

183. Geertz, supra note 58, at 89 (1973). Oppositional cultural practice becomes important once we recognize that culture has come to represent “a negotiated symbolic understanding”:

Anthropology has lately come full circle to one of the earliest concerns of the subject, namely culture as symbolic expression.

The definition of culture as symbolic expression leads inevitably to the demise of culture as autonomous entity, as soon as ordinary actors are permitted by theory to symbolize. In this intensely participatory notion of culture, culture is continuously created and reshaped in the course and by the process of social interaction. Culture is a constantly negotiated symbolic superstructure, elaborated by transacting individuals or the [spokespersons] for transacting groups. It can be defined as the commonality of perception that emerges between actors as they establish and conduct their social relations. Few proponents of this view would claim that such negotiation of symbols did not occur in an institutional context, nor would they claim that the balance sheets of actors were blank when they entered the cultural marketplace. In recent anthropological jargon, this participatory role of actors is highlighted as agency. In their exercise of agency, actors may privilege different aspects of experience, arriving at quite different symbolic expressions out of the same field of commonly experienced actions.


185. Arce, supra note 184, at 179.

Law, of course, is not only an instrument of social control but also a symbolic expression of dominant society.\textsuperscript{187} An important aspect of cultural analysis incorporates consideration of how these two characteristics of social control and symbolic expression intersect with symbolic boundaries that separate or integrate diverse peoples and cultures. Without negating the importance of force and fraud as determinants of oppression, or the social structure that supports that oppression, "[s]ymbolic boundaries separate realms, creating the contexts in which meaningful thought and action can take place."\textsuperscript{188} The focus on symbolic boundaries, however, should not detract from concrete investigation. Viewing culture as an observable aspect of human behavior emphasizes the realities of symbolic boundaries. Beyond conceptual distinctions in people's minds, these boundaries are publicly visible in discourse, in the manner in which social interaction occurs, and in tangible objects. Society expends resources in creating and maintaining them, and its activities may often reflect "efforts to sharpen eroded boundaries, to redefine cultural distinctions, or as symptoms of ambiguous frameworks. Identifying these activities is a concrete task to which cultural analysis can be applied."\textsuperscript{189}

A limited meaning of culture has arisen in contemporary social science as a result of the narrow conceptualization of culture as separate from how people behave, from the institutions they construct, and from their physical exchanges of capital and power.\textsuperscript{190} In this conception, culture is seen as limited to thoughts, moods, feelings, beliefs, and values.\textsuperscript{191} This limitation has been reinforced by the idea that the causes, form, and quality of culture are best studied by reducing them to considerations of social structure.\textsuperscript{192} This tendency is reflected in traditional "sociology of knowledge" analysis, in which social circumstances determine ideas. As

\textsuperscript{187} See also Freeman, supra note 43, at 1409 (Over time the Supreme Court "offers a vision of America that normalizes the existing patterns of inequality and hierarchy"). In this regard Kenneth Karst notes that the 1954 Brown decision "is our leading authoritative symbol for the principle that the Constitution forbids a system of caste." Karst, supra note 167, at 74 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)). See also Gerald Torres, Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations, 25 San Diego L. Rev. 1043 (1988) (examining generally the relation of law and culture); Aleinikoff, supra note 32, at 1081-95 (discussing race consciousness as an expression of "local knowledge" and a cultural critique of domination).

\textsuperscript{188} Wuthnow et al., supra note 182, at 260, 268.

\textsuperscript{189} Id. at 260-61.

\textsuperscript{190} Id. at 261. See also Murray Edelman, The Construction of Social Problems as Buttresses of Inequalities, 42 U. Miami L. Rev. 7 (1987) (arguing to the same effect but under the characterization of problems as ideological constructions).

\textsuperscript{191} Wuthnow et al., supra note 182, at 4.

\textsuperscript{192} Id.
Richard Delgado has pointed out, many critical race theorists employ a loose sociology-of-knowledge analysis in their work. This approach has proved fruitful in understanding some of the concrete reality we experience in light of our social circumstances, but cultural analysis is now conducted with an emphasis on the structure of culture itself rather than the relation between culture and social structure. Accordingly, “[t]he perspective now emerging emphasizes the patterns, rules and relations which are evident at the cultural level itself.”

E. CULTURAL ORIENTATION AND LIBERATING PRACTICE

In opposition to cultural reductionism, we should use culture to provide different ways of seeing the world as a prelude to socially reconstructing it. My approach here emphasizes the sociology of knowledge itself, the analysis of cultural orientation itself, and the intersection of the two. Thus, my position that culture is extremely important to critical race theory and liberating practice eschews any claim that culture maintains a superautonomy that reduces all facets of social experience to issues of culture and that cultural change is therefore the key to all other change.

One must avoid the risk that an emphasis on cultural investigation can be misinterpreted as “culturalism,” which, according to Arif Dirlik, is that “ensemble of intellectual orientations that crystallize methods logically around the reduction of social and historical questions to abstract questions of culture.” To ignore the issue of culture, however, is to remain locked in a state of cultural unconsciousness, under the control of imposed and conditioned vistas. This likely would defeat the self-conscious critical orientation that is part of the initial preparation for radical activity. For example, in the social theory of Roberto Unger, he conceptualizes an institutional program of “empowered democracy” that is significantly complemented by a program of cultural revolution. For Unger, cultural transformation entails transforming not only personal visions and rules, but also reformulating communal relations through “structure-transforming conflict.” Supporting Unger’s cultural-revolutionary platform are two planks—“role definance” and “role jumbling”—that are especially relevant to all intellectuals of color concerned

193. Delgado, supra note 42.
194. WUTHNOW ET AL., supra note 182, at 248.
196. ROBERTO UNGER, FALSE NECESSITY 556 (1987).
with insurgent functioning. The cultural revolutionary seeks to demonstrate how to stretch, pull apart, and combine various roles and then use them incongruously: "He acts out a loosened sense of what it means to occupy a role. In this way he helps disrupt frozen connections among social stations, life experiences, and stereotyped forms of insight and sensibility." ¹⁹⁷

Unger thus points to a conception of role playing that defies and jumbles dominant expectations and impositions. In this way, with a distinct cultural orientation, critical race theory can present a potentially viable means for people of color to live an intellectual life that is both more authentic and more effective in realizing the critical intervention necessary to oppose oppression. It is personally difficult for me, however, to compartmentalize my role as a colored intellectual in a way that insulates it from the rest of life. I believe it is the same for most people of color who are involved with, or becoming attracted to, critical race theory. This relates back to my earlier discussion of authenticity. The problem of separating roles was recognized by C. Wright Mills, who said that "scholarship is a choice of how to live as well as a choice of career; . . . [w]hat this means is that you must learn to use your life experience in your intellectual work: continually to examine and interpret it." ¹⁹⁸ The earlier discussion of Harlon Dalton's critical connection between community and scholarship is important here, too, because culture is produced, developed, and refined within the context of community.¹⁹⁹ From one's primary community stems a home culture. Even physical separation from that community will not necessarily prevent traces of the home culture from continuing to govern cultural identity and frames of reference. Through this identity and referencing, the home culture can always position a person within any community away from home.

The reciprocal relationship between community and culture grows more tenuous as we recognize that individuals do not belong merely to one discrete community. Marking the multiple, often overlapping communities that a person belongs to are such factors as place of birth, socialization, formal education, church, residence, and work; race, ethnicity, gender, and age; scholarship and readership.²⁰⁰ Thus, as a product of community, culture can be ambiguously produced and received. One way to militate against negative ambiguity is to emphasize

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¹⁹⁷. *Id.* at 562-63.
¹⁹⁹. *Kennedy, supra* note 2, at 723.
the cultural distinctiveness that stems from our home culture. Another way is to commit to relying on that distinctiveness to resist domination and subordination. These efforts, in turn, help to identify the significance of critical race scholars as a unique intelligentsia within the legal academy. To use Duncan Kennedy’s characterization, critical race scholars constitute a knowledge class of law professors who, acting individually or within self-organizing groups, “work at defining their community’s identity . . . its interests in competition and cooperation with other communities, and its possible strategies.”

Because our effectiveness is largely determined by our access to resources that lie within white institutional hands, an emphasis on our distinctiveness is not easily accommodated within the normal arrangements and practices. How people of color adopt to this situation gives rise to conflicts in orientation, as we must emphasize whether we are more directed by assimilation or autonomy, by individual self-fulfillment or collective responsibility, by group accommodation or group resistance. Critical race scholars adopt in each case the latter orientation. To do otherwise is to accept an integrated context that reflects tokenism, gradualism, and paternalism. To do otherwise is to discount too greatly the prevalence of group domination and subordination. As Duncan Kennedy argues:

The notion of domination and subordination is meant to indicate that we cannot understand what happens according to a model in which everyone in the society has innate or individual qualities and individual preferences that they bring into a neutrally structured competitive process that correlates their rewards with their social contributions.

. . . The dominant communities are those that have the most resources and rewards, those that manage to influence the rules that define the game to their advantage, and those that through time manage to reproduce or improve their top-dog position through competitive struggle.

These observations explain why I listen so intently to the music of Archie Shepp and why I am engaged in critical race theory.

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201. Kennedy, supra note 2, at 726.
202. Id. at 725.
203. Id.
Up to now I have been sketching a concept of culture to clarify the meaning of diversity within the context of multiculturalism. In that context, we move beyond variety of presence and perspective, a formal diversity, to a more substantive treatment tied to culture that implicates not only institutional makeup and social relations, but also national identity, beliefs, value orientations, and sense of commonality. From the bottom/outside, one is virtually forced to situate culture and diversity within the dialectical dynamics that would regulate a movement from oppression and subordination to some greater state of liberation, inclusion, power, and the like.

Just as there is no "negligence in the air,\textsuperscript{204} cultural analysis is contextual. As it is produced and received, culture fixes itself into the fullest range of valuations, activities, and relationships that constitute American society, "including the socially organized forms of domination, exploitation, and power pervasive in our own society and its history."\textsuperscript{205} Critical race theory is based significantly on culture; its adherents not only recognize this, we emphasize it. When we assert that our voices and experiences are distinctively not white, we are also saying that we are inner-directed as to white people because we reflect distinctively colored cultural backgrounds, valuations, and frames of reference. This is so in spite of any number of border crossings that, at any given moment, may situate us more within dominant culture than our home cultures. How could it be otherwise unless all of the interested parties were (color) blind and amnesic? As Brenkman points out, "[T]he cultural practices of modern societies elaborate a multilayered dialectic of identity and difference, of solidarity and struggle, of possible community and actual social conflict.\textsuperscript{206} It is our country's unique predicament that this elaboration of the dialectic is so driven by race formation, which in turn is also multicolored and multilayered. Those favorably associated with dominant America would have us imagine away this disrupting dialectical reality in the name of a tradition-bound conception of \textit{e pluribus unum}.

The connection I draw between a distinctively colored cultural orientation and liberating praxis is akin to viewing oppositional cultural practice as an ideological phenomenon.\textsuperscript{207} This is consistent with

\textsuperscript{204} Palsgraf v. Long Island R.R., 162 N.E. 89 (N.Y. 1928) ("Proof of negligence in the air, so to speak, will not do.").
\textsuperscript{205} BRENKMAN, \textit{supra} note 10, at 51.
\textsuperscript{206} Id.
\textsuperscript{207} See \textsc{Alvin W. Gouldner}, \textit{The Dialectic of Ideology and Technology} (1976). Gouldner explains:
Geertz's recognition of ideology as a cultural system with express political overtones. The reliance on ideology is stimulated by the necessity to resolve contested interpretations within a context of social conflict. At this stage of critical race scholarship, the ideology manifests itself in establishing a rule of law that would adequately account for the significance of race and racism in determining American law's rights and remedies in a manner that would eliminate racist subordination. Some, such as Mari Matsuda and Kimberlé Crenshaw, would fix the ideological commitment toward eliminating all structures of subordination. Some would go beyond race only to various points on the subordinating continuum—class, gender, or sexual orientation. The point is that almost all the critical race theory literature seems to embrace the ideology of antisubordination in some form.

Tying critical race theory so blatantly to ideology may take us involuntarily into deep water, because the term "ideology" is associated with so many negatives. The latest charge from the right would associate

Ideology is grounded in the utilization of an ordinary language, but it is the restructuring of an ordinary language in special ways: partly by selectively focusing the ordinary language on certain public projects; partly by changing certain of the meanings of ordinary language, giving it a somewhat new or extraordinary meaning, extended redefinition, or focusing; partly by taking certain parts of ordinary language and making them newly problematic, thus assigning a new significance to them; partly by the invention of new signs.

Id. at 81. See GEORGE RUDE, IDEOLOGY AND POPULAR PROTEST (1980).

208. GEERTZ, supra note 58, at 218-19.

209. Id. at 219.


211. Kimberlé Williams Crenshaw, for example, adopts a rhetorical vision and an expansive view that "interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression." Crenshaw, supra note 45, at 1341. Moreover, as Mari Matsuda argues:

The process of unmasking hidden centers and false objectivity is an important first step in producing a counter-ideology of antisubordination, as is acknowledging the psychology of dominance that accompanies subordination. The doctrinal elaboration set forth in this Article is an attempt to recast existing Title VII tools in a way that introduces this counter-ideology to the law.

Progressive legal theorists seek to include antisubordination ideology in the law through such strategies as affirmative action, reparations, and restriction of hate speech. All of these legal positions recognize that ours is a non-neutral world in which legal attention to past and present injustice requires rules that work against the flood of structural subordination. Anyone who has swum against the tide knows that it requires effort. Staying still means moving backward.

Matsuda, supra note 58, at 1398-99 (citations omitted).

212. For example, Christopher Wonneill includes me as one among many who espouse an untrue, mythical "affirmative action ideology" that is "highly dangerous in blocking the changes which are necessary for helping the minority underclass." Christopher T. Wonneill, Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology, 1989 B.Y.U. L. REV. 95, 119.
us, ironically, with the "politically correct." Some might counsel us that embracing ideology, given who, what, and where we are, is like embracing the black widow spider, which is notorious not simply because it is poisonous but because it eats its mate.

In response, I would begin with Geertz's argument that "[t]he function of ideology is to make an autonomous politics possible by providing the authoritative concepts that render it meaningful, the suasive images by means of which it can be sensibly grasped."\textsuperscript{2} Indeed, the present appears to be a propitious time to use ideology to address issues of multiculturalism. Geertz's analysis indicates that the emergence and development of counterideologies is significantly aided as the political system or society is freed "from the immediate governance of received tradition."\textsuperscript{214} I believe that in many quarters this tradition is on the defensive, although it is still quite strong. Critical race theory nonetheless is now well positioned to exploit the societal strain generated by the growing demands of racial diversity and multiculturalism. Ideology, to a degree, responds to this strain, especially when it is cultural in addition to social and psychological.\textsuperscript{215} In Geertz's words, "It is a loss of orientation that most directly gives rise to ideological activity, an inability, for lack of useable models, to comprehend the universe of civic rights and responsibilities in which one finds oneself located."\textsuperscript{216}

Unlike Stephen Carter, I do not think that "it is best for intellectuals to be politically unpredictable."\textsuperscript{217} Instead, I agree with Duncan Kennedy that ideology represents commitment:

\begin{itemize}
\item [213.] \textit{Geertz, supra} note 58, at 218.
\item [214.] Id. at 219.
\item [215.] Id.
\item [216.] Id.
\end{itemize}

\textbf{217.} \textit{Stephen L. Carter, Reflections of an Affirmative Action Baby} 7 (1991). Prof. Carter seems committed to his argument on behalf of blacks but appears to be disengaged and detached. \textit{See id.} at 251, 253. I recently read both Patricia Williams' book, \textit{see supra} note 120, and Stephen Carter's book. Both authors are well-known and respected African-American legal scholars with prestigious academic credentials and positions. From my association with critical race theory, I had previously read a good deal of Williams' work. Recently, I also read Stephen L. Carter, \textit{Academic Tenure and "White Male" Standards: Some Lessons from Patent Law}, 100 \textit{Yale L.J.} \textit{2065} (1991). It is through the scientific invention/discovery analogy of patent law that Carter finds "objective" standards for evaluating scholarship—that is, that the work be innovative and nonobvious in meeting the objective of scholarship, which is the advancement of knowledge. \textit{Id.} at 2082-85. These readings reveal why scholars like Randall Kennedy and Stephen Carter are so different from Pat Williams and others of us who are engaged in critical race scholarship. Basically, it is the difference between science and ideology:
Once you choose an ideology, you have “rejected one path in favor of another,” and what you see and do as you travel that path will be different from what you would have seen and done going the other way... [you] work on this line of inquiry rather than that one... [you] assume away these issues rather than those...\textsuperscript{218}

The ideology of critical race theory should not scare away people of color. It is not like the black widow. Our ideology maps social reality in an attempt to make “incomprehensible social situations meaningful, to so construe them as to make it possible to act purposefully within them.”\textsuperscript{219} This is true whether we refer to our intellectual roles within the legal academy or our activist roles there and outside that rarefied air. As John Broson Childs has argued, culture represents “the keystone upon which the foundation of modern African-American intellectual thought” has developed.\textsuperscript{220} Critical race theory can mature toward a significant representation of cultural analysis as it bears on legal values and thereby move to destroy the foundations and structures of racial subordination.

F. THE BLACK FEMINISTS’ ANALYSIS

It appears that progressive subcultures in the legal academy increasingly are dividing along the lines of white men into critical legal studies, white women into critical feminist theory, and men and women of color... The differentiae of science and ideology as cultural systems are to be sought in the sorts of symbolic strategy for encompassing situations that they respectively represent. Science names the structure of situations in such a way that the attitude contained toward them is one of disinterestedness. Its style is restrained, spare, resolutely analytic: by shunning the semantic devices that most effectively formulate moral sentiment, it seeks to maximize intellectual clarity. But ideology names the structure of situations in such a way that the attitude contained toward them is one of commitment. Its style is ornate, vivid, deliberately suggestive: by objectifying moral sentiment through the same devices that science shuns, it seeks to motivate action. Both are concerned with the definition of a problematic situation and are responses to a felt lack of needed information. But the information needed is quite different, even in cases where the situation is the same.

\textsc{Geertz, supra} note 58, at 230-31. This also explains why I am uncomfortable with Alex Johnson’s premature closure of the debate—Kennedy versus Matsuda, Carter versus Williams—over which is the better approach:

Finally, these seemingly two diametrically opposed variations of voice... should be recognized as different approaches for achieving a common objective: the eradication of racial prejudice, injustice, and inequality—the state of being dominated—in the academy and society. It is our differences that strengthen us in our quest to achieve this common objective. If we lose sight of this common objective and engage in vitriolic debate concerning which viewpoint is “correct,” we will then let our differences divide us, and our shared objective will never be realized.

\textsc{Johnson, The New Voice of Color, supra} note 127, at 2063. Do we really have “shared objectives” if our means, values, commitments, and self-identities are so contrasting?

\textsuperscript{218} \textsc{Kennedy, supra} note 2, at 743.

\textsuperscript{219} \textsc{Geertz, supra} note 58, at 220.

\textsuperscript{220} \textsc{John Broson Childs, Concepts of Culture in Afro-American Political Thought, 1890-1920, 4 Soc. Text} 143 (1987).
into critical race theory.\textsuperscript{221} In the latter grouping, the combined effort of men and women is potentially both empowering and problematic. For instance, as black feminism carves out a special influence not merely within critical race theory but also in the relations between black men and black women, we must work to limit mutual alienation that might undermine our significant common ground of concerns. This will result, however, only if we as a group are both self-critical and tolerant of our gender differences.

In April 1977, an important collective of black feminists issued a statement that began to define and clarify the politics of black feminism. The statement explained,

The most general statement of our politics at the present time would be that we are actively committed to struggling against racial, sexual, heterosexual, and class oppression and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking. The synthesis of these oppressions creates the conditions of our lives. As Black women we see Black feminism as the logical political movement to combat the manifold and simultaneous oppressions that all women of color face.\textsuperscript{222}

Barbara Smith sees the concept of the "simultaneity of oppression" as the pivotal aspect of black feminist understanding and political reality and "one of the most significant ideological contributions of black feminist thought."\textsuperscript{223} Because of the multiple, simultaneous oppressions of racism, class subjugation, sexism, and homophobia, most black feminists reject the ranking of oppressions.\textsuperscript{224}

The black feminist position, however, directly conflicts with the views of many African Americans that oppression should be ranked and that racism is the primary (if not only) oppression that African-American men and women must confront.\textsuperscript{225} While the multiple-oppression

\textsuperscript{221} I do not mean to overgeneralize. Within each school of thought, and among them, there is considerable difference.

\textsuperscript{222} Combate River Collective, \textit{A Black Feminist Statement}, in \textit{This Bridge Called My Back: Writings by Radical Women of Color} 210 (Cherrie Moraga & Gloria Anzaluda eds., 1983).


\textsuperscript{225} Crenshaw, \textit{supra} note 57, at 161-62.
position may facilitate a political orientation that is particularly conducive to coalition building, the rejection of racism as the primary oppression raises potential obstacles to racial solidarity. Moreover, black male-female relations are in tension because of the focus on sexism and homophobia: We argue over who is more oppressed, men or women. Furthermore, insecure men dismiss black feminism as subsumed by man-hating politics, while homophobic men and women emphasize the lesbianism within the black feminist movement and reject the whole because of this part.

These, of course, are all the wrong moves. I see a need for us to listen with more care and sensitivity to sister stories and claims. Attacking institutionalized or individualized oppression of women or homosexuals is not necessarily an attack on men or heterosexual men and women personally. Still, if I have sexist or homophobic habits or thoughts, I need to be challenged so that I can break free of them and we can emphasize the common objectives of humanity. This boils down to securing a decent human life for people now disadvantaged by all of the props of subordination, domination, and oppression.

Although I am quite sensitive to the intersection of race and class, I have not done enough to address issues of sexism or homophobia. These latter props of oppression are not missing from black communal life. Indeed, many of our intellectuals have actually supported them. In discussing homophobia in the black community, Cheryl Clarke severely criticizes black macho and black nationalist intellectuals and activists. We should recognize many dualities in African-American life and realize that an endorsement of some nationalist views on music and culture is not commensurate with an endorsement of their views on homosociality. If we can get that far, then we can perhaps get to Clarke's program:

The more homophobic we are as a people the further removed we are from any kind of revolution. Not only must black lesbians and gay men be committed to destroying homophobia, but all black people

228. I admit, however, to ranking racial oppression as central and predominant.
229. Clarke, supra note 227, at 201.
230. Although bell hooks cites Franz Fanon, Albert Memmi, Paulo Freire, and Aime Cesaire as unaware of the interrelated aspects of various forms of oppression, she advises that "[t]he sexist language in these translated texts does not prevent feminist activists from identifying with or learning from the message content. It diminishes without negating the value of the works." BELL HOOPS, FEMINIST THEORY: FROM MARGIN TO CENTER 39-40 (1984).
must be committed to working out and rooting out homophobia by engaging in dialogue with advocate gay and lesbian politics, confronting and correcting homophobic attitudes, and understanding how these attitudes prevent the liberation of the total being.\textsuperscript{231}

IV. THE SEARCH FOR AUTHENTICITY IN AFRICAN-AMERICAN INTELLECTUAL LIFE

A. INTEGRATIONIST OPTIONS WITHIN THE SUBSOCIETY OF INTELLECTUALS

Relating personal authenticity to an experiential grounding in critical race theory poses unique problems that are associated with certain social dynamics operating within the intellectual subsocieties represented by white academic institutions. As people of color teaching at predominantly white institutions, we are part of an intellectual subsociety that gives us greater integrated opportunities than those provided within society at large.\textsuperscript{232} In looking generally at this American intellectual subsociety and its significance, Milton Gordon suggests several potential consequences. For one thing, an intellectual of color who for some reason might find racial communality personally disagreeable finds an institutional escape.\textsuperscript{233} While not ignored, one's racial background could be treated as "an interesting but subsidiary issue rather than one which colors and dominates the rest of life."\textsuperscript{234} Second, the intellectual subsociety, with its interracial mixture, can symbolize for the rest of the nation "the possibility of inter-ethnic harmony and integration at the meaningful primary group level of communal living."\textsuperscript{235} Another consequence of the composition of an integrated intellectual subsociety is the risk of negative

\begin{itemize}
\item \textsuperscript{231} Clarke, \textit{supra} note 227, at 208.
\item \textsuperscript{232} Milton Gordon, \textit{Assimilation in American Life: The Role of Race, Religion, and National Origins} 254 (1964).
\item \textsuperscript{233} \textit{Id.} at 255.
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} \textit{Id.} As for African Americans, Gordon recognizes certain limits to this symbolic expression. He explains:

It is true that the process of achieving such integration is still incomplete even among intellectuals; the Negro, most notably, is still only partly and imperfectly encompassed in the communal life of the intellectual group. Nevertheless, partial as ethnic integration may be within it, the intellectual sub-society still serves as the most salient example of the possibility of a truly integrated society. As such, it provides a testing ground for the problems and processes inherent in the achievement of such a society and stands as a symbol of its potential development in larger scope.

\end{itemize}
marginality assumed by people of color. Gordon asks what consequences follow from the fact that these intellectuals are siphoned off into their own subsociety, retaining at best minimal concern for the communal life and issues of their parental group. 236

My answer to Gordon's query is that from a position of privilege, prestige, and "meritorious" achievement, this negatively marginalized black intellectual demonstrates that he has assumed a role that divorces him from significant ties to the African-American community. He defeats racial parochialism by living his life as a professor who just happens to be black. Happening to have been black in other social and institutional settings, he would argue, has had no significant influence on his values, world view, perceptions of reality, or sensitivity that would render his history and biography distinctively black and of value in directing his scholarly work. Thus, he assumes a profoundly individualistic orientation grounded in acceptance of dominant cultural values and practices as legitimate. In essence, he buys completely into a color-blind academic world, even while simultaneously recognizing the materiality of race distinction in other spheres of American life.

Too often under these "favorable" circumstances of integration, people of color assume the voice of a distinct individual, one separated in an operational sense from colored community, culture, and peoplehood. Such an intellectual would deny distinctive voice to those of us who draw experientially from the cultural and historical links that he has tried to sever. These distinct voices grapple with the status dilemmas of marginality that he has tried to resolve by adopting dominant values as legitimate and effective indicators for social relations, personality development, world view, and personal achievement. Given this intellectual orientation, such a person acts in the tradition of the black intellectual free agent. His integration distorts the potential for his blackness to constitute a countervailing force. 237 Harold Cruse aptly describes the social phenomenon at work here in these terms:

The tentative acceptance the Negro intellectual finds in the predominantly white intellectual world, allows him the illusion that integration is real—a functional reality for himself, and a possibility for all Negroes. Even if a Negro intellectual does not wholly believe this, he must give lip service to the aims of racial integration, if only to rationalize his own status in society.

236. GORDON, supra note 232, at 256.
This integrated status is not threatened or challenged; it is even championed, just so long as the black world is on the move in the struggle for integration. But when voices from the black world begin to raise doubts about the meaning, the aims, and the real possibilities of integration, the Negro intellectual is forced to question his own hard-won status. At the same time, those black Doubting Thomases begin to question the status of the Negro intellectual—"What is he doing out there?" "What is his function in relation to us?" In what follows I will consider the work of E. Franklin Frazier, Harold Cruse, and Cornel West as African-American intellectuals whose work provides some response to this predicament. From different time perspectives each presents responses to the seminar questions raised at the Buffalo critical race theory workshop.

B. E. FRANKLIN FRAZIER'S ANALYSIS

E. Franklin Frazier addressed the failure of the black intellectual in 1962, one year before I entered college. Frazier argues that only as an initial step must blacks be integrated into the American community in order to solve some of the problems of blacks. It is important, however, to draw a distinction between integration and assimilation. To Frazier, integration entails the acceptance of blacks as individuals into the economic and social organization of American life. An implied consequence of this integration is the gradual dissolution of the black community, that is, the decline and eventual disappearance of the associations, institutions, and other forms of associational life that constitute the black community. He points out that the gradual dissolution of the black community would cause certain aspects of community life to be affected sooner and more fundamentally than other aspects: Although integration may affect businesses, employment, schools, and residence, certain cultural institutions, such as the church and fraternal organizations, would

238. Id. at 453.
239. See supra notes 34-35 and accompanying text.
240. E. Franklin Frazier, The Failure of the Negro Intellectual, in THE DEATH OF WHITE SOCIOLOGY 52 (Joyce A. Ladner ed., 1973) [hereinafter WHITE SOCIOLOGY]. Frazier, a sociologist, was on the faculty at Howard University from 1934 until he died in 1962. See John Bracy et al., The Black Sociologists: The First Half Century, in WHITE SOCIOLOGY, supra, at 3. According to Norman Birnbaum, Frazier's "depiction of well-situated blacks as both agents of social control for the white majority and potential leaders of voices of renewed black militancy was an entirely accurate anticipation of what was about to occur in the civil-rights movement." NORMAN BIRNBAUM, THE RADICAL RENEWAL: THE POLITICAL IDEAS IN MODERN AMERICA 206 (1988).
241. Frazier, supra note 240, at 53. He notes, however, that nothing approaching this should be expected to occur in our lifetime. Id.
not dissolve or disappear. When Frazier addresses integration, then, we see that integration involves more than individuals. It extends to the organized life of the black community in relation to the organized white community.

Assimilation represents an extreme degree of integration. It "involves integration into the most intimate phases of the organized social life of a country." Thus, Frazier argues that it leads to complete identification with the people and culture of the dominant community, in which the social heritages of different people become merged or fused. Most social scientists today would view this merger as "acculturation" and would view assimilation somewhat differently. The process of assimilation is not one of merger or fusion, but rather one whereby the dominant society nullifies or submerges the nondominant group. Assimilation is not really a cross-cultural exchange. For the nondominant group it is the acceptance of dominant group culture, social heritages, and value orientations. Indeed, as Frazier critiques assimilation, he seems to be treating the concept in this way rather than as a concept that implies simple mixture.

With this distinction between integration and assimilation, Frazier criticizes black intellectuals for focusing only on the superficial aspects of increasing black participation in the economic, social, and political organization of American society. No attention, he claims, has been directed toward the interaction of the organized social life of the black community with the wider American community. Integrationist orientation has been directed by an implied or conscious assimilationist philosophy, which holds that blacks should enter life in the American mainstream as rapidly as possible. This move entails leaving behind our social heritage and becoming invisible as soon as possible. This orientation is seen as a function of the emergence of a new middle class whose social background and interests have determined the entire intellectual orientation of educated blacks. Notwithstanding integration, however, in the escape from its sheltered and privileged positions in the black community, the middle class became more exposed to the white world's

242. Id. at 53-54.
243. Id. at 54.
244. Id.
246. Frazier, supra note 240, at 56.
contempt and discrimination. Black intellectuals were criticized for having failed to provide this new middle-class group with an understanding of such problems. As members of the middle class themselves, the black intellectuals failed in part because they sought to achieve mainstream acceptance in American life through "conforming to the ideals, beliefs, values, and patterns of behavior of white Americans."248

Frazier severely criticizes black intellectuals for never beginning with the fundamental fact of what slavery has done to Negroes in the United States.249 This failure may stem from black intellectuals being the unconscious victims of experiences characterized as the "mark of oppression." Relatedly, blacks failed to achieve intellectual freedom. In Frazier's assessment, "It appears that the Negro intellectual is unconscious of the extent to which his thinking is restricted to sterile repetition of the safe and conventional ideas current in American society."250 The slow integration that blacks were experiencing was bought at the price of conformity in thought. Frazier further claims that black intellectuals failed to produce people of high intellectual stature who were respected by the world at large because philosophical questions, such as the nature of human knowledge and the true meaning of human existence, had not been dealt with from the standpoint of the African American's unique experience in this world.251

Frazier sees the black intellectual leadership as alienated from the masses because it had tried to escape from its black heritage. In their failure to dig into the black experience and cause a transvaluation of that experience, intellectuals failed to contribute to a new black self-image or self-conception.252 It was the responsibility of the black intellectual to provide other blacks with a positive identification through history, literature, art, music, and drama. For most black intellectuals, however, the interpretation of the black experience meant the opposite, "the emptying of his life of meaningful content and ridding him of all Negro identification."253 For these intellectuals, integration and eventual assimilation destroyed the African American—physically, culturally, and spiritually. But, according to Frazier, the black intellectual had to come to realize

247. Id. at 57.
248. Id.
249. Id. at 58.
250. Id.
251. Id. at 60.
252. Id. at 64.
253. Id. at 65.
that integration could not mean this form of escaping from his identifica-
tion. Frazier's critique of black intellectual orientation directs critical race scholars away from significant mistaken paths we dare not follow.

C. Harold Cruse's Analysis

Five years after Frazier's published assessment, Harold Cruse's classic The Crisis of the Negro Intellectual was published. In responding to Gordon's sociological findings, Cruse raises two questions: (1) For creative artists, how can their creative output be assessed; (2) for African-American spokespersons, do their analyses of the African-American situation really get to the bottom of things?

Cruse recognizes, as does Gordon, that the African-American intellectual (as well as the creative and performing artist) has the viable option of gravitating toward an integrated subsociety and "resting there on his laurels." But in recognizing the limitations inherent in such a move, Cruse argues more forcefully than Gordon that the African-American intellectual cannot be allowed to forget that the integrated intellectual world does not represent the group predicament of blacks; African Americans must galvanize their potential as a countervailing force. Cruse's notion of countervailing force, however, does not call for separatism:

But the Negro group cannot act out this role by assuming the stance of separatism. The program of Afro-American Nationalism must activate a dynamism on all social fronts under the guidance and direction of the Negro intelligentsia. This already implies that Afro-American Nationalism be broken down into three parts: political nationalism; economic nationalism; and cultural nationalism; in other words, organizational specialization. Therefore the functional role of the Negro intellectual demands that he cannot be absolutely separated from either the black or white world.

A salient feature of Cruse's analysis that is understated by Frazier is the importance of culture in orienting the African-American oppositional movement against white domination. Frazier views culture as uniquely the product of those African Americans living in the United States who

254. Id.
255. CRUSE, supra note 237, at 10. Here, Cruse is addressing the controversial issue of whether black intellectuals can serve as spokespersons for the black masses.
256. Id. at 451.
257. Id. at 452.
258. Id.
were marked by oppression. Although Frazier feels that African freedom "would probably save the soul of the American Negro in providing him with a new identification, a new self-image, and a new sense of personal dignity," 259 he sees African Americans largely with no significant past that predated slavery. 260 For Cruse, however, the African American's special intellectual role is a cultural one, entailing a radical assessment and critique of the dominant American ethos. 261

At the time of Cruse's assessment, he saw different pressures on the African-American intellectual than those cited by Frazier in 1962. By 1967, when Cruse wrote, the country had experienced a new level of protest activity, new civil rights legislation, and new black nationalist expression along with a new African consciousness in Africa itself. The entire concept of integration was being questioned as the drive for integration was encountering significant resistance in the North as well as the South, and violence and urban civil disorders were taking place throughout the land. These forces seemed to be converging to transform the concept of black-white relations into something entirely new. Operating within this social context, Cruse describes a black creative intellectual stratum that was under an increasing demand to be accountable to a newly critical and scrutinizing black world. In response, Cruse sees the black intellectuals as undertaking a new role: They became interpreters of the black world for the white. From this perspective, Cruse makes a point of crucial importance to black intellectuals facing the 1990s:

But this new dialogue between the black and white intelligentsia somehow sounds flat and unconvincing to the ear. While Negro intellectuals are busy trying to interpret the nature of the black world and its

259. Frazier, supra note 240, at 66.
260. Accordingly, Frazier is quoted by Melville Herskovits:

The tradition and culture of the American Negro have grown out of his experience in America and have derived their meaning and significance from the same source. Through the study of the Negro family one is able to see the process by which these experiences have become a part of the traditions and culture of the Negro group. To be sure, when one undertakes the study of the Negro he discovers a great poverty of traditions and patterns and behavior that exercise any real influence on the formation of the Negro's personality and conduct. If, as Keyseling remarks, the most striking thing about the Chinese is their deep culture, the most conspicuous thing about the Negro is his lack of a culture.

MELVILLE J. HERSKOVITS, THE MYTH OF THE NEGRO PAST 31-32 (1990). Influential white social scientists also fostered this general view. See, e.g., NATHAN GLAZER & DANIEL P. MOYNIHAN, BEYOND THE MELTING POT 53 (1963) (arguing that blacks had no values and culture to guard or protect; that they were just Americans).
261. CRUSE, supra note 237, at 455.
aspirations to the whites, they should, in fact, be defining their own roles as intellectuals within both worlds.\textsuperscript{262}

This effort must connect the cultural with the political, and both in turn must be connected to demands and programs. While Cruse addresses various issues relating to white allies, the Marxist class analysis, and the necessity of dealing with structural problems of American society, he moves steadily toward this conclusion: "For the Negro creative intellectual, the watchword is this: There can be no real black revolution in the United States without cultural revolution as a corollary to the scheme of agencies for social change."\textsuperscript{263} In Cruse's analysis, the most crucial requirement for American society in 1967 was a total democratization of the national cultural ethos. This would entail displacing the Anglo-Saxon idea with the cultivation of a democratic cultural pluralism.\textsuperscript{264}

\textsuperscript{262} Id. As observed by Birnbaum, Cruse's work went beyond merely analyzing the limited success of African-American liberatory movements: "By comparing the role of the black intellectuals to that of other cultural elites, it told us much about the general relationship of thought to power in America." Birnbaum, supra note 240, at 206.

\textsuperscript{263} Cruse, supra note 237, at 457.

\textsuperscript{264} Id. at 457. By 1970, full inclusion in American society was still the predominant civil rights goal of African Americans. The term "inclusion," however, came to be defined as "cultural pluralism" for many rather than "assimilation." Faustine C. Jones, \textit{External Crosscurrents and Internal Diversity: An Assessment of Black Progress, 1960-1980}, 110 Daedalus 71, 79 (1981). Indeed, one of the salient trends marking the post-civil-rights era is the emphasis on cultural pluralism rather than political pluralism. Cultural pluralism emphasizes the value of group heterogeneity and is usually posited in contrast to assimilation. Rather than "Americanization" dictating an Anglo-Saxon conformity, cultural pluralism assumes that "a society benefits when it is made up of a number of interdependent ethnic groups each of which maintains a degree of autonomy." Sharon O'Brien, \textit{Cultural Rights in the United States: A Conflict of Values, 5 Law & Ineq. J. 257, 268 n.3} (quoting Thomas Ford Houlton, \textit{Dictionary of Modern Sociology} 239 (1969)). According to Robert Post:

Pluralist law rests on two premises: that diversity is to be safeguarded, and that diversity inheres in the various perspectives of differing groups. "In a multi-ethnic society," the historian John Higham has written, "the assimilationist stresses a unifying ideology, whereas the pluralist guards distinctive memory." The pluralist guards his distinctive memory because for him "[i]ndividuals can realize themselves, and become whole, only through the group that nourishes their being."

\textit{Post, supra} note 245, at 302-03. Political pluralism purports to sanction interest-group politics in a way that prevents any single group from exercising total dominance and power. Ellis Cashmore, \textit{Dictionary of Race and Ethnic Relations} 217 (2d ed. 1988). But Robert Wolff has noted:

The government quite successfully referees the conflict among competing powers—any group which has already managed to accumulate a significant quantum of power will find its claims attended to by the federal agencies. But legitimate interests which have been ignored, suppressed, defeated, or which have not yet succeeded in organizing themselves for effective action, will find their disadvantaged position perpetuated through the decisions of the government. It is as though an umpire were to come upon a baseball game in progress between big boys and little boys, in which the big boys cheated, broke the rules, claimed hits that were outs, and made the little boys accept the injustice by brute force. If the umpire undertakes to "regulate" the game by simply enforcing the "rules" actually being practiced, he does not thereby make the game a fair one. Indeed, he may actually make matters worse, because if the little boys get up their courage, band together, and
While Frazier's analysis provides guidance about what black intellectuals should reject, Cruse's analysis begins to tell us what to embrace.

D. CORNEL WEST'S ANALYSIS

Continuing a theme voiced by E. Franklin Frazier and Harold Cruse, Cornel West has recently claimed that the road to becoming a black intellectual entails a self-imposed marginality that renders the intellectual peripheral to the black community.265 Viewing today's African-American intellectuals as objects of deep suspicion and distrust in the black community, West attributes this predicament to the general refusal of black intellectuals to remain, in some viable way, organically linked to African-American cultural life. Moreover, he argues, because black intellectual activity has a minimal immediate impact on the African-American community and American society, common perceptions that black intellectuals are impotent, and even useless, are reinforced.266

Both as to projected image and self-identity, for many African Americans intellectual life lacks intrinsic virtues and liberatory or empowering possibilities. Rather, they view its utility as restricted to short-term political gain and social status. According to West, given the constraints on black upward social mobility and the pressures for status and affluence among middle-class peers, many black intellectuals seek recognition, status, power, and often wealth. For black intellectuals this search is particularly problematic in that it requires integrating oneself in, and addressing oneself to, the very culture and society that degrade and devalue the black community from which blacks come.267 Black intellectuals tend to fall within one of two camps created by this predicament: "successful" ones, who are distant from and usually condescending...
toward the black community, and "unsuccessful" ones, who are disdainful of the white intellectual world. The successful black intellectual tends to capitulate, often uncritically, to "the prevailing paradigms and research programs of the white bourgeois academy."268 The unsuccessful black intellectual "remains encapsulated within the parochial discourses of Afro-American intellectual life. The alternatives of meretricious pseudocosmopolitanism and tendentious, cathartic provincialism loom large in the lives of black intellectuals."269

As law professors—academic legal intellectuals, if you will—the aspirational task is to shun both alternatives. Each of us will have to figure out in critical self-assessment how best to do so. What I write here describes simply one person's attempt, an attempt significantly influenced by critical race theory, which I see as facilitating the best potential resolution of the vacillation between the alternatives West has cited.

In situating the black intellectual, West presents four models: the bourgeois humanist, the Marxist revolutionary, the Foucaultian postmodern skeptic, and the critical organic catalyst. The black intellectual as bourgeois humanist seems to represent the prevalent experience of African-American law professors who teach at predominantly white institutions. Academic legitimation and placement constitute the linchpin of this model of intellectual life.270 The costs to intellectuals who seek such legitimation and placement, however, are existential and intellectual stultification. A problematic characteristic unique to this model is that the content and character of intellectual work is a function of reaction and defensiveness. Black humanity itself is contested, and there is an incessant need to defend that humanity, particularly in terms of our ability and capacity to demonstrate logic, coherent thought, and lucid writing.271 West notes that this preoccupation is particularly "acute among the first generation of black intellectuals accepted as teachers and scholars within elite white universities and colleges, largely a post-1968 phenomenon."272

Hence, West describes the co-optation and conversion risks of the black intellectual personifying this model, and his description tells us precisely why critical race theory's oppositional stance is so crucial for many. According to West:

268. Id.
269. Id.
270. Id. at 116.
271. Id. at 115.
272. Id.
[C]harges of intellectual inferiority can never be met upon the opponent's terrain—to try to do so only intensifies one's anxieties. Rather the terrain itself must be viewed as part and parcel of an antiquated form of life unworthy of setting the terms of contemporary discourse.

The bourgeois model sets intellectual limits in that one is prone to adopt uncritically prevailing paradigms predominant in the bourgeois academy because of the pressures of practical tasks and deferential emulation. Every intellectual passes through some kind of apprenticeship stage in which s/he learns the language and style of the authorities, but when s/he is already viewed as marginally talented s/he may be either excessively encouraged or misleadingly discouraged to examine critically paradigms deemed marginal by the authorities. This hostile environment results in the suppression of one's critical analyses and in the limited use of one's skills in a manner considered legitimate and practical.\textsuperscript{273}

In contrast, although the Marxist model does not provide an ultimately satisfactory reference, it is liberating in promoting "critical consciousness" and attitudes regarding the bourgeois paradigms.\textsuperscript{274} Progress under the Marxist model for West, however, largely satisfies cathartic needs, and the resultant critical consciousness does not really advance creative thinking. Moreover, the Marxist preoccupation with social structural constraints too often produces "either preposterous chiliasmic projections or paralyzing pessimistic pronouncements."\textsuperscript{275}

West is an expansive, if not encyclopedic, intellectual who has taken to heart Cruse's advice that African-American intellectuals define their own roles within both the black and white worlds. To this end, West develops two themes: challenging the logic of dominant discourse\textsuperscript{276} and perpetuating the African-American "prophetic tradition."\textsuperscript{277} West relies

\begin{itemize}
  \item \textsuperscript{273} \textit{Id.} at 116-17.
  \item \textsuperscript{274} \textit{Id.} at 119.
  \item \textsuperscript{275} \textit{Id.}
  \item \textsuperscript{276} West views the structure of modern discourse as consisting of "controlling metaphors, notions, categories, and norms that shape the predominant conceptions of truth and knowledge in the modern West." \textsc{Cornel West, Prophesy Deliverance: An Afro-American Revolutionary Christianity} 50 (1982).
  \item \textsuperscript{277} West describes this tradition in these terms: Prophetic modes of thought and action are dotted across the landscape of Afro-American history. I understand these modes to consist of protracted and principled struggles against forms of personal despair, intellectual dogmatism, and socioeconomic oppression that foster communities of hope. Therefore the distinctive features of prophetic activity are Pascalian leaps of faith in the capacity of human beings to transform their circumstances, engage in relentless criticism and self-criticism, and project visions, analyses, and practices of social freedom.

\end{itemize}
heavily on Michel Foucault's analysis of the ways discursive practices and institutional means constitute "regimes of truth." Here the role of the intellectual as postmodern skeptic discontinues the struggle on behalf of the truth and instead struggles over the "very status of truth and the vast institutional mechanisms which account for this status."278 West views the Foucaultian model as promoting a postmodern skepticism in that "it encourages an intense and incessant interrogation of power-laden discourses in the service of neither restoration, reformation, nor revolution, but rather revolt... the dismantling of prevailing regimes of truth—including their repressive effect—of present day societies."279 Drawing upon this model, West characterizes the central priority of postmodern black intellectuals as stimulating, hastening, and enabling alternative "perceptions and practices by dislodging prevailing discourses and powers."280

The insurgency model of black intellectual life draws from each of the three previous models but is rooted in African-American existential and historical specificity.281 Thus rooted, the model is also inextricably linked to the American, European, and African elements that shape it. The model entails incessant critical innovation and a concomitant insurgency that looks both inward and outward. Collective self-criticism must scrutinize black intellectuals in the context of social positions, class locations, and cultural socializations. This self-inventory lays the groundwork that will enable an expansion of critical space and insurgent activity.282

The significant strand that I take from Cornel West's analysis of the predicament of the African-American intellectual is the necessity to engage in cultural investigation as well as economic and social analysis. Oppositional cultural practice, then, is a means of challenging dominant regimes of truth, creating a critical consciousness, and summoning a heroic tradition that runs throughout African-American history. Only in this way will black intellectuals break free of the defensive role playing

278. West, supra note 265, at 120-21.
279. Id. at 121.
280. Id. at 122. Foucault is difficult to summarize. Among critical race scholars, Kendall Thomas most expressly embraces his theories of knowledge and its relation to power, the importance of discourse and signification, and his grounding in post- or neostructuralism. At the Wisconsin Conference on Critical Race Theory, held in Madison on Nov. 9, 1990, Thomas presented a plenary address, Postmodernism, Poststructuralism, and Critical Race Theory. Hear also AALS Conference Tapes 124 & 125, Minority Section Program (Jan. 4, 1991).
281. West, supra note 265, at 122.
282. Id. at 122-24; West, supra note 17, at 53.
V. OPPRESSION: THE CONDITION TO BE REDRESSED THROUGH THE EXERCISE OF CRITICAL RACE THEORY

Critical race theory adopts condition-directed models of redress that extend beyond presently permitted legal claims for relief. As we move away from analyzing doctrine and instead incorporate extralegal factors into the picture, identifying the critical race problems, causative factors, and responsible agents, we add complexity to our legal analysis. Nonetheless, in a post-civil-rights America, a focus on present legal rights to secure equality of opportunity and to counter discrimination is simply too narrow to be of any significant help. Critical intervention

283. Condition-directed redress is a basic advocacy orientation of critical race scholarship. See, e.g., Crenshaw, supra note 45, at 1341-42 (contrasting equality as a process and equality as a result). My view, at least since 1980, has been influenced by Alan Freeman's development of the "victim perspective." Freeman, supra note 48, at 1052-54. According to Freeman, the analysis of racial discrimination begins with the concrete experience of one who belongs to the group that suffers the discrimination. Alan Freeman, Antidiscrimination Law: A Critical Review, in THE POLITICS OF LAW, supra note 37, at 96, 97. My emphasis on condition-directed redress is consistent with Freeman's characterization of the victim perspective's focus on "the persistence of conditions traditionally associated with racist practice." Freeman, supra note 43, at 1041. He elaborates in these terms:

Central to the victim perspective is an insistence on concrete historical experience rather than timeless abstract norms. For black Americans that experience has been one of harsh oppression, exclusion, compulsory reduced status, and derogatory cultural stereotyping. Years of oppression have left their mark in the form of identifiable consequences of racism: residential segregation, inadequate education, overrepresentation in the lowest-status jobs, disproportionately low political power, and a disproportionate share of the least and worst of everything valued most in our materialistic society. From the victim perspective, when antidiscrimination law announces that racial discrimination has become illegal, that law's promise will be tested by the only relevant measure of success—results.

Id. See LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1515-16 (2d ed. 1988).

284. There are at least 12 themes reflected in the move from the civil rights era of the mid-1960s to the present post-civil-rights era. First, there is a movement primarily from government and public policy initiatives to private-sector responsibility for affecting: (a) the allocation of opportunities, (b) the provision of services, and (c) the distribution of resources. Second, rights of citizenship and legal or formal equality (embodied in the doctrine of equal protection of law) are now claimed with an emphasis on group-based rights and the collectivist ideal of substantive and material equality, which are functions of social and economic justice, rather than on individual rights and the ideal of personal liberty. Third, and relatedly, the focus on racial discrimination has been enlarged to that of racial oppression and subordination. Fourth, disproportionate impact rather than intentional discrimination is seen as giving rise to remedial action. Fifth, claims based on race now compete with claims of a larger "minority" of women, other racial and ethnic groups, the disabled, homosexuals, etc. Sixth, claims based on race alone are now extended to encompass claims based on the intersection of race and class and of race and gender. Seventh, state claims and judicial forums are now complementing, if not replacing, federal claims and judicial forums. Eighth, a rights strategy heavily grounded in litigation has been significantly complemented by legislative lobbying and mass media
must be culturally directed and must respond to an explicit and particular orientation to the meaning of oppression. That conceptualized oppression can be particularized to meet the demands of the specific situations of oppression with which one is dealing at any given moment. Family resemblances will exist among the specific aspects of oppression, but we must identify and then destroy the generic root.

Iris Marion Young, for example, sees five faces to oppression. A group is oppressed when it or a significant number of its members suffer (1) *exploitation* of their work or energy without reciprocity; (2) *marginalization and exclusion*, particularly from the workplace; (3) *powerlessness*, in the sense of living under the authority of others with little autonomy or authority over others; (4) *cultural imperialism*, in the sense that they are stereotyped even while “their experience and situation is [sic] invisible in the society in general, and they have little opportunity and little audience for the expression of their experience and perspective on social events”; and (5) *random violence and harassment* that is motivated by group hatred or fear.285

Ira Goldenberg approaches oppression by trying to describe the essence of the condition. For Goldenberg, that condition represents a pattern that finds the oppressed “static, limited, and expendable.”286 The condition is marked by social isolation and alienation from the larger society of which the oppressed are formally, at least, members. Goldenberg argues that the oppressed person and her society may be spatially connected but are psychologically separate, living in worlds that are parallel but not reciprocal:

**Oppression, in short, is a condition of being in which one’s past and future meet in the present—and go no further. To be oppressed is to**

appeals. Ninth, the importance of integration and desegregation as overriding civil rights imperatives is increasingly giving way to empowerment, enrichment, equity, control, and self-determination even in the continuing context of segregated housing and schooling. Tenth, the need to affect race relations between blacks and whites only has shifted to the more complex need to reduce intragroup conflicts among black socioeconomic classes and to explore with other people of color mutuality of values, interests, and coalition-building prospects. Eleventh, the emphasis on political pluralism has been joined with a goal of multiculturalism as assimilationist goals have been intensely challenged. Twelfth, remedial consideration is moving to include the prospective value of diversity even in the absence of the need to compensate for past discrimination.

285. Iris M. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 261 (1989). Young's conceptualization of oppression, however, loses some of its force in her overinclusive application to the following oppressed groups: “women, blacks, Native Americans, Chicanos, Puerto Ricans and other Spanish-speaking Americans, Asian Americans, gay men, lesbians, working-class people, poor people, old people, and mentally and physically disabled people.” Id. Without addressing degrees of oppression the concept grows amorphously abstract.

be rendered obsolete almost from the moment of birth, so that one's experience of oneself is always contingent on an awareness of just how poorly one approximates the images that currently dominate a society.\textsuperscript{287}

For Goldenberg, the two basic structures through which various forms of oppression are manifest, both institutionally and socially, are containment and expendability. Physical or psychological containment restricts and narrows a person's sense of the possible.\textsuperscript{288} Expendability, as a daily reality, removes positive meaning from individual and group distinctiveness. As Goldenberg explains, "Within a given group of people individuals can be replaced or substituted by others with no loss to the whole."\textsuperscript{289}

Finally, Paulo Freire has characterized the oppressed as manipulated and dehumanized people living under the oppressor's prescribed conditions.\textsuperscript{290} This prescription reflects the oppressor's imposition of choice, transforming the consciousness of the oppressed into one that conforms to the dictates of the oppressor. Consequently, the oppressed internalize the oppressor's image and adopt his guidelines, thereby becoming afraid of their own liberation. For Freire, the central problem blocking the oppressed from participating in developing a pedagogy for their own liberation lies precisely in their being proscribed as unauthentic beings who serve as "hosts" of the oppressor.\textsuperscript{291} Freire argues, "As long as they live in the duality in which to be is to be like, and to be like is to be like the oppressor, this contribution is impossible."\textsuperscript{292} Critical intervention, under Freire's liberatory theory, thus must be directed toward reconstructing reality so that the oppressed perceive their world as one that can be transformed rather than one that is completely closed off and from which there is no escape.\textsuperscript{293}

Freire contemplates dialogical action among those who critically intervene against oppression and those who are oppressed. His "revolutionary leaders" were not to bring "messages of salvation," but rather through dialogue to gain knowledge and appreciation of the objective situation of the oppressed. Critical intervention has to break through the oppressed's "culture of silence":\textsuperscript{294}

\begin{itemize}
  \item \textsuperscript{287} Id. at 3.
  \item \textsuperscript{288} Id. at 4-11.
  \item \textsuperscript{289} Id. at 9. \textit{See} BALDWIN, supra note 176, at 21-22; Bell, supra note 47.
  \item \textsuperscript{290} FREIRE, supra note 33, at 31.
  \item \textsuperscript{291} Id. at 33.
  \item \textsuperscript{292} Id.
  \item \textsuperscript{293} Id. at 34.
  \item \textsuperscript{294} Id. at 52.
\end{itemize}
The pedagogy of the oppressed, as a human and libertarian pedagogy, has two distinct stages. In the first, the oppressed unveil the world of oppression and through the praxis commit themselves to its transformation. In the second stage, in which the reality of oppression has already been transformed, this pedagogy ceases to belong to the oppressed and becomes a pedagogy of all men in the process of permanent liberation. In both stages, it is always through action in depth that the culture of domination is culturally confronted. In the first stage this confrontation occurs through the change in the way the oppressed perceive the world of oppression; in the second stage, through the expulsion of the myths created and developed in the old order, which like specters haunt the new structure emerging from the revolutionary transformation.  

For my purposes, the underlying importance of culture is reinforced initially by Young's linking oppression to a cultural imperialism that silences the oppressed, a notion similar to Freire's focus on the cultural aspects of oppression and the revolutionary practice required to liberate the oppressed. Freire's theory places great weight on critical consciousness and critical intervention on behalf of the oppressed, achieving a cultural synthesis to overcome the divisive historical cultural invasion as perpetrated by those in dominant positions. In cultural invasion, Freire sees the dominant group as penetrating the oppressed's cultural context, disrespecting the oppressed's potentialities, and imposing dominant world views and themes upon them. As a consequence, the oppressed suffer inhibited creativity and curbed expression. A profound inferiority complex develops as a result of the oppressed culture being rendered unauthentic and the oppressed responding to the dominant values, standards, and goals. Cultural invasion, as imposed oppressive reality, is both an instrument and a product of domination.

295. Id. at 40.
296. Id. at 150.
297. Id. The tension involved in working out this synthesis can be complex. See, e.g., Alfieri, supra note 161 (describing the conflict between client narratives and the potential misinterpretation of them by lawyers attempting to represent these clients, and arguing that the storytelling of advocacy must integrate empowering client narratives).


298. Freire, supra note 33, at 151-52.
As relatively privileged professionals, those of us who are intellectuals of color must recognize that our potential effectiveness entails overcoming present differences between ourselves and the mass of people who are more oppressed. Reliance on Freire’s concept of cultural synthesis is crucial if we are to exploit positively our own marginal status for the betterment of the community. He explains:

Instead of following predetermined plans, [intellectuals] and people, mutually identified, together create the guidelines of their action. In this synthesis, [intellectuals] and people are somehow reborn in new knowledge and new action. Knowledge of the alienated culture leads to transforming action resulting in a culture which is being freed from alienation. The more sophisticated knowledge of the [intellectuals] is remade in the empirical knowledge of the people, while the latter is refined by the former.

In cultural synthesis—and only in cultural synthesis—it is possible to resolve the contradiction between the world view of the [intellectuals] and that of the people, to the enrichment of both. Cultural synthesis does not deny the differences between the two views; indeed, it is based on these differences. It does deny the invasion of one by the other, but affirms the undeniable support each gives to the other.299

In the context of this Article, my particular, explicit orientation to the conceptualization of oppression is that it represents primarily (1) the cultural imperialism, powerlessness, exclusion, exploitation, and violence described by Young; (2) the structured containment and expendability described by Goldenberg; and (3) the construction of prescribed reality and cultural invasion described by Freire.

VI. CRITICAL RACE THEORY AND FUTURE-SOCIETY RIGHTS

A. THE UTILITY OF RIGHTS

From a victim perspective that calls for condition-directed redress, rights assertion on behalf of those oppressed because of race is now more tenuous than at any time since the Supreme Court’s 1954 decision in Brown v. Board of Education.300 Alan Freeman has powerfully argued that the development of antidiscrimination law, as reflected in Supreme
Court decisions, does not reflect the liberal notion of linear reformist progress. Instead, it is more accurately viewed "as a process of containing and stabilizing the aspirations of the oppressed through tokenism and formal gestures which actually enhance the material lives of few." Thus, tying rights assertion to a substantive reconception of "the good society" is very important. For blacks the task of using rights involves, initially, avoiding co-optation and avoiding being employed to legitimate the present order of things.

Scholars of color use rights in two related but very different ways. First, we employ the language of rights to facilitate our access to a variety of legal norms and enforcement mechanisms by which we try to vindicate, in a particular case or controversy, important claims. Second, we invoke the ideology of rights to mobilize people in support of a particular agenda. Until the subjugated group feels a sense of moral outrage, the group will almost certainly fail to resist the injustice that is oppressing it. The group must obtain justice for itself. The language of rights is used to provoke within the oppressed group the sense of outrage necessary to mobilize the group in a just cause. It is in this fashion that a right can most effectively be utilized. Accordingly, Morton Deutsch has emphasized that in awakening the sense of injustice in the victim

the process basically entails falsifying and delegitimizing the officially sanctioned ideologies and myths that justify the injustices; exposing the victim to new ideologies, new models, and new reference groups that justify and give life to the possibilities of a change in his status; stimulating hope by successful efforts to improve his situation; and reducing fear by increasing his relative bargaining strength.

This describes critical race theory's basic rights strategies.

Viewed rhetorically, a fundamental role of linguistic construction is to create paradigms through which our experiences become significant in

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Footnotes:

301. Freeman, supra note 47, at 296.
302. Id.
304. Crenshaw, supra note 45, at 1385.
307. Id. During the recent civil disorder in Los Angeles, there was a common hue and cry: "No justice, no peace."
establishing a new mode of public discourse.\textsuperscript{309} In a sense, then, much of our world, particularly as people of color, is not merely observed individually but is also audited collectively.\textsuperscript{310} Rhetoric in this sense is more than a mere tool of persuasion. Indeed, as Barry Burmmet observes, "it is in the deepest and most fundamental sense the advocacy of realities."\textsuperscript{311} The advocacy of reality is absolutely crucial to redirecting rights strategies. In the following subsection, I develop the role of such advocacy in constructing a rights strategy toward relieving oppression.

B. THE OPPRESSED AND THE STRATEGY OF RIGHTS

Beyond the realms of constitutional and legislative enactment, administrative regulation, and judicial declaration, the rights namer is \textit{sui juris}. While often philosophical or theoretical, rights imagining by and for the oppressed is nonetheless justified in instrumental terms: Will utilization of the right as imagined lead to improvement in the life conditions plaguing the oppressed?\textsuperscript{312}

Rights discourse is both principled and expedient, both technical and rhetorical. The technical is the attribute of the right that compels recognition as a legal claim. The claimant relies on a constitution, statute, code, or judicial precedent to impose a duty or obligation on an individual, group, or the state. All rights, though, potentially carry rhetorical force. Indeed, as with the civil rights movement, the rhetorical force of rights can inspire people on their own behalf to counter injustice, deprivation, inequality, and restricted freedom.\textsuperscript{313} Rights assertion can involve the technical and the rhetorical at once, one at the expense of the other, or vacillate between the two. For the oppressed, rights assertion


\textsuperscript{310} Id.

\textsuperscript{311} Id.

\textsuperscript{312} This of course is Alan Freeman's ultimate question associated with the victim perspective. \textit{See supra} note 283. Kimberlé Crenshaw argues that an expansive view of civil rights law directs antidiscrimination law toward eradicating the substantive conditions of African-American subordination and seeks to employ the courts' institutional power to erase the effects of racial oppression. Crenshaw, \textit{supra} note 45, at 1341.

\textsuperscript{313} Today, some characterize the crucial issues facing civil rights proponents in terms of the need to "define the image, agenda and relevance of the civil rights movement itself" and to again present a compelling moral message that can mobilize minorities without alienating whites. Peter Applebome, \textit{Rights Movement in Struggle for an Image as Well as a Bill}, N.Y. Times, Apr. 3, 1991, at A1.
tends to travel a continuum from the rhetorical to the technical. That continuum is dynamic and often dialectically so.\textsuperscript{314}

Because established rights must correlate with obligations, the oppressed find that the early stages of rights assertion are quite adversarial as interpretations of needs, interests, and duties are contested. As with any strategy of rights, the tricky part is to move from a social ideal to an institutional program.\textsuperscript{315} Cultural themes and world views are implicated. Moral and ethical values are posited. At bottom, however, are issues of politics and power. Thus, while the contestants will call upon various legitimating references, the oppressed should almost never strive for a consensus of shared values or rely on "neutral principles" because too much of the struggle will be shaped and directed, indeed validated and legitimated, in terms of the status quo's dominant power holdings.\textsuperscript{316}

In the beginning, the social psychology of rights assertion suggests a self-directed evaluation and orientation with an eye to consequences, to fixing things up. Because this process is played out as a power struggle, the rights of the oppressed are seldom effectively asserted and exercised within the dominant institutionalized channels of the social order, at


In one view, probably the dominant one among jurists and laymen, law is associated with order, unequivocal meaning, settlement of disputes \textit{lites finiri oportet}, enforcement of rules. It is a view which emphasizes the decisive role of statements by authorities: legislators, courts, especially, especially supreme legislators and supreme courts; but also prevailing doctrines and official opinions, which congeal normative options as positive facts by placing them in an established context of government, power, interests and ideology. This conception appeals to a traditional mentality of deference to the status quo; it feeds on man's inclination towards regularity, his need of certainty, his complacence. As is often said, law is a form of social control.

In the other contrasting view law is associated with liberation from existing restrictions, with the possibility of improvement, critique of authority. Emphasis is on justification, not only of deviations from established norms and opinions but, in the case of deviance or contestation, of these norms and opinions as well. The distinctive feature of a "legal" order is not its official confirmation of a \textit{status quo} but its recognition that things can be changed, that there is always a multiplicity of meanings [and] that law lends itself to quite different interpretations and uses. In this view, legal life embodies the belief that social reality is faulty but that it can be reformed.

\textit{Id.} Of necessity, the oppressed are motivated by the latter view.


least as these channels are constituted in the early going. Residing outside the beneficent reach of these channels, the oppressed must use rights as attention grabbers and wedges. Here, "wedge" is defined as "an action, procedure, or idea constituting the earliest stage in a division of unity, change of policy, intrusive action, etc." Rights in these senses express demands for the reformulation of institutional norms, structures, and functions. Rights here call for a reevaluation of basic legitimating notions and cultural orientations—for societal themes to be rewritten. In short, the rights holders claim a new social order. The new social order will entail a new recognition of the claimant as a rights holder, and new notions of citizenship or personhood will pertain. In the context of collective conflict, the assertion of rights must be seen as claims to power, privileges, and resources. These claims, in turn, further collective identity and solidarity.


318. As Patricia Williams observes:
For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the denial of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.

Williams, supra note 120, at 152.

319. As Jean Cohen explains:
Contemporary collective actors consciously struggle over the power to socially construct new identities, to create democratic spaces for autonomous social action, and to reinterpret norms and reshape institutions. It thus becomes incumbent on the theorist (a) to look into the processes by which collective actors create the identities and solidarities they defend, (b) to assess the relations between adversaries and the stakes of their conflicts, and (c) to analyze the structural and cultural developments that contribute to such heightened reflexivity.


... [T]he cultural orientations of a particular society (its pattern of knowledge, type of investment, and image of the relation of man to nature) are not seen as incontestable givens, seamlessly transposed into social norms and institutions. Rather, the way a society
In both the metalegal and legal senses, then, rights are seen by the oppressed and their advocates as the means to achieve the ends to which they feel they are entitled. These ends are thought of in terms of human well-being, dignity, and personhood. The material prerequisites to these ends are accompanying objectives sought in the process of asserting rights and establishing the circumstances for their effective exercise.\textsuperscript{320}

We now see in the post-civil-rights era, for example, that after the effective use of rights as a wedge is achieved, the basic rights articulated are never completely delineated and stabilized. As the judicial decisions interpreting certain rights develop, a body of doctrine emerges that reflects a process of legalization. This process whereby rights are defined by law, however, is substantially isolated from the very needs that generated those rights and the values they envisaged.\textsuperscript{321} As Professor Iredell Jenkins explains further:

When it is held that the meaning of a particular right is exhaustively given by the relevant body of legal doctrine, then argument is confined to this doctrinal apparatus, while the decisions that are reached are strongly influenced by . . . extrinsic and unacknowledged considerations. . . .

When this attitude prevails—and it may do so in some fields of law and not in others during the same period of time—law loses touch with the needs and aspirations of people. . . . To the extent that law is responsive only to its own inner logic and the individual consciences of judges, it ceases to be sensitive to the conditions and the mood of the time. I do not mean to denigrate the quality of this logic and these produces its cultural orientations involves both social conflict and social relations of domination. Society itself is understood as "the changing, unstable, loosely coherent product of social relations, cultural innovation and political processes."

Cohen, supra, at 699 (quoting Alain Touraine, \textit{Triumph or Downfall of Evil Society?, in Humanities in Review} 220 (1982)).

320. IREDELL JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 243 (1980). The early career of rights assertion is described by Jenkins as follows:

In their original occurrence and long before there is any machinery for their enforcement or even recognition of their legitimacy, rights already carry the double weight of need and title. It is exactly this that gives the assertion of a right its emotional force and its practical urgency. When men declare that they have a right to something, they are voicing the conviction that what they are demanding is both legitimate and necessary: it belongs to them as human beings, and it is requisite to their human well-being.

. . . .

The primary locus of rights might thus be said to lie in the sense of injustice. Rights have their origin in the effort to redress what is experienced as an undeserved harm; that is, as a wrong. The purpose of a right is thus to right a wrong. As with everything else that men pursue, rights are felt and fought for well before they are enunciated and catalogued, much less justified.

\textit{Id.} at 243-44.

321. \textit{Id.} at 248.
consciences, but there is no guarantee that they will be contemporary or representative. When they are not, legal doctrine moves at a tangent to social reality.\(^{322}\)

A recent Supreme Court opinion is illustrative of constitutional doctrine that will likely move at a tangent to social reality. On June 27, 1990, the Supreme Court addressed issues of racially distinctive voice, culture, and experience in \textit{Metro Broadcasting v. FCC}.\(^{323}\) The Court's decision resolved the issue of whether two separate FCC minority preference policies violated the constitutional equal protection provision of the Fifth Amendment. The two policies in question were (1) a program that cited minority ownership as an enhancing factor in comparative proceedings for new broadcast licenses and (2) a minority "distress sale" program that, under limited circumstances, permitted a transfer of broadcast stations only to minority-controlled firms, at a price no more than seventy-five percent of market value.\(^{324}\) In holding that neither policy violated equal protection, the majority opinion of Justice Brennan and the separate concurrence of Justice Stevens both emphasized that the Court squarely rejected the limitation of race-conscious remedies as appropriate only to correcting past wrongs and concluded that promoting future benefits under certain circumstances would also permit race-conscious classification.\(^{325}\) Relying on the 1980 decision \textit{Fullilove v. Klutznick},\(^{326}\) Justice Brennan explained that "benign race-conscious measures" mandated by Congress, even though not designed to compensate victims of historic governmental or societal discrimination, are constitutionally valid if they serve important governmental objectives within the scope of congressional power and are substantially related to achievement of those objectives.\(^{327}\) The objectives at issue, which were intended

\(^{322}\) Id. at 248-49. Sometimes, however, responding to the majoritarian mood of the times is itself the problem. Public hostility toward black rights may be translated into Supreme Court decisions. See, e.g., Kathleen M. Sullivan, City of Richmond v. Croson Co.: The Backlash Against Affirmative Action, 64 Tul. L. Rev. 1609, 1609 (1990) ("Social backlash has set in against affirmative action [and] the Croson decision suggests that the backlash has touched the Supreme Court"); Giradeau A. Spann, \textit{Pure Politics}, 88 Mich. L. Rev. 1971, 1973 (1990) (the Supreme Court "has responded to a conservative shift in majoritarian attitudes about race discrimination by subtly incorporating contemporary attitudes" into its judicial opinions).


\(^{324}\) Id. at 3002.

\(^{325}\) See id.

\(^{326}\) 448 U.S. 448 (1980) (upholding a benign racial classification in a federally legislated set-aside program).

\(^{327}\) 110 S. Ct. at 3008-09.
to increase a diversity of views and information on the broadcast airwaves, met both standards.\textsuperscript{328}

Although compensation for past discrimination must remain an affirmative action objective, future rights strategies are likely to focus as well on valuing diversity and enlarging the categories of governmental decisions "for which racial or ethnic heritage may provide a rational basis for differential treatment."\textsuperscript{329} Given the narrow 5-4 majority and the subsequent retirement of Justices Brennan and Marshall,\textsuperscript{330} even with the shift in objectives, minority preference policies will likely face numerous challenges.\textsuperscript{331} Two of these challenges posit questions especially related to the discussion of distinctive voice: (1) Is there a demonstrable nexus between minority participation in a given activity and the promotion of valued diversity? and (2) In the absence of compensating victims of past discrimination, does the policy or program unfairly victimize innocent whites?\textsuperscript{332}

Particularly troublesome in a back-to-the-future sense is Justice O'Connor's dissent, for if the case were decided today, it is likely that the recent appointments of Justices David Souter and Clarence Thomas to replace Justices Brennan and Marshall would mean that she would represent the voice of a 6-3 majority. Justice O'Connor adopts a method of Supreme Court ideological retrenchment that includes a number of steps and typifies the likely majority analysis: (1) It endorses a color-blind or "race-neutral" universalistic conception of citizenship wherein rights infuse only in individuals who are overly disaggregated and atomized in relation to their racial group;\textsuperscript{333} (2) it limits actual conditions of racist domination to a narrowly defined "actionable discrimination" that is heavily decontextualized and thereby divorced from societal discrimination;\textsuperscript{334} (3) it characterizes racial classifications as "suspect," even if

\textsuperscript{328} Id. at 3010-11.
\textsuperscript{329} Id. at 3028 (Stevens, J., concurring).
\textsuperscript{333} See Metro Broadcasting, 110 S. Ct. at 3028-29 (O'Connor, J., dissenting).
\textsuperscript{334} See id. at 3034-35.
benign or favorable to the traditionally oppressed party, and these classifications are justifiable only if narrowly tailored to remedy past discrimination;\textsuperscript{335} (4) it narrowly construes the causal link between past discrimination and present harm as “but-for causation,” and claims for relief are limited to identifiable victims directly harmed.\textsuperscript{336}

Cultural distinctiveness and unique racial identity are not viewed by Justice O’Connor as valued objectives, but rather as elements of diversity that detract from nationalism and render America “a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”\textsuperscript{337} Justice O’Connor’s familiar conservative argument also cites the problem of stereotypes that stigmatize nondominant groups resulting from the race-based analysis of diversity. She argues that this will create considerable tension with the nation’s widely shared commitment to evaluating individuals upon their individual merit.\textsuperscript{338} Justice O’Connor’s perspective, we see, atomizes people of color in a way that fails to correlate with our actual experiences in a country plagued by racism. She is preoccupied with “disaggregating” the group ties that play such a dominant role in determining individual experience.\textsuperscript{339}

The self-defined reality of people of color must be re-presented. Advocates for African-American rights must redirect legal doctrine and put it back in touch with the people’s needs and aspirations that were part of the earlier wedgelike assertion. In order to do this successfully, critical legal strategies must attack cultural racism and properly assess

\textsuperscript{335} Id. at 3033.
\textsuperscript{336} Because Metro did not need to resolve the factual issue of whether there was past discrimination, I infer that O’Connor would impose a stringent causation test. See Robert E. Suggs, Rethinking Minority Business Strategies, 25 HARV. C.R.-C.L. L. REV. 101, 109-13 (1990).
\textsuperscript{337} Metro Broadcasting, 110 S. Ct. at 3029. Justice O’Connor’s conception of national citizenship is premised on a national unity that stems from a singularly defined notion of who constitutes the national community. But as Mari Matsuda argues: “The alternative of a diverse, dynamic, and diffuse concept of national culture, of a living, moving interactive culture imaginable as expanding circles of sameness and difference, is ignored when uniformity is seen as essential to national identity.” Matsuda, supra note 58, at 1396.
\textsuperscript{338} Metro Broadcasting, 110 S. Ct. at 3029. Former Solicitor General Charles Fried voices the same concern, contending that “there is no form of stereotyping more disturbing than that which assumes that members of racial or ethnic groups exhibit distinct ways of thinking, share particular dispositions, or display common patterns of values and behavior.” Charles Fried, Comment, Metro Broadcasting v. FCC: Two Concepts of Equality, 104 HARV. L. REV. 107, 123 (1990). Prof. Fried understates the African-American sense of community rooted in common sentiments, common experience, and a common history. This latter factor is very important, for it does more than provide a common ancestry and descent; it also provides an important foundation for organizing the present. RINGER & LAWLESS, supra note 245, at 5. See also GWALTNEY, supra note 176, at xxvii (“Black nationhood is not rooted in territoriality so much as it is in a profound belief in the fitness of core black culture and in the solidarity born of a transgenerational detestation of our subordination.”).
\textsuperscript{339} See Williams, supra note 124.
how a strategy of rights can enhance African-American life in the quest for resource mobilization and collective identity.

C. THE ATTACK ON CULTURAL RACISM

Racism combines individual, institutional, and cultural aspects.\textsuperscript{340} All three facets of racism must continue to be marked as points of attack. It is cultural racism, however, that commands my attention in this writing.\textsuperscript{341} Dominant society relies heavily on cultural racism and stereotypes to bias both its interpretation and evaluation of the subordinated group.\textsuperscript{342} Cultural bias sets standards for performance in terms of the tendencies, skills, or attributes of white America, and it is against these standards that all other groups are measured. Poor performance by the members of these groups is translated into inferior capacity that represents general group traits.\textsuperscript{343} A second, related fundamental cultural bias is the practice of dominant society giving more value and status to areas in which white people excel or find interest than to those areas in which people of color have excelled or demonstrated aptitude or interest.\textsuperscript{344}

\textsuperscript{340} James M. Jones, \textit{The Concept of Racism and Its Changing Reality}, in \textit{Impacts of Racism, supra} note 47, at 27.

\textsuperscript{341} As defined by James Jones, cultural racism is the dominant culture's belief in the inferiority of the implements, handicrafts, agriculture, economics, music, art, religious beliefs, traditions, language and story of African peoples; \ldots [and the belief that] black Americans have no distinctive implements, handicrafts, agriculture, economics, music, art, religious beliefs, traditions, language or story apart from those of mainstream white America and those deriving from the pathology of years of oppression in American society. \textit{Id.} at 28. \textit{See John Hodge, Cultural Bases of Racism and Group Oppression} (1975).


\textsuperscript{343} As Jones argues, "Whether we use IQ scores, speech, dress, values, religion, or whatever, access to opportunities in this society is highly correlated not with an objective measure of merit so much as subjective measure of cultural attitude and orientation." Jones, \textit{supra} note 340, at 41.

\textsuperscript{344} \textit{Id.} According to Jones:

Western society has had a tendency to categorize human groups according to simple visible traits and to infer mental, behavioral, and sociocultural capacities and tendencies from them. It is also profoundly the case that the evaluation of these traits and their presumed correlates places those attributed to Western people and societies squarely at the top, and all others in varying degrees of subordinate status.

As long as the only standard of cultural acceptability continues to be those models of European heritage and upper-class white America, ethnic and racial minority groups will always be at a disadvantage. Black Americans as a group cannot claim parity, even relative parity, as long as their legacy is an African past and their adaptational reality is viewed as lower-class, urban ghetto. The popular notion of "cultural deprivation" as a description of black children attests to a wholesale disregard of black life and culture. Individual Blacks can escape as if by osmosis through semipermeable membranes which Du Bois
In characterizing various types of assimilation, Milton Gordon describes the psychological aspect as “identificational assimilation,” which is the “development of [a] sense of peoplehood based exclusively on [the] host society.”\(^{345}\) He also describes a facet of assimilation as “cultural or behavioral assimilation,” a process by which ethnic group members increasingly adopt the cultural characteristics and patterns of the host society.\(^{346}\) If colored Americans fail to identify in these ways, we will be penalized and the penalties will be justified in terms of our individual behavioral problems or our collectively deficient, nonconforming cultural traits. Take, for example, the ways many whites characterize the “suitable” employee. In a recent study to assess the importance of race as a factor in hiring decisions, one interviewed employer indicated that “the styles of interaction” characteristic of many blacks were inappropriate to the business world:

I think for most middle-class white people there’s a big cultural gap between them and the culture . . . I would call typical of many Chicago black men, and it’s not something that a lot of white people are comfortable with. There’s a certain type of repartee that goes on between black guys; even in this building you see it. We have a security guard and a couple of his friends that come in, I’m real uncomfortable with that. You know, I do my best to realize it’s a cultural thing, but I don’t like it, I don’t think it’s being professional, and I don’t think it’s the right atmosphere for a building.\(^{347}\)

Another employer focused on black speech patterns and styles of dress:

We have a couple of black workers—a friend of mine, one of the black secretaries who’s been here several years, said, “Well, they’re black but their soul is white” and, because culturally, they’re white. They do not have black accents. They do not—I think the accent is a big part of it. If someone—it doesn’t matter—if someone is black but they speak with the same accent as a Midwestern white person, it completely changes the perception of them. And then dress is part of it. So, you’re dealing with what is almost more socioeconomic prejudice than purely racial prejudice.\(^{348}\)

\(^{345}\) Id. at 2220. (1903) referred to as “the Veil,” but in doing so they must distance themselves from Blacks as a group (that is, be a “credit to their race”).

\(^{346}\) Id. at 40-41. See also Jeff Greenfield, The Black and White Truth About Basketball, ESQUIRE MAG., Oct. 1975, at 170.

\(^{347}\) Id. at 40-41.

\(^{348}\) Id. at 2220.
A placement director focused not on styles of interaction but on styles of presentation as inappropriate, complaining that "a lot of the blacks still wear their hair in tons and millions of braids all over their heads. They're sort of hostile." In the lower-skilled, blue-collar and service job market, trainability rather than experience is often valued and blacks get stereotyped as untrainable and undependable. Again, "it's a cultural thing."

As Adolf Reed observes in commenting on white claims that blacks are inferior, "it often appears that all that has changed in a century of this discussion is that culture has replaced biology as the favored source of African Americans' inferiority." It is through dominant cultural understandings, we see, that whites act out and reinforce racism as it is found in social relations, institutional arrangements, and personal behavior. Generated through culture, racism is self-generative, and thus change is difficult because the appearance of change often substitutes for substantive change. I do not want to understate the significance of personal and institutional racism, but I agree strongly with Benjamin Bowser and Raymond Hunt that "if we were somehow able to separate interest-group-manipulated institutions from their cultural hearts, racism would lose its ideological veil, appear as exactly what it is, and thereby lose legitimacy." White racism results, in part, from cultural conditioning that reinforces and in turn is reinforced by the particular actions of interest groups. Institutional arrangements are organized and manipulated by power holders in our political economy with the aim of securing maximum social control and selective privilege. As Bowser and Hunt contend, "Racism . . . is an element of culture which conveniently lends itself to interest group struggles for social power. Success in gaining societal control and securing its benefits reinforces cultural racism by verifying the 'truth' of white supremacy and buttresses its institutional bastions. Institutional racism finally compels personal racism."

349. Id. at 223.
350. Id. at 227-28.
353. Id.
354. Id.
355. Id.
Often cultural racism is put forth as something different from the "old racism." In commentary on the aftermath of the Rodney King verdicts, Charles Murray, for example, argues that since the Watts disorder in 1965 there has been a significant shift in reality, and therefore white reaction to the recent disorder will be different from what it was a quarter century ago.\textsuperscript{356} Two dominant themes will direct that reaction—the white fear about black crime and the white refusal to accept blame for black problems. According to Murray:

\begin{quote}
[T]he claims that blacks must receive more assistance will be received with little sympathy. Some of this reaction among whites is mean-spirited and racist in the old sense. But most is not. It is not racism—not racism in the old sense, at any rate—to conclude that blacks have in truth been given a number of advantages for more than twenty years. It is not the old style of racism to conclude that the present problems of the black community owe more to black behavior than to white oppression. And it is above all not the old style of racism to look at the unaided achievements of poor Asian immigrants—and the unaided achievements of poor West Indian immigrants, poor Nigerian immigrants, poor Ethiopian immigrants—and ask, "If they can do it, why can't American blacks?" It is a legitimate question, requiring more than glib answers about the legacy of slavery.\textsuperscript{357}
\end{quote}

Murray's reference to the "unaided achievements" of poor immigrants is disingenuous. He reinforces the model-minority mythology of success that is often associated with Asians. This image obscures substantial disadvantage among segments of the Asian-Pacific-American population. For example, the respective poverty rates for the Vietnamese, Cambodian, Hmong, and Laotian populations are 33.5%, 46.9%, 65.5%, and 67.2%. For all Americans, the poverty rate is 9.6%.\textsuperscript{358} Advancing the model-minority stereotype simply overstates the achievements of Asian Pacific Americans. According to Ronald Takaki,

\begin{quote}
There is a need for the myth. Here is a society that is very nervous about the black underclass and gloomy about the economy...[so] you need a model minority to reassure people, they need to be told the American dream still works... 'look at these immigrants, they can still do it.'\textsuperscript{359}
\end{quote}


\textsuperscript{357} \textit{Id.} at 32.


\textsuperscript{359} \textit{Id.} at A10.
Whether we call it the old racism, the new racism, or pretextual racism, we must be careful that our focus on the adjective does not distract us from the substantive implications of the noun itself. Pretexts for racism are now everywhere. Consider David Duke's recent political campaigns for governor of Louisiana and for President. Although Duke's middle-class supporters tended to represent their support in economic (race-neutral, color-blind) terms, we know better. Of Duke Julia Reed observes:

He says what the others are scared to say. And what he says is not the racist pitch of old, that the "niggers" are going to rape your wives and your daughters, but that they are going to cheat you out of your jobs and take your tax money to support their legions of illegitimate children. "Down deep the whites like the message," a political observer in Shreveport told Anthony Lewis. "Finally after thirty years somebody's going to put the niggers down." Duke made it not just OK but an act of bravery to say what had been verboten to say for at least two decades.  

Reed recalls, moreover:

Almost twenty-five years ago Roy Harris, a crony of Herman Talmadge and a president of the White Citizens Council, said, "Some people think the nigger is beneath their dignity. They talk Constitution but they look at the nigger. They talk states' rights but they mean nigger. This will never be a dead issue. Some issues never die."  

Through racialized color blindness today's core civic ideals that are advanced by the new racism are (1) radically individualized opportunity, (2) opportunity based substantially on the operation of a free-market economy, and (3) minimal state intervention, particularly by the federal government. There is no need to be racist in the old sense if the reigning ideology adopts a color-blind orientation that defeats the legitimacy of group rights and the corresponding attempts to establish collective equality by imposing responsibility on the national government to redress racial subordination and structural inequality, as currently practiced and as a legacy of past state-sanctioned racism. In discussing race and reaction, Michael Omi and Howard Winant correctly point out that the new racism is camouflaged in code words and cultural messages to subordinate those historically disadvantaged as a result of overt racism.  

361. *Id.* at 24.  
363. OMI & WINANT, *supra* note 105, at 120.
the forces of racial reaction have seized on the notion of racial equality advanced by the racial minority movements and rearticulated its meaning for the contemporary period. Racial reaction has repackaged the earlier themes—infusing them with new political meaning and linking them to other key elements of conservative ideology.364

The discussion of cultural racism indicates that racial identification is a social construction of self-identification and societal determination. In all regions of the United States, black-white relations are still marked by this “we-they” character.365 As Benjamin Ringer and Elinor Lawless point out, the black—or “we-ness”—side of this duality is affected by and in turn affects many things, including (1) the role of history, (2) our group’s cultural distinctiveness, (3) our group’s structural components, (4) the degree of our group’s nuclear constitution, inclusiveness, and self-sufficiency, (5) our group’s associational character, (6) our group’s nature as a public and political interest entity, and (7) the degree to which our group functions as a subsociety in the larger society.366 All of these factors come into play as we establish an internal definition of our racial distinctiveness.367

Conversely, there is simultaneously at work an external, societally designated racial distinctiveness that raises the “they-ness” side of the duality.368 In this regard, many white Americans see the African American as a conflicting, contrasting conception of whites. This affects, and is affected by, such factors as (1) dominant society’s nullification of our distinctiveness and the delegitimation of African Americans as a group, or (2) at the other, more benevolent extreme, the nullification of our unique group characteristics and absorption of the group into larger society, which often takes form in social-cultural assimilation or biological amalgamation through intermarriage.369

The latter route to assimilation or amalgamation has never been successfully traveled by black America at large, although at any given time, in a variety of situations, individual blacks have tokenistically made progress this way. European ethnic groups have done much better. Indeed, it is the disparate histories of African Americans and these white ethnic

364. Id. at 114.
367. Id. at 1, 18.
368. Id. at 23-25.
369. Id.
groups in traveling along this path that argues for a need to distinguish race from ethnicity rather than treating these categories as combined.\textsuperscript{370}

As African Americans in dominant white society, we must guard against institutional co-optation that socializes us away from our own identities and value systems.\textsuperscript{371} In that regard, to emphasize our lived social experiences as distinctly nonwhite is a deliberate political move that emphasizes ties to a community, culture, and history that is nonwhite. According to Louis Wirth, a nondominant group's pluralistic orientation is directed toward maintaining its distinctive identity while seeking to gain tolerance of its distinctiveness from the dominant society.\textsuperscript{372} Initially, attaining cultural autonomy might be its first move. The claims for cultural autonomy, however, are generally not pursued independently of other interests. Along with these demands, and often prior to them, the struggle for equalization of economic and political opportunity will proceed.\textsuperscript{373} While the culturally pluralistic-oriented group reflects no desire to merge completely with the larger society, it does demand that its members secure a greater degree of economic and political freedom, if not strict civic equality.\textsuperscript{374} Wirth concludes that the culturally pluralistic-oriented group's aim is obtained only "when it has succeeded in wresting from the dominant group the fullest measure of equality in all things economic and political and the right to be left alone in all things cultural."\textsuperscript{375}

Assimilationist goals are quite contrary to the culturally pluralistic group in placing the nondominant group in relationship to the dominant society. While the culturally pluralistic group may be content with tolerance and with securing its cultural autonomy, the assimilationist group

\begin{itemize}
  \item \textsuperscript{370} \textit{JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS} 9 (1984).
  \item \textsuperscript{372} Louis Wirth, \textit{The Problem of Minority Groups}, in \textit{THE SCIENCE OF MAN IN THE WORLD CRISIS} 362 (Ralph Linton ed., 1945).
  \item \textsuperscript{373} \textit{Id.} at 363-64.
  \item \textsuperscript{374} \textit{Id.}
  \item \textsuperscript{375} \textit{Id.} I would not characterize cultural autonomy to reflect the isolation of "being left alone." Multiculturalism implies a cultural interaction and exchange; Matsuda's notion of "racial pluralism" expresses this sense of cultural autonomy. For her this means
  \begin{itemize}
    \item that groups and individuals as members of groups are free to live in and express their culture—including their language, their religion, and their style of living. There is no norm in any of these things that a democratic nation can legitimately impose, and the right to cultural difference must spread to the full range of culture chosen and defined by the group, not by any dominant culture.
  \end{itemize}
  Matsuda, supra note 58, at 1401.
\end{itemize}
desires the greatest chance for participation in the life of the larger society. It seeks uncoerced incorporation into that society. It seeks to submerge itself in the larger whole, obtaining for its members the greatest possibilities for their individual self-development.\textsuperscript{376}

As a civil rights promise, integration was conceived as a reciprocal process whereby white and black Americans would gravitate toward each other, exchanging culture and sharing decision-making power over institutions and communications.\textsuperscript{377} This concept of integration was based on an appreciation of American society's culturally pluralistic nature.\textsuperscript{378} But things have gone off track. As viewed by Tony Brown, "the ideal of assimilation replaced the hard-fought-for integration as pluralism" that stemmed from a respect for differences.\textsuperscript{379} In theory and fact, African Americans generally came to pursue social association with whites for its own sake, implying that inferior "blacks must mix with superior whites and emulate them"—a sure-fire formula for black failure.\textsuperscript{380} In 1897, W.E.B. Du Bois said that our "destiny is not absorption by the white Americans."\textsuperscript{381} Assimilation resembles the attempt to run away from ourselves, with success coming only through the negation of self, history, culture, and community.

Beyond an opposition to assimilation, adherents of critical race theory must act in formally organized and informal ways to advance a bridging project that facilitates, among people of color, dialogue, understanding, and collaboration among our own communities. Our community relations must be broadened and deepened. Multiculturalism need not be merely an overly romanticized abstraction; it can be made to serve as a viable organizing concept for valuing diversity. After the recent disturbance in Los Angeles, a group of Asian-Pacific-American leaders offered a perspective on human relations that we should adopt: "Los Angeles must resolve misunderstandings and hate revealed by the riots. We need mechanisms for interactive, multicultural synergy."\textsuperscript{382} The notion of "interactive, multicultural synergy" is really a call not just to people of color, but to the nation.

\begin{itemize}
\item \textsuperscript{376} RINGER & LAWLESS, \textit{supra} note 245, at 18.
\item \textsuperscript{377} Tony Brown, \textit{The Integration Gap}, TONY BROWN'S J. 3 (Oct.-Dec. 1983).
\item \textsuperscript{378} \textit{Id.}
\item \textsuperscript{379} \textit{Id.}
\item \textsuperscript{380} \textit{Id.}
\item \textsuperscript{381} KARST, \textit{supra} note 167, at 117 (citing W.E.B. DU BOIS, \textit{SPEAKER: SPEECHES AND ADDRESSES 1890-1919} (Philip S. Foner ed., 1970)).
\item \textsuperscript{382} Stewart Kwoh et al., \textit{Finding Ways to Salve Intergroup Sore Points}, L.A. TIMES, June 5, 1992, at B7.
\end{itemize}
Those of us engaged in critical race theory are undertaking an ambitious commitment to personify movement intellectuals rather than established intellectuals. Because we are professionally engaged in the production of ideas or the manipulation of symbols as colored professors of law at established institutions, we must go out of our way to contribute to the ideological direction of critical social movements for rights and social justice. Critical race theory presents the opportunity not simply to carve out space to challenge established intellectuals and to reinterpret established practices, but as a growing movement it can provide opportunities for new types of intellectuals to emerge.

Not only must we confront dominant society and culture’s ideological right, but also we must contend with a growing segment of colored intellectuals who have joined that camp. These colored intellectuals are prone to suffer a race-image anxiety, rely on a Eurocentric cultural frame of reference, and adopt a model of resolving racial conflict that emphasizes assimilation-integration goals and value orientations. William Cross discusses various stages of racial identity, in terms of both general personality and reference group orientation, which he characterizes as a “psychology of nigrescence”—the process of becoming black and gaining an authentic sense of self. At its most sophisticated stage, he argues, it “is a time for working through and incorporating into the self concept the realities of one’s Blackness as well as the enigmatic, paradoxical, advantageous, and supportive aspects of one’s ‘Americaness.’” This is conducive to embracing a genuine multicultural perspective and value orientation. Cross makes this point, quoting Bailey Jackson:

The individual (in stage four) also has a new sense of the American culture. The person is able to identify and own those aspects of the American culture that are acceptable (e.g., material possessions, financial security, independence, etc.) and stand against those aspects which...
are toxic (racism, sexism, war, imperialism, and other forms of oppression). The ownership of the acceptable aspects of the American culture does not preclude or override the ownership of Black culture.\textsuperscript{387}

This quote, in conclusion, returns us to the Article's subtitle: securing an authentic intellectual life in a multicultural world.

VII. CONCLUSION

Through a connection with African-American culture, as expressed in the fire music of Archie Shepp, I have tried to illustrate how critical race scholarship provides an oppositional expression that challenges oppression. In the process, white experience and judgment are rejected as paradigms against which people of color must be measured. As reality itself is contested as a culturally directed and socially constructed reference, critical race theorists are insurgently critical in the effort to undermine dominant context-setting assumptions and truths. The oppositional grounding is a distinctive, experiential, and subjective orientation that directs critical race theorists to connect politics and culture as they offer alternative definitions of reality.

The fundamental identity of critical race theorists also is culturally directed and socially constructed so that people of color deliberately emphasize their outside-other marginality and turn it toward advantageous perspective building, intellectual presentment, ideological commitment, and concrete advocacy on behalf of those oppressed by race and, perhaps, such other interlocking factors as economic class, gender, and sexual orientation. Authenticity toward oneself and toward the world are reinforced as colored intellectuals reject assimilating absorption and rely instead on cultural autonomy, even while fighting to bring oppressed peoples into the national community as American citizens or members of society who are viably integrated within the nation's structures of opportunity, power, and privilege.

Recognizing oppression as a condition that directs redress, I have explicitly sought to explain oppression in terms of cultural silencing and invasion, exploitation, structured containment and expendability, and the dominant imposition of a prescribed reality. To the extent that rights assertion and exercise are viable, I have contended that at present the principal force of a rights strategy lies in its wedgelike rhetorical challenges that attempt to awaken a sense of injustice among both victims and victimizers. Rights are constructed as claims to power, privilege,
and resources. These claims also bear on improving viable collective identity and solidarity. In a rights-driven social movement, I have argued, we must take into account not only social relations, but also cultural orientations; not only oppositional social projects, but also contested structures of oppression.

At present, the development of legal doctrine associated with race law unfolds from a calcareous judiciary that is largely divorced from the needs and aspirations of people of color who do not unquestioningly accept the inevitability and legitimacy of their own continued oppression. To redirect dominant society and its state apparatus, I have urged an all-out attack on cultural racism, employing rights and social justice claims like a wedge to break free of dominant truths that tell lies about the colored past, present, and future.

I have earnestly thought about how to end this Article rather than just stop writing. I have, however, arrived at no satisfying way to do it. Part of the difficulty, I suspect, is an audience problem. When all is said and done, this writing is probably for my children, 10-year-old Jonathan and 6-year-old Canai, and for their rainbow of little friends, associates, and peers, who at this time cannot really appreciate fully what I have struggled to write here. Perhaps the slim hope, however, does indeed lie in "cohort replacement."388

The nation's pressing challenge, I think, lies in us adults providing good answers to questions like these: Can this one nation under God continue as presently constituted and oriented without burning out or burning up before Jonathan, Canai, and their group can position themselves to improve the situation? When they are able, will they still be willing, as they are now when left to their own devices, to reconcile human differences? Will they properly recognize those differences as culturally and socially constructed determinants of value that place a disproportionately high premium on whiteness, elitism, maleness, high income, or wealth? Will enough of them reject the pursuit of life, liberty, and happiness that is so constricted by a material aggrandizement

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388. Glen Firebaugh & Kenneth E. Davis, Trends in Antiblack Prejudice, 1972-1984: Region and Cohort Effects, 94 Am. J. Soc. 251 (1988) (attributing a decline in antiblack prejudice to attitudinal changes and cohort replacement—the replacement of older, more prejudiced birth cohorts with younger, less prejudiced ones). Canai and Jonathan, remember these words of Maya Angelou:

The fact that people became heroes and sheroes can be credited to their ability to identify and empathize with “the other.” These men and women . . . [m]ake the decision to be conscious of the other—the homeless and the helpless, the downtrodden and oppressed.

Heroism has nothing to do with skin color or social status.

Maya Angelou, An American Odyssey: From Martin Luther King to Rodney King, 8 New Persp. Q., Summer 1991, at 36, 37.
secured at the expense of social relations that value people, cooperation, inclusive community, and true broad access to the realization, finally, of America's high positive ideals? Can we save the children so that they will have their chance to save the nation?