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ESSAY

SOME CRITICAL THOUGHTS ON CRITICAL RACE THEORY

Douglas E. Litowitz*

Critical Race Theory (CRT) is perhaps the fastest growing and most controversial movement in recent legal scholarship, stirring up debate in much the same manner Critical Legal Studies (CLS) did fifteen or twenty years ago. Although CRT was inspired in part by the failure of CLS to focus sufficiently on racial issues, it remains indebted in style and substance to CLS; it also draws from such diverse sources as Continental philosophy (especially postmodernism and poststructuralism), radical feminism, Marxism, cultural studies, and the black power movement. CRT is still a young movement: it emerged in the 1980s and held its first official conference in 1989. Judging by the sheer volume of recent articles and symposia on CRT, the movement is here to stay.¹ Several months ago, Temple University Press published a comprehensive anthology of writings by CRT scholars under the title Critical Race Theory: The Cutting Edge,² and I will use this text as a springboard for my assessment and critique of CRT as an intellectual movement.

Writings that fall under the CRT rubric are diverse and cannot be easily categorized or summarized, except to say that they all address, however directly or obliquely, the various ways in which assumptions about race affect the players within the legal system (judges, lawyers,

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and lay people) and have a determining effect on substantive legal
doctrines. To be sure, a previous generation of scholars (most of
whom were white males) had written about the intersection of race
and law, but their work followed the traditional method of legal schol-
arship and was nowhere as confessional or interdisciplinary as the cur-
tent scholarship in CRT. The last several years have seen an explosion
in CRT-style articles, giving rise to the need for a collection of core
texts that are representative of CRT as a movement.

Critical race theorist Richard Delgado has assembled just such a
collection of pivotal writings in Critical Race Theory. This multifaceted
anthology was assembled from an impressive range of articles in leading
law journals. Some fifty wide-ranging articles appear under twelve
separate headings, including “critique of liberalism,” “storytelling,”
“revisionist interpretations of history,” and other CRT focal points.
Many of the major CRT players are represented, including Derrick
Bell, Patricia Williams, Regina Austin, and Delgado himself. Conspic-
uously absent are founding CRT scholars Mari Matsuda, Charles Law-
rence, and Kimberlé Crenshaw, whose work can be found in the other
widely-available anthology on CRT, the influential Words That Wound.5

In the introduction to Critical Race Theory, Delgado mentions the im-
portance of these thinkers and directs the reader to their essays else-
where. Surely the anthology would have been more thorough had it
included works by Matsuda, Lawrence, and Crenshaw (who, according
to Delgado, “declined to participate”), but Critical Race Theory can
nonetheless stand on its own as the most comprehensive introduction
to CRT currently available. So I recommend the anthology for legal
scholars who are interested in exploring CRT either on their own or
through a law school seminar. Those who are thinking about using
the anthology as a textbook will be thankful for Delgado’s introduc-
tory essay on CRT, his brief statements introducing the various sec-
tions, and his suggestions for further reading (all of which, however,
are somewhat abbreviated).

At nearly six hundred pages, the anthology is perhaps too
lengthy, yet one gets the impression that more than a few of the con-
tributions have been cut abruptly, as is the case with Delgado’s own
seminal article proposing a tort action for racial epithets,4 which ends
before Delgado can present and defend his proposed statute. Still, in

3 Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assault-

4 Critical Race Theory, supra note 2, at 159-69. Richard Delgado’s Words That
Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 Harv. C.R.-C.L. L.
Rev. 133 (1982), is reproduced more fully in Matsuda et al., supra note 3, at 89, 89-
110.
cases like this it is useful to treat the anthology as a path to the complete articles, which are available in any law library. I have only two remaining qualms about the formal aspects of the volume. First, Delgado is perhaps over-represented here, appearing in a full nine of the fifty selections. He is doubtless a pivotal figure in CRT, but the book makes him appear more central than he might in fact be. Second, although the book contains a few selections that are critical of CRT, one might have preferred a chapter devoted exclusively to authors who are critical of CRT. Delgado has included the important critical work of African-American law professor Randall Kennedy, but the anthology would have benefitted from other critical selections, perhaps from Stephen Carter\textsuperscript{5} and Richard Posner.\textsuperscript{6} Still, these are minor flaws; overall the book is clearly organized and the essays are engaging.

Now for the bad news. After a thorough reading, and even re-reading, I cannot shake the feeling that there are some systematic problems with CRT. I use the term \textit{systematic} to indicate my contention that much of the work in CRT is problematic at the level of deep structure; that in many cases CRT takes an approach that embodies fundamental errors or confusions about the proper role of argumentation within the law and the proper methodology of legal scholarship. In what follows I will present five problems that CRT scholars should address. I offer these points as a somewhat sympathetic and interested critic who finds much value in CRT, but who also recognizes that a great deal needs clarification. Let me begin by presenting the basic theoretical underpinning of CRT and by looking at two representative articles from the anthology. I will then offer my critique of the movement.

\section{The Basic Themes of CRT}

Prior to editing this anthology, Delgado co-authored the introductory essay to \textit{Words That Wound}, collaborating with high-profile CRT thinkers Mari Matsuda, Charles Lawrence, and Kimberlé Crenshaw. In that essay, CRT was introduced as a new movement centered around six "defining elements," which can be paraphrased as follows:

1. Racism is endemic to American life. Race has a hand in all decisions by courts and legislatures, if only because judges and legislators go about their business from a particular "raced" perspective


not simply as judges or legislators per se, but as blacks or whites, men or women). Legal scholarship as well is racially situated, such that there is a "black" and a "white" view on legal issues.

2. The existing legal system (and mainstream legal scholarship as well) are not color-blind although they pretend to be. Despite the pretense of neutrality, the system has always worked to the disadvantage of people of color and it continues to do so. People of color are more likely to be convicted, to serve more time, to suffer arbitrary arrest and deprivation of liberty and property. A pervasive but unconscious racism infects the legal system.

3. The law must be understood historically and contextually. A court which is hearing a case involving women or people of color must take into account the context and history of our legal system as one that has marginalized these "out-groups."

4. The subjective experiences of women and people of color render them especially well-suited for analyzing race relations law and discrimination law. Women and minorities see the world differently—they see sexism and racism where dominant groups cannot. Minorities make better race-relations scholars (and law professors) because they have experienced racism first-hand.

5. CRT scholarship borrows from diverse intellectual traditions, including the political activism of the 1960s, nationalism, postmodernism, Marxism, and pragmatism.

6. CRT works toward the elimination of oppression in all forms (race, class, gender) and issues a challenge to hierarchy itself.7

In the introductory essay to Critical Race Theory, Delgado has narrowed these six features into four defining elements, which might be paraphrased as follows:

1. Racism is "normal" in our society. Racist assumptions about minorities pervade our mind-set and are reinforced in the media and popular culture. Race is encoded not merely in our laws, but in our cultural symbols such as movies, clothes, language, and music. Our commonsense assumptions about people of color are biased—we are all racists.

2. Liberalism has failed to bring about parity between the races, for the simple reason that formal equality cannot eliminate deeply entrenched types of racism (sometimes called "microaggressions") which are encountered by minorities on a daily basis. Liberal solutions to affirmative action and free speech are white compromises which fail to significantly advance minority interests. Although liberalism professes to value equality, it actually prevents

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7 This is paraphrased from Charles R. Lawrence III et al., Introduction to Mat-suda et al., supra note 3, at 1, 6-7.
the radical reforms necessary to achieve true equality between the races.

3. CRT posits an "interest-convergence theory" which holds that the dominant white culture can tolerate minority successes only when these successes also serve the larger interests of whites. Major civil rights advances occur rarely, and only in situations where whites stand to benefit as well. Every movement toward change is a struggle against the dominant white culture. People of color can only achieve limited success under the current system.

4. CRT issues a "call to context" which rejects the formal perspective taken by white male scholars who subscribe to the "dominant narrative" of the law, whereby the law is seen as clear and neutral. CRT advocates a situated perspective which brings out the nuances of life as experienced by historically oppressed minorities. The dominant type of legal scholarship should be countered with techniques such as storytelling, science fiction, sarcasm, and parody.\(^8\)

These lists differ slightly, but each captures the basic themes of CRT, and when read together they provide a fairly comprehensive and accurate blueprint for the work being done by critical race theorists. To be sure, not every article in Delgado's anthology hits these points on all fours, but each article focuses on at least one of the elements listed above. To get a feel for how CRT operates, we should examine two articles chosen more or less at random from the anthology: Thomas Ross's piece on the Supreme Court's decision in City of Richmond v. J.A. Croson Co.,\(^9\) and Patricia Williams's autobiographical essay.\(^10\) These articles are representative of CRT and will provide a suitable backdrop for my subsequent discussion.

The first essay discusses the Richmond case, in which the Supreme Court held a minority set-aside ordinance enacted by the City of Richmond unconstitutional. The ordinance required thirty percent of the subcontracting work for the City to be assigned to minority-owned firms; the law was designed to level the playing field after centuries of racism in the Richmond construction industry. The Court's majority ruled that the ordinance denied white contractors equal protection under the law (as required by the 14th Amendment) because the ordi-

\(^8\) This is paraphrased from Richard Delgado, Introduction to Critical Race Theory, supra note 2, at xiii, xiii-xvi. For contrast, see Delgado's eight-point list of CRT themes in Richard Delgado, When a Story Is Just a Story: Does Voice Really Matter?, 76 Va. L. Rev. 95, 95 n.1 (1990).


\(^10\) Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, in Critical Race Theory, supra note 2, at 84, 84-94.
nance required the City to use race as a consideration in the awarding of city contracts.

The Richmond case is highly controversial, and it is not surprising to find a law professor like Thomas Ross arguing that it was wrongly decided. But one might expect his analysis to take place on doctrinal grounds, perhaps by advancing the argument that the 14th Amendment was intended to block laws which discriminated against blacks, and therefore does not bar an arrangement which provides reparation for past discrimination. That would be an argument about doctrine, because it would look to the Constitution and its history for a proper solution to the case. But CRT often eschews doctrine in favor of a different type of analysis, and so we find Professor Ross looking at the opinion in Richmond in terms of narrative and rhetoric. He argues that the concurring opinion by Justice Scalia focuses obsessively on the racial set-aside language of the ordinance without attempting to understand the racist context which it was designed to remedy. As Scalia describes the ordinance, one could get the false impression that it was enacted out of thin air by black City Council members as a way of hurting whites. In contrast, Justice Marshall's dissenting opinion takes history and context into account by providing a historical narrative about racism in the City of Richmond, seeing the ordinance as an overdue response to the legacy of racism in Richmond. Ross favors Marshall's account because it leads to "empathy," which might convince whites to favor the type of set-aside program enacted by the City. In a subtle and intriguing series of passages, Ross shows how Scalia turns the affirmative action debate on its head by portraying the white contractors as victims of the black councilmen, thereby distracting our attention from the centuries of racism in which whites oppressed blacks. According to Ross, Marshall's opinion subverts Scalia's maneuver and "invites the white reader to imagine the hurt and insult of racism."\(^\text{11}\)

Several things are worth noting about the article. First, Ross does not set forth a doctrinal argument which proves (or attempts to convince his audience) that set-asides of the sort at issue are constitutional. Instead, it begins from the position that set-asides are legitimate, and then ferrets out the devious rhetorical devices (such as the avoidance of history and context) which Justice Scalia uses to reach a different conclusion. Second, notice the supposition that different Justices have different perspectives on the law simply because of their race: not only do Justices Scalia and Marshall think differently about the law, they also speak differently and have different narratives

\(^{\text{11}}\) Ross, supra note 9, at 45.
of the Constitution. Finally, note the implication that abstract, formal reasoning is less valuable than empathy and context.

Turning to the second article, Professor Williams’s contribution is striking in that it does not discuss any recent cases, nor does it even address legal theory in the abstract. She begins with a fictional story about a power struggle in Celestial City, which is her way of telling a friend what the CLS movement is “really all about.”\footnote{12 Williams, \textit{supra} note 10, at 85.} She eventually turns to an account of her attempt to rent an apartment in New York City so that she could team-teach a contracts course with Professor Peter Gabel, who was also looking for an apartment. It turns out that Gabel, who is white, was able to reach an oral lease agreement sealed by a handshake, whereas Williams felt compelled to draw up a formal lease agreement. Williams speculates that her need for a formal contract was motivated by the historical marginalization of black females: the formal agreement empowers her with the legal status which black females have been denied. After discussing this event at length, she recalls a childhood memory of riding in the family car and arguing with her sister about whether the road ahead was purple or black. Williams eventually bullied her sister into an admission that the road was black, but her father pointed out that her sister still saw the road as purple. From this event, Williams concludes that people have deeply entrenched viewpoints and that we should try to become good listeners to hear “the uncensored voices of others.”\footnote{13 \textit{Id.} at 89.} Williams recounts the feelings aroused by the knowledge that her great-great grandfather was a white slave owner and a lawyer. She talks about how this legacy has affected her and how she was driven at times by the “false idol of the white-man-within-me,” and finally, she imagines a scenario in which she is asked to defend her great-great grandmother in court from being sold under a slave contract. She concludes the article with a somewhat kinetic passage which advocates giving rights to trees, cows, rivers, rocks, and even to “history.”\footnote{14 \textit{Id.} at 92-93.}

Notice the classic features of CRT embodied in Williams’s article. First, the emphasis on storytelling and the subjective experience of race. Second, the notion that law must be understood by looking at the past treatment of women and minorities (in the slave-holding era) because the attitudes of this era affect our present perceptions of race. Third, the notion that race affects every aspect of our lives, from the way we wear our hair to the way we search for an apartment. Notice finally, the supposition that viewpoints are deeply entrenched and dif-
difcult to change. As with Professor Ross’s article, there is little discussion of doctrine and no legal argument in the strict sense. Instead, the author’s goal is to use a story or narrative to bring about a psychological shift in how we view the world. Professor Williams writes, “It is my hope that in redescribing the historical alchemy of rights in black lives, the reader will experience some reconnection with that part of the self and of society whose story unfolds beyond the neatly staked bounds of theoretical legal understanding.”

Delgado and the other CRT founders praise this method in Words That Wound: “Critical race theorists embrace subjectivity of perspective and are avowedly political. . . . We use[ ] personal histories, parables, chronicles, dreams, stories, poetry, fiction, and revisionist histories to convey our message.”

Traditionally, law review articles have attempted to explain what the law is or should be on a particular subject by expounding theory, reviewing applicable precedents, or examining legislative histories. By eschewing traditional legal scholarship in favor of an avowedly politicized stance, critical race theorists hope to engage in a program of “challenging racial orthodoxy, shaking up the legal academy, questioning comfortable liberal premises, and leading the search for new ways of thinking about our nation’s most intractable, and insoluble, problem—race.” No one should expect the traditional trappings of legal scholarship from CRT, and indeed CRT questions the very standards of the scholarship that hold sway in legal academia.

II. Two Good Points and Five Problems

Before I present five problem areas for CRT, I want to briefly mention two important points raised by the movement: the pervasiveness of racism, and the need to consider multiple perspectives in legal scholarship. To begin with, CRT is doubtless correct that racism is endemic in American society. Racism is deeply ingrained, not merely in certain aspects of our legal system, but in our collective unconscious and our everyday attitudes toward people of color. And because racism is typically unconscious, it is notoriously difficult to bring into a light in which people can see it; everyday acts of racism are subtle and very difficult to regulate by law. This point is brought out

15 Id. at 86.
16 Lawrence et al., supra note 7, at 3-5.
17 Richard Delgado, Introduction to Critical Race Theory, supra note 2, at xiii, xiii.
nicely by Peggy Davis in her contribution, *Law as Microaggression*,\(^{19}\) which documents the dozens of individual slights which affect minorities on a day-to-day basis. As Margaret Russell points out in her fine piece on law and popular narratives,\(^{20}\) the dominant media (movies, TV) perpetuate denigrating and condescending images of minorities, images which find their way into the courtroom. This concern with racism at the level of ordinary experience has driven CRT toward the recent “cultural studies movement” in which popular images are dissected and examined for bias in race, class, and gender. This is an important line of research because it exposes racism where it is most intractable: at the core of our everyday assumptions and practices. And of course it follows that formal equality cannot eradicate *all* racism, because even when formal equality is mandated by law, the seemingly color-blind standards of law (reasonable doubt, legitimate force, due process) are applied differently to blacks and whites because of unconscious racism. There is a danger not only of racist laws (which are becoming less common), but also a danger of the racist application of neutral laws.

I also agree with CRT that legal scholarship should incorporate the perspectives of those who are denied a voice under the current legal system, people such as minorities, women, criminals, jurors, and the poor. For too long, legal scholarship has focused on the perspective of judges and lawyers, and if we get too wrapped up in this viewpoint we can become insensitive to the ways in which our practices affect everyday people who must live with the laws we enact and the cases we decide. There is much to be learned by comparing how black and white people see legal issues, and there is a good deal of research presented in this anthology which shows that perceptions of the legal system differ by race. For example, Delgado and Jean Stefancic point out that whites tend to favor an absolute position on freedom of speech because they see free speech as a safeguard for the maximum flow of information, whereas blacks are dubious of absolute freedom of speech because they bear the brunt of offensive speech.\(^{21}\) Similarly, Peggy Davis points out that black jurors are more likely to see the criminal justice system as biased according to race and class.\(^{22}\)

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22 Davis, supra note 19, at 174-77.
and Sheri Lynn Johnson shows that this perception of bias is rooted in a legacy of racism at the hands of white judges and juries. It stands to reason that if judges and lawyers see minorities in stereotypical and distorted ways (for example, that blacks are violent and overly sexual), then they will misjudge, for example, the degree of force that is "reasonable" when the police arrest a black male. CRT is correct to point out that if we want to determine if the legal system is biased against women and people of color, we should probably ask them for their impressions, rather than rest content with the accepted wisdom that the system is color-blind.

A. The Critique of Liberalism Needs to Be Focused

In Critical Race Theory we are informed that CRT is "discontent with liberalism," which is not uncommon nowadays, but "liberalism" is being understood as "a system of civil rights litigation and activism characterized by incrementalism, faith in the legal system, and hope for progress, among other things." This is an unusual characterization of liberalism, which raises the question whether CRT is properly critiquing liberalism at all. According to most thinkers, the classic tenet of liberalism is that the right precedes the good: the state should be neutral between competing conceptions of the good life.

For liberals, the main purpose of the law is to protect citizens from harm by others (including the government and its agents), so that individuals can be free to pursue their own plans in free agreement with others. In exchange for state protection, the individual agrees to obey the law and not harm other people. This is the classical liberal position which runs through the work of John Stuart Mill, John Rawls, and Ronald Dworkin. Typically, liberals endorse representative de-
mocracy and a limited welfare state, organized under a republic which follows the rule of law and guarantees the equality, liberty, and property interests of its citizens. Certainly liberals can disagree over political questions such as the proper extent of taxation or conscription, and they can also disagree on whether a liberal society should support affirmative action, euthanasia, or boxing. But liberalism is characterized by a core commitment to equal rights, autonomy, and due process. And so it is puzzling to see liberalism defined by Delgado (and others in CRT) as a movement distinguished by a belief in progress and a faith in the legal system.

This confusion is compounded by the readings under the heading "Critique of Liberalism." Nowhere in these readings is there any mention of Rawls, Dworkin, Mill, Kant, Locke, or any other classic or contemporary liberal. Instead, the first selection is a science fiction story by Derrick Bell in which aliens visit America to offer an economic and environmental bail-out in exchange for turning over all of the black people, who will then be taken up into space and never seen again. Bell sketches a situation in which the dominant white society accepts this trade and imposes it on the black citizens by amending the Constitution so that the trade is rendered constitutional. Bell says that the hypothetical trade would probably be accepted by white Americans, and he argues (without much evidence) that middle and lower-class whites seem to accept the income gap which separates them from upper-class whites because they retain a "property right in their whiteness" which elevates them above blacks. He concludes with the pessimistic claim that minorities cannot continue in a cycle of "progress and reform" because "[p]olitics, the courts, and self-help have failed or proved to be inadequate," which (I suppose) means that black progress requires some sort of revolution.

It is difficult to see what Bell's article has to do with liberalism, and the subsequent selection takes us even farther afield. Michael Olivas tells us that Bell's figurative trade with space aliens has already occurred in American history, in the antebellum South, for example, when the lives of blacks were sacrificed to benefit whites, and in the forced westward march of Native Americans so that whites could take Indian land, and in the exclusion of the Chinese under draconian

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27 Critical Race Theory, supra note 2, at 1-36.
28 Derrick Bell, Racial Realism—After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch, in Critical Race Theory, supra note 2, at 2, 2-8.
29 Id. at 8.
immigration laws. These historical accounts are intertwined with reminiscences about Olivas's grandfather and the stories he told, but there is nothing on liberalism as a doctrine. In the final article offered as a critique of liberalism, Girardeau Spann argues that the Supreme Court has become a majoritarian force (read: a white force) aligned against minority interests, such that a "rational minority response... would be to abandon efforts to influence the Court and to concentrate minority political activities on the representative branches." In other words, minorities should give up trying to seek legal reforms on the ground that they are required by justice, and instead should seek empowerment in other branches (hence Spann's appeal to "pure politics," as opposed to the impure politics of the judiciary).

All of this is interesting in terms of strategy and legal history but it gets us nowhere as a critique of liberalism. And indeed, none of these selections challenge liberalism as a theoretical approach, except to say that the civil rights movement advanced by liberalism has not brought about perfect equality between the races, and that the liberal legal reforms of the 1960s have been a hollow hope, a failure. But I doubt that liberals ever believed that legal reform alone would magically eliminate all vestiges of racism. Liberals, I think, felt that the battle against racism should be fought on all fronts, including legal reform, and that we should do our best to eliminate discrimination in as many contexts as possible (housing, education, employment), and enact affirmative action schemes in the hope that they withstand constitutional muster. Liberals hope for a better, fairer society, and while it is true that our society has made only modest gains in this direction, this is not the fault of liberalism as a doctrine. It is due rather to the inequalities in wealth and political power which pre-dated liberal reform and which liberals are trying to remedy. To fault liberalism for the oppression and inequality of blacks or for the mistreatment of Native Americans and Chinese immigrants is to lay blame with the wrong party. Further, Spann's and Bell's rejection of attempts to work within the legal system bespeaks a kind of fatalism that one wouldn't expect to find in law professors who are concerned with civil rights. The deeper problem, however, is that none of these articles deals with liberalism as a theory.


31 Girardeau A. Spann, Pure Politics, in CRITICAL RACE THEORY, supra note 2, at 21, 31.
Perhaps a more subtle critique of liberalism can be found in the work of critical race theorist Mari Matsuda, who, in another context, has made the argument that when the liberal state tolerates racial epithets under the guise of free speech, the state is actually promoting racist speech. That is, by remaining neutral, the state authorizes hate speech:

[T]olerance and protection of hate group activity by the government is a form of state action. . . . To allow an organization known for violence, persecution, race hatred, and commitment to racial supremacy to exist openly and to provide police protection [for such groups] means that the state is promoting racist speech. . . . State silence . . . is public action. . . .

The argument here is that the state cannot be neutral, so it should not try to be. Since the state must promote a particular view, it should take the high road and come out against racist speech.

The error here, I think, is to conflate state tolerance of hate speech with state promotion of such speech. Matsuda’s analysis cannot account for cases in which the state allows speech on both sides of an issue. For example, the State of Illinois recently allowed a demonstration by the KKK and a simultaneous counter-demonstration for ethnic diversity to take place side-by-side: would Matsuda have us believe that Illinois was simultaneously promoting racism and ethnic diversity? Matsuda’s argument that state tolerance of speech is equal to promotion of such speech would also require the absurd result that the government encourages violent revolution against itself because it allows Maoists and Anarchists to hold rallies. Isn’t it simply more accurate in these cases to say that the state is providing a neutral forum for speech, that the state can be neutral when it wants to be?

Matsuda is upset that the state permits racist speech because she thinks that “the state is the official embodiment of the society we live in,” and since our society should not be racist, neither should it tolerate racist speech. This essay overlooks the fact that the state itself can be neutral or even anti-racist in its own actions and speech while simultaneously tolerating racist speech by private parties. A deeper concern is that Matsuda’s claim smacks of the far-right notion that the state should advance a particular moral agenda rather than allow its citizens to choose their own agenda (however noxious) through public debate; far from being radical, this is a view which sits comfortably with conservatives. It was precisely under dubious appeals to the state

32 Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, in Matsuda et al., supra note 3, at 19, 48-49 (emphasis added).
33 Id. at 49.
as the embodiment of "moral fiber" and "blood and soil" that past governments were given too much power to regulate speech and conduct. If Matsuda got her wish and the state were magically transformed so that it "embodies the society we live in," then minorities would suffer, not gain, because our society can be quite racist.

I am not persuaded by those sections of the anthology that set out CRT's critique of liberalism. Given liberalism's emphasis on individual dignity, fairness, and due process, it would seem that CRT should embrace the fundamental tenets of liberalism, especially because liberals have been active supporters of minority rights since the early 1960s. If indeed CRT finds it necessary to critique liberalism as a doctrine, then it must do so in the proper way, by looking at key liberal theorists and pointing out their errors. This requires an engagement with Rawls, Dworkin, and Feinberg, an engagement which CRT has yet to initiate. Finally, if liberalism is to be rejected, we must find a replacement approach and understand how this new approach will preserve individual rights. Solving this problem would be a worthwhile project for a critical race scholar.

B. The Danger of Narcissism

Sigmund Freud once used the expression "narcissism of minor differences" to denote how various ethnic groups proclaim their uniqueness and superiority over other ethnicities based upon a handful of idiosyncratic traits, when in fact they are not very different from the other groups.\(^3\)\(^4\) Freud's terminology seems to fit much of the work being done in CRT to the extent that many critical race theorists end up writing about themselves on the ground that their personal experience is unique and that there is something special that they can contribute because they are black, Latino, Asian, and so on. So instead of writing an article on why a particular law is wrong or unconstitutional, the critical race scholar provides a "raced" or "situated" analysis along the lines of: The Black View of Case X, or The Latino Perspective on Statute Y. Inevitably the authors of these types of articles write about the perspective of those who share their ethnicity. I must admit some reservations about the ultimate value of this scholarship.

In Critical Race Theory we find Jennifer Russell writing about what it is like to be a black woman law professor;\(^3\)\(^5\) Margaret Montoya (a

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Latina law professor) writing about what it is like to grow up Latina and to attend Harvard Law School;\textsuperscript{36} Robert Chang writing about what it is like to be an Asian-American legal writing instructor;\textsuperscript{37} and Alan Freeman (a white law professor) writing about how his whiteness is an "inescapable feature" and an "uncrossable gap" which might render him incapable of truly contributing to CRT.\textsuperscript{38} 

Many of these writers are writing about themselves, and not just about how this or that event has influenced them (for example, how growing up black has motivated someone to be a civil rights lawyer), but writing about deeply personal events that are seemingly unrelated to legal questions. For example, two authors in this collection discuss in detail how they wear their hair, one article starting with the refrain, "I want to know my hair again, to own it, to delight in it again."\textsuperscript{39} 

Generally speaking, articles in this vein have a similar format: first a series of personal stories and memoirs, then a discussion of cases and statutes from 1750 to 1950 in which courts have been insensitive to the target group, and then a conclusion which states that prejudice is still alive and well today. In most articles there is little discussion of the law as it is now, although abominations like \textit{Dred Scott v. Sandford},\textsuperscript{40} \textit{Plessy v. Ferguson},\textsuperscript{41} and \textit{Korematsu v. United States}\textsuperscript{42} are repeatedly mentioned. And when recent cases are mentioned, they are often discussed without an effort by the author to see both sides of the issue—to see how the court could have reached its decision.

CRT's message about the legacy of racism is important, but one gets the impression that writing these pieces is a relatively easy game to play, that all one needs is an angle, a personal trait which can serve as an entrance into the game; and if one possesses several angles, she can write about how these facets intersect, that is, what it is like to lie

\textsuperscript{36} Margaret E. Montoya, Máscaras, Trenzas, y Greñas: Un/masking the Self While Un/briding Latina Stories and Legal Discourse, in CRITICAL RACE THEORY, supra note 2, at 529, 529-39.

\textsuperscript{37} Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post Structuralism, and Narrative Space, in CRITICAL RACE THEORY, supra note 2, at 322, 322-36.


\textsuperscript{39} Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, in CRITICAL RACE THEORY, supra note 2, at 267, 267-77.

\textsuperscript{40} 60 U.S. (19 How.) 393 (1857).

\textsuperscript{41} 163 U.S. 537 (1896).

\textsuperscript{42} 323 U.S. 214 (1944).
at the "intersectionality" of blackness and femininity,\textsuperscript{43} or to be Latino and gay.

I am not a critical race scholar but I could probably produce a manuscript in this vein in a relatively short time by following the standard format. I would begin with a story about what it was like to grow up Jewish, how I went to temple, celebrated Passover, got ridiculed by kids at school, heard people refer to Jews as "kikes," went to Germany and became depressed about the Holocaust, how I see swastikas in the bathrooms at the school where I teach, and so on. I could then discuss how Jews were discriminated against here in America, how we couldn't attend certain schools, couldn't vacation in certain places. And I could conclude by saying that anti-Semitism still exists today and that we should be on the lookout for it.

But we need to ask where these stories and narratives lead in the law, especially constitutional law. The answer is nowhere. The reason for this is that in most cases the law does not turn on my private story about growing up Jewish, nor does it turn on anybody's personal account of being black, Hispanic, and so on: these are \textit{private} issues; the law turns on \textit{public} issues.

To see this, consider what would happen if I (or any other Jew) were asked to determine, first as a Jew, then as a judge, the infamous case \textit{Village of Skokie v. National Socialist Party of America}.\textsuperscript{44} How would my situated perspective as a Jew differ from my perspective as a judge in reaching an answer to the question whether the Nazis have the right to march in a predominantly Jewish suburb? Would my raised consciousness as a Jew somehow transform my judicial opinion from a generic opinion into a Jewish opinion?

Perhaps I am naïve, but it seems that my status as a Jew really doesn’t matter when it comes time to rule on the constitutionality of the ordinance in \textit{Skokie}, because that issue turns on a public question about the Constitution as it affects all Americans, not on the private question about what it is like for me to be a Jew. Certainly, as a Jew I have some insights into the horrors of Nazism, but this, standing alone, does not give me a privileged interpretation of the Constitution as it affects Jews and Nazis. If anything, it might distort my view of the Constitution, making me a poor judge of the law. My "raised consciousness" is useful in the sense that I will be unlikely to hold mistaken beliefs about Jews, but my decision in this case will come down

\textsuperscript{43} For example, see Kimberlé Crenshaw’s discussion of her “intersectionality” as black and female, in Kimberlé Crenshaw, \textit{Beyond Racism and Misogyny: Black Feminism and 2 Live Crew}, in Matsuda \textit{et al.}, supra note 3, at 111, 113.

\textsuperscript{44} 373 N.E.2d 21 (Ill. 1978).
to constitutional doctrine, and the right decision in *Skokie* is the right decision for us all—black, white, Jew, Asian, and, I suppose, Nazi.

Much CRT scholarship seems to be infused with the mistaken notion that blacks have a unique ability to write about how the law affects blacks, that only Hispanics can really see how the law affects Hispanics, that white judges can’t act as good judges in cases involving these “out-groups.” So the movement can easily fracture into a composite of diverse people who write about themselves and their out-group; each person claims a scholarship interest in his own ethnicity or gender or both. The notion that each race has a unique view of the law is common in CRT, as we can see from the following reading of *Plessy* and *Brown v. Board of Education* by a black CRT scholar: “From a white perspective, it is unclear what is wrong with separate but equal, but when one takes a black perspective, it is easy to see why *Plessy* was wrong and why *Brown* was constitutionally right.” This passage ignores the point that the Constitution (and other laws) are public documents that affect all of us regardless of our race—so *Plessy* was wrong from any decent perspective, and *Brown* was right from any perspective; it is not a question of black and white, but a question of right and wrong.

Part of the problem here is that CRT seems to fall victim to balkanization, a splintering effect in which each racial, ethnic, or gender category becomes a unitary focus, to the neglect of the fragile overlapping consensus which binds us. Thus Paulette Caldwell contributes *A Hair Piece* which goes into great detail about her own hair as a way of exploring the issues raised in a federal case which upheld the right of American Airlines to prohibit a black employee from wearing her hair in braids. The court found that the company’s rule against braided hair applied neutrally to both blacks and whites (at the time, the movie “10” had popularized braided hair for white women), and the court also pointed out that the rule did not discriminate against an immutable racial characteristic of blacks, such as bushy hair or dark skin. This was a controversial decision, and, like Caldwell, I disagree with the court’s ruling; but the wrongfulness of the decision is not really affected in any way (nor is any light shed on the decision) by finding out how Caldwell wears her own hair. The implication from Caldwell’s discussion of her hair is that she has special knowledge of

this case because she is black, a special ability to see that the court was wrong. But we don’t need an argument against a bad decision from a black perspective; we need an argument that works from all reasonable perspectives, especially if we want to convince people who are outside our race and ethnicity.

C. The Trouble with Storytelling

Much of CRT revolves around personal stories which are drawn from the experiences of minority law professors, detailing not only negative experiences such as name calling and ostracism, but also positive aspects of their heritage, such as racial solidarity, the importance of tradition and honor, and the struggle against oppression. In a useful contribution to the anthology, Daniel Farber and Suzanna Sherry identify three features of the new storytelling:

First, the storytellers view narratives as central to scholarship, while de-emphasizing conventional analytic methods. Second, they particularly value “stories from the bottom”—stories by women and people of color about their oppression. Third, they are less concerned than conventional scholars about whether stories are either typical or descriptively accurate, and they place more emphasis on the aesthetic and emotional dimensions of narration.49

This approach is borne out in many selections from the anthology, including Patricia Williams’s story about renting an apartment in New York City,50 Margaret Montoya’s reminiscences of braiding her hair in the Latina style,51 and Jennifer Russell’s explanation of how she feels like a “gorilla in your midst” as a black female in the legal academy (in a nauseating act of racism, a photograph of a gorilla was placed in her mailbox).52 In a representative article on the power of narratives, Richard Delgado describes the hiring procedure at a law school which rejects a candidate of color, recasting the story from three different perspectives—the “stock story” of the white professor on the hiring committee, and two “counterstories” from a radical activist of color and an anonymous commentator.53

All of this storytelling is interesting, even fascinating, but I think it can be dangerous as well. As lawyers, we seek doctrinal solutions to

50 Williams, supra note 10, at 86-87.
51 Montoya, supra note 36, at 529-39.
53 Richard Delgado, Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative, in CRITICAL RACE THEORY, supra note 2, at 64, 64-74.
problems, and indeed this is precisely what distinguishes us from the public at large. For example, the general public is free to see a criminal trial (O.J. Simpson's, say) as a story about good and evil, black and white, or love and hate, whereas lawyers see it through the filter of the law—in terms of probable cause, hearsay exceptions, burdens of proof, permissible jury instructions, rights to suppress evidence, and so on. *We are lawyers precisely because we do something more than listen to stories: we filter stories through the framework of legal doctrine.* While it may be useful for lawyers to see the facts of a case as a narrative construction, or even to think of the law itself as a work of fiction, lawyers must look beyond stories to questions of doctrine, policy, and argument.

There is a danger in storytelling precisely because it can lead in any and every direction, politically speaking. It is true that narratives about oppressed groups often lead to left-leaning social reform for the simple reason that narratives tend to humanize people whom we would otherwise consider outsiders. For example, when we read in the anthology about the experiences of minority CRT scholars struggling against racism, we begin to identify with them, and, frankly, we start rooting for them. Of course, if one identifies with people of color or with women, it is possible that one will be more likely to understand their side of an issue.

But this cuts both ways. If one set of narratives can make us *more* sympathetic to people of color, it stands to reason that a different set of narratives can make us *less* sensitive. Indeed, Delgado contributes an article to the collection which recognizes that black thinkers like Shelby Steele and Stephen Carter make use of stories, irony, and humor to send a conservative message that contrasts with the narratives offered by CRT scholars Derrick Bell and Patricia Williams. We can easily imagine the emergence of narratives and stories in which white authors describe the experience of being denied entry into professional schools when they would have been accepted had they been black or female. In extreme cases it might be imagined that such authors would use storytelling to glorify a white utopian society without minorities. The error by CRT is to think that storytelling is inherently liberating when in fact it is inherently neutral—neither liberal nor conservative, neither constraining nor freeing.

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Another danger of legal storytelling is that it plays upon emotion, instead of reason, and therefore it can convince people to adopt a position without giving them a doctrinal basis for it. Suppose you were uncommitted in the last presidential election, and I wanted to persuade you to vote for Bill Clinton. One method that I might use would be to cite Clinton's accomplishments, his attempt to balance the budget, his health-care proposal, or his record of judicial appointments. These are all relevant points because they bear directly on his ability to serve the country. But now suppose that I suddenly realize that these arguments, while relevant, may not work; in fact, you stand ready to present some counter-evidence against my points. In that case, I might switch tactics and try to convince you by telling a story. I might tell you about what it was like for Clinton to grow up as a poor child in the rural South, how he struggled from humble beginnings to realize the American dream of becoming President. My goal would be to move you emotionally so that you undergo a psychological conversion in which you find yourself voting for him even though you remain unconvinced of his qualifications. The problem with convincing people in this way is that it is circuitous and skirts the real issues; it is a way of convincing people at any cost, in order to serve a higher cause. CRT sometimes works similarly, where issues that should be decided on doctrinal grounds by looking at federal law (issues like affirmative action, free speech, and criminal sentencing) are determined by stories, personal accounts, and other miscellanea.

It is somewhat difficult to make sense of CRT's turn away from doctrine. In this anthology we find Alan Freeman praising Derrick Bell for his lack of doctrinal argument:

Bell's approach to legal doctrine is unabashedly instrumental. The only important question is whether doctrinal developments have improved, worsened, or left unchanged the actual lives of American blacks . . . . Bell eschews the realm of abstract, ahistorical, normative debate; he focuses instead on the relationships between doctrine and concrete change, and the extent to which doctrine can be manipulated to produce more change.56

I am disturbed by the notion that doctrine (constitutional doctrine, no less) is understood by Bell to be merely "instrumental" and something to be "manipulated" to satisfy the all-important test of black empowerment. After all, if the law is to be judged simply as an instrument for black empowerment, then the best legal system would be one which helps blacks at any cost, for example, by "manipulating"

56 Alan D. Freeman, Derrick Bell—Race and Class: The Dilemma of Liberal Reform, in CRITICAL RACE THEORY, supra note 2, at 458, 458-59.
legal doctrine through "instrumental" measures like exempting blacks from income tax, requiring whites to give a tithe to the NAACP, redistributing white pensions to blacks, and appointing only blacks to the judiciary. But these changes in the law would violate deeply held notions of fairness, property, and due process. Bell's self-professed "racial realism" seems to be radical and tough-minded, but it sanctions some irresponsible legal reforms.

As a final point about storytelling, I am concerned about the potential for self-stereotyping that occurs when minority law professors write stories instead of producing exhaustively researched law review articles. The idea that minorities are specially endowed with storytelling abilities but not with analytical skills is precisely the type of stereotype that should be countered.

D. *The Fatalistic Pseudoscience of Interest Convergence*

It was once (and perhaps remains) a tenet of ultra-orthodox Marxism that the bourgeoisie tolerates advances by the proletariat only when such advances also benefit the bourgeoisie to an even greater extent. This was not called an interest-convergence theory at the time, but it might as well have been. The Marxist formula was designed to advance the party line about the intractability of class warfare and the impossibility of progress without full-scale communist revolution. After all, there is no point in pursuing piecemeal reform when every step forward for the workers is an even greater step for the owners.

The problem with the Marxist formula was that it was a piece of pseudoscience incapable of demonstration or refutation. For example, if one pointed out to the ultra-Marxist that the New Deal of the 1930s was an advance for the proletariat, the Marxist could respond by saying that the New Deal was really motivated by the need for capitalists to keep the economy going, so the real beneficiaries were the bourgeoisie. The Marxist claim was pseudoscience because the Marxist refused to specify the evidence that would refute his claim: indeed, no evidence could disprove the claim, because any evidence against the claim was simply reinterpreted as evidence in favor of it.

Philosophers can recall a similar situation with the position known as "psychological egoism," which in its strongest version holds that everybody always acts self-interestedly. When the person who holds this view is asked to explain why people give anonymous gifts to charity and risk their lives fighting for others, she responds by redescribing these selfless acts as really egotistical, saying that if we really understood the person's true motivations, we would see that
they were acting egotistically. There is certainly no way to prove or disprove psychological egoism as a doctrine; the best we can do is to say that it fails to describe the facts of life as we experience them, that it is a poor interpretation of human behavior.

The same can be said for the much-vaunted interest convergence thesis, which finds its way into a fair amount of CRT scholarship. The interest-convergence thesis originated with Derrick Bell, whose view is paraphrased by Delgado as follows: "whites will advance the cause of racial justice only when doing so coincides with their own self-interest." 57 According to some critical race theorists, "civil rights law was never designed to help blacks," 58 and decisions like Brown were decided not on the basis of racial justice, but as a mechanism for whites to win the Cold War. 59

On its face, the interest-convergence thesis is a strange claim. After all, the whole point of the desegregation cases, the Voting Rights Act, Title VII, and so on, was to advance black interests by eradicating racism. The Court's decision in Brown makes no mention of the Cold War or the interests of the dominant white culture in desegregation. There have indeed been cases in which the Court was motivated by alleged interests of national security, as in the disastrous Korematsu decision, but in that case the Court told us what it was doing, for better or worse. All of this goes to show that there is little direct evidence that the decision in Brown was meant to help whites more than blacks. Furthermore, if desegregation and affirmative action benefitted whites, why were whites so resistant to them? 60

According to Delgado's interpretation, the interest-convergence theory is confirmed by our experience with affirmative action, which he describes as a "majoritarian device" designed to benefit whites. 61 According to Delgado, affirmative action is not intended to help blacks, but to assuage white guilt and to absolve whites from taking further steps toward racial justice:

57 Delgado, supra note 55, at 466 (paraphrasing Derrick Bell from Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980)).

58 Id.

59 Mary L. Dudziak, Desegregation as Cold War Imperative, in CRITICAL RACE THEORY, supra note 2, at 110, 110-21.

60 A leading textbook on constitutional law asks a similar question about Bell's reading of Brown: "If desegregation was really in the interest of the white majority, why did it have to be judicially imposed?" GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 466 (1986).

61 Richard Delgado, Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?, in CRITICAL RACE THEORY, supra note 2, at 355.
Crits [critical race theorists] point out that periodic victories—*Brown v. Board of Education*, the 1964 Civil Rights Act—are trumpeted as proof that our system is fair and just, but are then quickly stolen away by narrow judicial construction, foot-dragging, and delay. The celebrations assure everyone that persons of color are now treated fairly in virtually every area of life . . . . With all that, if blacks are still not achieving, well, what can be done?62

The implication here is that whites benefit from affirmative action more than blacks, hence the convergence of interests in which the modest gains by blacks are outweighed by gains for whites. This comment seems to confuse cause and effect, however. The "periodic victories" to which Delgado refers were caused by a concern for black equality as a matter of justice; it makes little sense to recharacterize these victories as "allowed by whites." With regard to affirmative action schemes, Delgado is probably correct that some whites have become complacent about advancing black interests, or that some whites have had their guilt assuaged since these programs became popular, but this is hardly what one would call a "benefit" that whites receive from affirmative action. In any event, there is no evidence that whites allow affirmative action because it benefits them, and in fact the opposite is true—most whites who endorse affirmative action (myself included) believe that it will work to their personal detriment, but nevertheless feel that it is required by justice.

The interest-convergence thesis seems to hold that blacks can advance *only* when whites also advance, or in other words, that in every case where blacks advance, whites also advance. This blanket statement can be refuted by a single instance (a single piece of legislation or a single court decision) in which blacks gained and whites did not. Examples of this abound—affirmative action, Title VII, fair housing laws, and prohibitions on red-lining. To say that these much-needed reforms were really an advancement for whites is to reinterpret the facts in a way that is highly implausible.

But even if the interest-convergence theory were true, what would follow from it? How would it alter the project of reforming the law to achieve greater racial justice? As far as I can tell, it would have absolutely no effect on the effort to defend affirmative action, to push for redistricting of congressional seats, and to advocate greater minority representation in the judiciary. The only effect of the interest-convergence thesis is one of fatalism, to paint a picture of heroic struggle against impossible odds. I can't see how this attitude advances people

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of color, and I don’t see what CRT has to lose by abandoning the interest-convergence thesis.

E. “Outsiders” and “Insiders”

Much of the cachet of CRT is purchased on the notion that it fosters a new type of “outsider jurisprudence” which subverts the “dominant narrative” of the law in favor of accounts which are highly personal and grounded in the social reality and unique experience of the author. According to Mari Matsuda, this is part of an attempt to “know history from the bottom” and to reject views of the world which are “androcentric, Eurocentric, and falsely universalist.” Delgado echoes this theme by saying that mainstream scholars have erred by endorsing universalism over particularity, by favoring abstract principles and the rule of law over multiple perspectives. The subtext of these messages is that outsiders (read: women and people of color) have a unique view of the legal system that cannot be fully understood by white male insiders. Matsuda says that minorities have a “special voice,” and Delgado suggests that “[t]he time has come for white liberal authors . . . to redirect their efforts [and make way for] talented and innovative minority writers and commentators.” He reports:

[N]early three-fourths of articles on equality or civil rights published in the leading journals during the last five years were written by women or minorities. Ten years ago, the situation was reversed: minorities were beginning to publish, but their work was largely ignored. The same is true in other areas as well. Critical legal studies and other modernist and postmodern approaches to law are virtually the norm in the top reviews. Formalism has run its course.

Now it is somewhat ironic that so many self-titled “outsiders” are sitting on the faculties at top law schools and publishing in the best law journals. When seventy-five percent of the articles on civil rights are written by “outsiders,” then the term is no longer meaningfully applied. The problem here is not only that the term “outsider” is being misused, but more broadly that it is increasingly hard to find an

63 Delgado, supra note 17, at xiii.
64 Matsuda, supra note 32, at 19.
65 Delgado, supra note 17, at xv.
outside to the “outsider” view. This is an obscure way of saying that many of the CRT articles focus so heavily on the outsider view that they totally neglect any other vantage point. The outside perspective is valuable in the first place because it provides check and balance against the views of the insiders; so that what results is an overall balance between inside and outside. And that is our goal—a balanced view.

When a majority of scholars claim to be outsiders, it is hard to find an insider viewpoint to balance the outsider viewpoint. This may sound like an overly academic concern, but it is a very real problem owing to CRT’s rejection of the notion that scholarship should consider all sides of an issue. In discussing the First Amendment concerns raised by speech codes on college campuses, the editors of Words That Wound admit that: “We do not attempt to present all sides to this debate. Rather we present a dissenting view grounded in our experiences as people of color . . . .”69 Similarly, when Delgado discusses a decision by a law school hiring committee to reject a candidate of color, he does not present the school’s position in its best light, but rather assumes that the school’s explanation is bogus and proceeds to examine how the school’s decision can be attacked by counter-stories and demonstrations.70 What is lacking here is balance, nuance, and a weighing of competing interests and accounts, not to mention the principle of charity whereby one criticizes an argument by first placing it in its best light. In Delgado’s hypothetical case, the law school’s hiring committee was concerned that the black candidate had not published anything and was unable to teach a course in commercial law; these are real lacunae that would hold back any candidate, white or black, but Delgado dismisses the committee’s concerns as “deeply coercive.”71 In a separate article, Thomas Ross criticizes the notion that there are “innocent whites” who are harmed by affirmative action,72 yet he fails to consider the perspectives of, for example, poor Appalachian males or recent immigrants who are denied spots in professional schools to make way for blacks who were raised in wealthy families. It simply will not do to say that all whites are equally complicitous in this country’s legacy of racism and that all blacks are innocent victims; what results is a somewhat simplistic universe of oppressors and oppressed, sketched in black and white. What is missing here, I

69 Lawrence et al., supra note 7, at 2.
70 Delgado, supra note 53, at 64-74.
71 Id. at 68.
72 Thomas Ross, Innocence and Affirmative Action, in CRITICAL RACE THEORY, supra note 2, at 551, 551-63.
think, is what is missing in much of CRT work: balance, nuance, and a weighing of insider and outsider perspectives.

III. CRT AS Consciousness Raising

I think we can put CRT in its best light by seeing it as a form of what Marxists and feminists refer to as consciousness raising. That is, CRT elevates our sensitivity to racial issues and gives us a heightened awareness of what it is like to experience the sting of racism. And there is no question that it accomplishes this goal. One emerges from reading this anthology (and from reading other CRT articles) with a new sensibility, as if one is seeing the world through a new set of eyes. This alone is worthwhile for at least three reasons: it clarifies and brings to the fore the racist stereotypes and assumptions which pervade our psyches; it reminds us of our brutal history of racial prejudice and exclusion; and it humanizes people of color so they do not seem so Other, and instead appear as living, breathing people who deserve equal treatment.

But there is a problematic assumption running through much CRT scholarship to the effect that once our consciousness has been raised through narratives and stories, the correct legal decision will immediately become clear to us. That is, judges and lawyers who genuinely understand the experiences of people of color will start making decisions that will benefit these "out-groups." But is this a correct assumption? I think not, for the simple reason that a raised consciousness is no guarantee that a particular decision will be chosen. This can be seen by the rise of African-American intellectuals who have experienced stinging acts of racism yet remain staunchly opposed to affirmative action and set-asides, on doctrinal grounds. The very existence of neoconservative black intellectuals like Stephen Carter and Shelby Steele (not to mention Justice Clarence Thomas and law professor Randall Kennedy) militates against the idea that the subjective experience of racism will automatically lead to some sort of psychological conversion in which judges and lawyers will know how to "do the right thing."

CRT acts as a sort of disinfectant which dispels some widely-held misconceptions about people of color, assumptions which are often held unconsciously by judges and lawyers. A judge who has read the works of Patricia Williams and Derrick Bell may be less likely to hold stereotypical, denigrating views of black people, and while this may not affect every decision that she makes, it can have a certain salutary effect. And the importance of this gestalt switch, this psychological conversion in how one sees minorities, should not be minimized, be-
cause many judges and lawyers carry around distorted beliefs on racial matters.

But even when CRT has raised our consciousness to the point where it is clear of racism (or at least relatively clear of it), there remains a separate debate which must take place at the level of legal doctrine, where we discuss theoretical questions of equality, fairness, due process, and desert. Assuming that CRT wants to contribute something more than consciousness raising, it needs to address this doctrinal, theoretical level, and to make the constitutional arguments that appeal to all of us (black, white, Asian), because we are splintered enough as it is.