Critical Race Theory: New Strategies for Civil Rights in the New Millennium?

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I. Introduction

The development of critical race theory points to a new direction taken by civil rights activists in the wake of civil rights setbacks in the 1970s and 1980s when official government policy no longer supported an expansive civil rights agenda. The United States Supreme Court began limiting and eviscerating precedents that once promised full equality for African Americans under the law. Critical race theorists who fought against this declension from civil rights began storytelling, in which they gave voice to the contemporary civil rights struggle. They explained the situation of "outsiders," people of color dispossessed by the law.

The Parts of this Article—civil rights litigation before the Supreme Court under Earl Warren and under Chief Justices Burger and Rehnquist, the breakup of the African American liberal coalition, the storytelling response, and protest—explain the development of critical race theory, its antecedents in the legal liberalism that enabled the civil rights movement, and its rejection of formalism on the Supreme Court. The critical race theorists had as their objective, ending exclusive reliance upon civil rights litigation, storytelling to broaden public consciousness of racism and discrimination under the law, and protest reminiscent of the civil rights movement of the 1950s and 1960s.

In 1969, the civil rights movement was in crisis. The decade-long struggle for equal rights in the South had crested, and the momentum that began with *Brown v. Board of Education*[1] had begun to dissipate. Although Congress had passed two pieces of legislation that promised to eradicate the evils of Southern apartheid, the Civil Rights Act of 1964[2] and the Voting Rights Act of 1965,[3] the future looked bleak. Martin Luther King had been assassinated the year before, and his attempts to bring the civil rights movement to the North had come to naught. Northern blacks

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
2. July 2, 1964, P.L. 88-352, 78 Stat. 241.
3. August 6, 1965, P.L. 89-110, 79 Stat. 437.

had never experienced legal segregation and discrimination; instead, they experienced it on an unofficial basis. Long-standing housing discrimination relegated them to ghettos and their children to neighborhood schools inferior to those attended by white children. Blacks from Watts to Newark had rioted against an unseen enemy: their lack of economic opportunity, for which no Jim Crow institution could be blamed.

African American intellectuals, in their long-standing position as leaders and activists, tried to determine what the next strategies should be. Was the movement over? Had the legal aspects of the movement done all it could do? Was the movement in the hands of a federal government, seemingly pledged to eradicate the problems, stemming from decades of discrimination, subservience and poverty? Should blacks rely upon group-based remedies such as affirmative action? What was the best means of ensuring empowerment? Some said it lay in individual effort; all official barriers to full participation in American society had already been blasted away by the force of civil rights legislation. Others looked to black power, removal from dependency upon whites, buttressed by a determination to do for self. In their view, dependency only led to vulnerability, because whites decided how and when blacks would become empowered, on terms palatable to them, but not necessarily beneficial to blacks.

At the same time, American politics began to move right and officials abandoned the liberal activism that had been central to the civil rights movement. White voters looked at "black power" with fear. In their minds, this new nationalism had a sinister tone, one that resonated with violence in the city streets and a disregard for law and order. It was a blackness rooted in arrogance and disdain for whiteness, in which every white became culpable for the sins committed against African Americans over centuries of slavery and disempowerment. This was far different from the liberalism of 1950s-era activists who made appeals to Christian morality and notions of justice.

The white response to the evolution within the civil rights movement varied. While some remained loyal, others abandoned the civil rights project, believing that the movement was over, because civil rights legislation had been passed. Banding with conservatives who rejected liberal judicial activism, they joined a growing populist movement, arguing that it was time to circle the wagons and take care of whites. Along with their white liberal allies, the "bleeding heart liberals" supportive of expansive civil rights policy, and the upper class "armchair liberals," blacks seemed to these newly conservative whites to be bent upon using government to take away the rights of working and middle class whites. Affirmative action thus meant reverse discrimination, as innocent whites were sacrificed for the actions of long-dead slaveholders.

White populism meant the rise of the Republican party and rejection of the Democrats, as the coalition between white ethnic laborers in the Northeast and blacks fell apart. Nixon, Ford, Reagan, and Bush made it into the White House, as compared to only Carter and Clinton. As presidential politics began more and more to determine the nature of judicial policy and politics, the Supreme Court reflected this new trend, as Republican presidents nominated like-minded judges to the bench.

The Court became the means by which Republican presidents could ensure the end of liberal civil rights policy because Justices have life tenure. These justices promulgated a formalist position on civil rights that marked a return to narrow concepts of jurisprudence and a rejection of liberal judicial activism. In the eyes of activists, the Supreme Court was no longer an articulate voice in favor of civil rights and liberties; instead, it became a threat, for the justices seemed able to limit precedents or do away with them altogether. Law professors of color such as Derrick Bell were among the first to notice this trend.

Derrick Bell was an activist lawyer in the civil rights movement; he once worked for the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund in fighting for full equality under the law. He believed in an expansive civil rights project which would guarantee protection of African American rights on all fronts. He supported *Brown*. But in the wake of white conservative populism, the rise in black nationalism and the failure of liberal judicial activism to insure the promise of *Brown*, he began to question the liberal legal ideal. By this time, Bell was a law professor; both his scholarship and pedagogy reflected his developing perspective.

Bell came to believe *Brown* was a failure, because the lawyers who litigated the case sought a formal remedy—desegregation—without considering the heart of the true claims African Americans made. Inequality in resource allocation was the true problem, and it was one that could not be disguised by cosmetic remedies. The mere presence of African Americans in all-white institutions meant nothing as long as whites retained full power and control over decision-making processes. African Americans thus remained supplicants to white benevolence, and whites made changes only to the point at which their personal interests were not compromised.

As a legal educator in the early 1970s, Bell transferred his activism to a different milieu. He began to train the next generation of lawyer activists. Harvard Law School hired him because he had practical civil rights experience, and the trend of legal education at the time encouraged the presence of seasoned civil rights veterans. Civic-minded law students were gravitating toward civil rights practice; thus, Bell had a special role. But in addition, his presence as an African American was important, as greater numbers of law students of color started entering law school. The law students looked to him for mentoring and for instruction on what they could expect as civil rights lawyers. They learned his critique of civil rights practice and followed his examples of activism. Bell criticized the law as an institution; insofar as Harvard was part of that institution, he criticized it too and raised the rallying cry of protest.

Bell's students took the lessons he taught them and critiqued Harvard's traditional role in society as an elite mainstream institution, responsible for supplying the lawyers who populated the ranks of high court judges, practitioners and legal educators. They blamed Harvard for failing to contribute to a true liberal agenda that would empower communities of color. They followed Bell's example of legal activism in academia and raised protests within the law school at various times during Bell's tenure. When Bell took over as dean of the University of Oregon's law school in 1983, they boycotted a civil rights class being offered, on the

ground that there remained no tenured instructors who could serve as effective mentors to students seriously interested in civil rights.

Among the Bell students who became academics, one can find founding members of a group of legal scholars who built upon Bell's critique of legal liberalism through their own scholarship, such as Kimberlé Williams Crenshaw and Patricia J. Williams. Following in Bell's footsteps, they adopted "storytelling," an approach to scholarship and pedagogy in which they articulated the worldview of the downtrodden. They explained how people of color experienced the law, how it limited them and corralled them into subservience. Telling stories had the potential to liberate people of color made powerless by the forces of law, as the critical race theorists offered therapeutic consciousness-raising. As scholars themselves, they were seeking their own liberation, an understanding of the "dual consciousness" that came with their status as law professors of color. They were supposedly empowered under the law, but they felt disempowered by the white institutions that employed them. But they were also powerful arbiters of the law, articulate in its language, leaders of their people. They had a special responsibility to engage the law and use it for their community's liberation, even though the law traditionally operated to dispossess people of color.

Within the legal academy, critical race theory generated controversy. Traditionalist legal scholars rejected it as not being scholarly enough. Storytelling as an approach to scholarship did not resemble anything the traditionalists could recognize. There was little discussion of law, of legal rules, or of jurisprudence. In the eyes of some, storytellers simply told tales with no legal context. These were "agony tales," with no corresponding explanation of how legal rules mattered to the story. They did not propose alternative ways of looking at legal rules and did not develop new ones. To that extent, traditionalists claimed the critical race theorists neglected their responsibilities as lawyers, scholars and professors.

Notwithstanding rejection by the traditionalists, critical race theory continued to develop. Early members of the critical race theory cohort were teaching at law schools throughout the country, and by the late 1990s, other scholars became interested in it. Some were curious observers, others were students of the early cohort who gained employment at law schools. They began writing in the storytelling tradition. Most significant in this movement however, was Bell's ability to marshal popular support for critical race theory storytelling in the early 1990s. He turned his long-standing criticism of Harvard Law School into an indictment of American civil rights policy as a whole.

Bell took a protest leave from Harvard. He claimed that Harvard engaged in a long-standing practice of offering visiting professorships to qualified African American female law professors, but then declined to offer them tenured positions. Instead, the administration routinely offered such positions to visiting white male professors. This protest brought Harvard and Bell to national attention, as the struggle over affirmative action within the legal academy raised serious policy questions being debated throughout the country.

Within the African American middle and professional class, Bell became a hero and was held up as an example to emulate, even as political conservatives, formalist justices and traditionalist legal scholars rejected

him. He was leading the contemporary civil rights movement in a period when discrimination was no longer a straightforward issue as it had been during the period of legalized segregation prior to *Brown*. In the wake of changing ideas about discrimination law when formalism threatened to undo the gains of the 1960s, Bell's protest articulated the concerns of many blacks who perceived that although they made headway into white mainstream society and middle class professional status, racism and discrimination always threatened to rise up to and thwart their ambitions.

The acceptance of Bell and critical race theory was made possible through storytelling. Once Bell and other critical race theory storytellers such as Richard Delgado and Patricia J. Williams reached beyond an academic audience and addressed the public through fiction writing, storytelling became popularized. Divorced from the debates within the legal academy, it became cultural criticism, and the critical race theorists became well-known critics of the conservative right and of the legal system in general. Looking at current events, they pointed out the inconsistencies of the term "equal justice under the law," whenever the legal system failed to live up to its promises and instead denied justice to African Americans.

Commenting upon well-known and controversial cases of the mid to late 1990s, such as Rodney King, they explained what seemed inexplicable to many. At a time when many African Americans thought they were experiencing a backlash against civil rights and greater tolerance for racism seemed to be in vogue, the critical race theorists explained that the law upheld and provided justification for racist behavior. Political liberals thus celebrated critical race theory as a literature that demonstrated why the civil rights struggle had not ended. They welcomed scholars of color who explained the changing discourse on civil rights as it was being developed by formalist justices on the Supreme Court.

II. Litigation: Legal Liberalism During the Civil Rights Movement

Brown v. Board of Education[4] *rejected* Plessy v. Ferguson[5] *as the justices on the Court rejected the narrow and formalist position on civil rights that was typical of classical legal thought in the late nineteenth century. Supportive of legal realism and sociological jurisprudence, the proposition that judges ought to use the law to benefit progressive public policy measures, the Warren Court established its reputation of liberal judicial activism. Civil rights advocates and legal liberals bent upon ending America's brand of apartheid celebrated the decision as the first step in inaugurating an integrated society where all could be free from discrimination, and providing an impetus for the civil rights movement of the 1960s. But the decision generated great controversy. Those legal liberals concerned about judicial integrity perceived that the Court usurped the role of the legislature in deciding that segregation was illegal. White conservatives throughout the South protested that the Court overreached its power and threatened democracy. Massive resistance to civil rights followed.*

4. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
5. Plessy v. Ferguson, 163 U.S. 537 (1896).

With the passage of the Civil Rights Act of 1964[6] and the Voting Rights Act of 1965,[7] traditional scholars of the civil rights era found an endpoint to a movement that had begun a decade before with the *Brown v. Board of Education*[8] decisions. The African American struggle to gain equal rights ended because the federal government put machinery in place to protect civil rights. There was nothing left to struggle for, as African Americans got a guarantee from the government that Southern state officials and private citizens could no longer discriminate against them.

The Civil Rights Act of 1964 banned discrimination in public facilities altogether, and gave the attorney general the ability to sue on behalf of victims. Public facilities, such as schools, receiving federal funds could not discriminate, on the pain of losing their funding. The Act further prohibited private business operators engaged in interstate commerce from discriminating against their customers based upon race, and made discrimination in employment illegal. The Voting Rights Act, in turn, alleviated an evil that had long existed in Southern communities: disfranchisement of African Americans in order to limit their political effectiveness. The Act removed to the jurisdiction of the federal government control over the registration process within those states where the abuses had been most prevalent. States which had fewer than half of their voting age residents registered found their literacy tests suspended. Others could make no changes to their registration procedures without federal approval. Furthermore, the attorney general could send examiners to register members of the community, oversee the voting process and prosecute those who prevented qualified voters from exercising the franchise or who used violence to prevent them from voting.

Brown stemmed from the early twentieth-century efforts of the NAACP to fight the formalism that eviscerated the gains of Reconstruction. Founded by white and black liberals of the early twentieth century, the NAACP emphasized gaining equality for African Americans through the use of the law in order to integrate African Americans into mainstream American society that was free of racial violence and the denial of civil rights. During the early part of the century, racial hate crimes and glaring discrimination, particularly in the South, were the focus of the NAACP. For although "the freed slaves, within a few years of emancipation, enjoyed full political rights and a real measure of political power,"[9] the promise of equality proved ephemeral at the end of the nineteenth century.

Conservative white Southern Democrats "redeemed" their state governments from the control of the radicals, the Republicans who had been at the forefront of gaining African American freedom during the Civil War and protecting their rights during Reconstruction. President Hayes removed federal troops from Louisiana and South Carolina, sending a signal that the national government would no longer concern itself with the problems of the African Americans living there.[10] The Supreme Court

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6. July 2, 1964, P.L. 88-352, 78 Stat. 241.
7. August 6, 1965, P.L. 89-110, 79 Stat. 437.
8. 347 U.S. 483 (1954); 349 U.S. 294 (1955).
9. Eric Foner, Nothing But Freedom: Emancipation and Its Legacy 40 (1983).
10. Eric Foner, A Short History of Reconstruction 244–45 (1990).

picked up on the trend, by holding the Civil Rights Act of 1875 unconstitutional[11] and by holding segregation legal.[12]

Legal historians have long explained the role of formalist legal thinking in determining late nineteenth-century decisions of the Court, and the classical legal thought that enabled them. Edward Purcell explains that by the 1880s, American lawyers had awakened to older notions of "natural law and rigid theories of common law precedent," which, when combined "with a formalistic, deductive concept of legal reasoning,"[13] provided a framework for jurisprudence of the period: it was logical—clear, syllogistic and universal in its application of law to fact.[14]

Scientists of the time set forth a hierarchy of races based upon social Darwinism, the proposition that different races had different "immutable instinctive behaviors"[15] which affected their morality, intelligence, status and ability to survive in society. Biology was destiny. Northern Europeans were of a higher race; other Europeans were of lesser races, and people of color, blacks in particular, were of the lowest. Since blacks were inferior, they could not be the social equals of whites. To permit the "social equality" of integration would violate long-standing principles of race relations dating back to the earliest days of slavery, which denied blacks an equal place in the American polity. Moreover, integration could lead to miscegenation. The white race would become damaged as a result, as intermarriage produced mixed race children of inferior genetic material. Blacks should thus be left separate from whites, to try and improve themselves within their own culture and society.

Thus, the *Plessy* majority opinion was based in the prevailing views held by nineteenth-century whites on the question of integration under the Fourteenth Amendment Equal Protection Clause: adherence to race consciousness and segregation in the social sphere, but with a race-neutral equality in the political realm.[16] In response to the claim that segregation violated the Thirteenth Amendment, the Court found the distinction between blacks and whites irrelevant. It had "no tendency to destroy the legal equality of the two races, or to reestablish a state of involuntary servitude."[17] Using this logic, the Court upheld a Louisiana statute that required segregated transportation facilities for whites and blacks.

Just as important and related to the Court's support of the statute, was its position on individual rights and a state's right to legislate for the police power. The nineteenth-century Justices who decided *Plessy* jealously guarded personal and contractual rights from government incur-

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11. The Civil Rights Cases, 109 U.S. 3 (1883). The Court held that Congress could not legislate integration of state public facilities under the Fourteenth Amendment; Congress could only respond to state statutes that discriminated. *See also* Foner, *supra* note 10, at 247.
12. Plessy v. Ferguson, 163 U.S. 537 (1896).
13. Edward Purcell, The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 74 (1973).
14. *Id*. at 74–75.
15. Charles A. Lofgren, The Plessy Case: A Legal-Historical Interpretation 97 (1987).
16. *Id*. at 178, citing to Justice Henry Billings Brown's majority opinion, at *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).
17. Lofgren, *supra* note 15, at 176.

sion and protected state governments from federal government intrusion.[18] Thus, the state of Louisiana had the right to pass a law barring integration in public transportation. Judges were supposed to be non-political arbiters of the law, free to operate within their sphere, basing their determinations upon neutral principles of logic.

The overall effect of this formalist trend on the Court meant that the promise of the Reconstruction Amendments that freed the slaves, gave them equality under the law and the right to vote, was eviscerated.[19] The Supreme Court would do nothing to stop the tide. This "hands off policy" gave Southerners license to go forward with their redemption agenda of "dismantling the Reconstruction state, reducing the political power of blacks, and reshaping the South's legal system in the interests of labor control and racial subordination."[20] White Southerners used *Plessy* to inaugurate segregation, but denied the equality of facilities the decision required.

Charles Hamilton Houston, hired as special counsel by the NAACP, became responsible for the attack against segregation in the South. He plotted a careful litigation strategy to take *Plessy* apart bit by bit, until the Supreme Court could be persuaded to overturn it altogether. Houston matriculated at Harvard Law School and served on the *Harvard Law Review*, graduating "in the top 5 per cent of his class in 1922."[21] He later earned a doctorate in juridical science under Felix Frankfurter.

Houston had been trained in the sociological jurisprudence that developed during the Progressive era after *Lochner* and through the legal realism of the 1920s; each school arose to challenge classical legal thought.[22] Sociological jurisprudence, according to Roscoe Pound, one if its early adherents, presupposed that the law ought to be used as a tool for organizing the efficient running of a society becoming more and more

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18. *See, e.g.*, Morton J. Horowitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992). This statement is a broad and general one, based upon trends legal historians have identified in formalist jurisprudence, for example, in *Lochner v. New York*, 198 U.S. 4 (1905) (the Court invalidated a New York maximum working hours statute as violating individual contractual rights) which ended with the post-1937 trend toward erasing the public-private distinction and enabling the federal government to become more active in regulating state government, as seen for example, in *United States v. Carolene Products*, 304 U.S. 144 (1938) (The Court upheld a federal regulation from state challenge, under Congress's commerce clause powers).
19. *See* the Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution.
20. Foner, *supra* note 9, at 248.
21. Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution 4 (1994). *See also* Greenberg, *supra* at 19. The NAACP Legal Defense and Education Fund (Legal Defense) became a separate organization from the NAACP in 1940. Its purpose was purely educational and legal, focusing upon civil rights litigation efforts. Houston remained affiliated with the organization until his death in 1950.
22. *See, e.g.*, William M. Wiecek, The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937 (1998); Stephen Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage (2000).

industrialized and complicated.[23] The Supreme Court was doing society a disservice by invalidating legislation useful for the new social order industrialism wrought. Legal realists rejected the presumption that the law was based on logic and notions of natural law; instead, the law was about politics and policy. This view became more apparent in the wake of the Great Depression, when the federal government undertook a regulatory role in order to cope with the crisis. New Deal Lawyers—many of whom had also been Frankfurter students—were at the helm, administering policy; prior to 1937, the classical legal thought that dominated the Supreme Court stood in their way.[24]

The NAACP lawyers used the courts as a tool to demonstrate the failure of Southern government officials to create equal facilities for African Americans, in violation of the formalist logic of *Plessy*. They used the Supreme Court to set policy. Houston decided to use school desegregation cases in undermining *de jure* discrimination against African Americans because inequality in education was significant and had the most pernicious effect upon the community, as African American schoolchildren were denied quality educations. The *Brown* case decided in 1954 had its foundation in the early cases Houston litigated: equalization of teacher salaries between white and black schools, and the admission of black students to all-white professional schools.[25] The litigation strategy in the 1930s focused efforts on equalization of pay for black and white primary school teachers, and upon higher education because Houston and the other NAACP lawyers perceived that such a strategy would make segregation more expensive. White school board officials were known to pay black teachers less than white teachers of commensurate schooling and responsibility. With respect to higher education, although most Southern states had black colleges, they did not offer professional schooling to blacks. Thus, those who wanted to further their education had to leave their home state.

The NAACP lawyers hoped to establish that such policies violated the Fourteenth Amendment Equal Protection Clause because white citizens were offered professional education, while blacks were not. Furthermore, when states established all-black professional schools, black students were denied equality of education because the new schools' facilities were unequal and/or because they were denied the opportunity to associate with their peers and future colleagues—white members of their profession. Focusing on graduate education, where the stakes were much lower, made it easier in the future to litigate the primary school cases.[26]

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23. *See, e.g.*, Edward B. McLean, Law and Civilization: The Legal Thought of Roscoe Pound (1992), and G. Edward White, Patterns of American Legal Thought (1978).
24. *See, e.g.*, Jerold Auerbach, Unequal Justice: Lawyers and Social Change in Modern America (1976). *See also* Carolene Products, Nebbia v. New York, 291 U.S. 502 (1934). "By a bare majority, the Court upheld the New York Milk Control Act of 1933, which allowed the state to set minimum wholesale and retail milk prices in an effort to sustain the dairy industry," 2 Documents of American Constitutional & Legal History 154 (Melvin Urofsky ed., Alfred A. Knopf 1989).
25. Greenberg, *supra* note 21, at 5.
26. *See* Mark Tushnet, The NAACP's Legal Strategy against Segregated Education, 1925–1950 (1987); Richard Kluger, Simple Justice: The History of *Brown v.*

Sociological jurisprudence played a significant role in the litigation strategy taken by the Legal Defense Fund in *Brown*. An appendix to their brief was a document entitled: "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement." The document included the well-known doll studies done by psychologists Kenneth and Mamie Clark. They presented black children with black and white dolls in order to gauge the effects of segregation and discrimination upon black children's self-esteem. Each child was asked various questions on how they perceived the dolls and themselves. All of the children identified with the black dolls; they described them, however, in a negative light. These findings led the Clarks to believe that African American children experienced self-hate and felt inferior to whites because they were confronted with the social realities of segregation early in life. When black children were barred from participating in the greater society, Jim Crow reinforced white supremacy. The Court used the results of the study to justify overruling *Plessy*.

As Laura Kalman notes, the sociological jurisprudence of *Brown* wrought a crisis among legal liberals. *Brown* was the hallmark of the Warren Court. It sealed the Court's reputation for liberal judicial activism. But for law professors dedicated to the process of democracy, their crisis lay in the claim that the Court was "legislating from the bench."[27] The Court accepted the sociological evidence as presented by the NAACP lawyers, finding that segregation was illegal based not upon case law, but upon modern psychological authority not known during the time of *Plessy*.[28] Herbert Wechsler's critique of the decision pointed to the crisis as it was developing: judicial review in his mind meant that a court's jurisdiction was "limited," in that judges were called upon to hear "the litigated case and to decide it in accordance with the law."[29] There was no judicial power to undertake the legislature's duties.

Gary Peller explains that Wechsler's ideas grew out of the "process theory" approach to jurisprudence that developed in the post-World War II period. Wechsler and other legal liberals like him were proponents of an efficient administrative state stemming from a legislature that determined policy by weighing competing social interests. They had once protested the tendencies of formalist justices on the Supreme Court who invalidated statutes passed for the general welfare. If legislatures could

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Board Education and Black America's Struggle for Equality (1977); *See also* cases such as: Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (A state that excluded blacks from admission to its law school violated the Equal Protection Clause, even though it provided tuition for blacks to attend law school in an adjacent state); Sipuel v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948) (The state of Oklahoma could not deny a qualified black applicant admission to its law school based upon her race); Sweatt v. Painter, 339 U.S. 629 (1950) (A Texas state law school set up for blacks did not have equal facilities to that of the white law school, in violation of the Equal Protection Clause of the Fourteenth Amendment); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (A black student admitted to the law school was segregated from the other students based upon his race).

27. Laura Kalman, The Strange Career of Legal Liberalism 1–59 (1996).
28. Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).
29. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 6 (1959).

pass "economic social welfare" legislation, they could also pass laws to regulate social interaction between races. To disagree would be hypocritical.[30]

Because Wechsler presumed that the democratic process worked well, he sounded like a formalist justice in the *Plessy* decision, in his claim "that black and female victims of social domination might simply 'choose' to see it that way" [as a badge of inferiority]. He suggested that segregation based upon distinction did not necessarily mean discrimination. Peller explains the paradox of legal liberals in the civil rights era:

> The fifties lawyers came on the scene in the midst of a rupture between old-line liberty-of-contract traditionalists and the legal realists. The traditionalists still viewed law in the formal Willistonian imagery, as a set of neutral, abstract background principles facilitating the free choice of individuals in their private, market sphere. The legal realists asserted that the abstract principles were indeterminate, and that policy judgment was inevitably necessary in order to determine the actual application of any of the principles.[31]

They walked a narrow tightrope, veering between each. Legal realists supported the efficient administrative state; yet, they hoped to evade "the most corrosive aspect of the realist message—that there was no analytically defensible way to distinguish law from politics."[32] They resolved the conflict between the two by focusing upon process; effective process would result in the best substantive determination.

But with respect to African Americans in the South, process had never been effective. Southern legislatures failed African Americans by denying them democratic participation and protection under the law. For that reason, civil rights lawyers looked to the Supreme Court for recourse. Thus, African Americans of the civil rights era hailed the men and women of the Legal Defense Fund as heroes and heroines,[33] lawyer warriors fighting on their behalf in the Supreme Court. Derrick Bell was one of them. He spoke to local communities about the effort to end legal segregation. He and his colleagues advised local attorneys on how to defend and initiate lawsuits; when it was necessary, they defended activists in court and represented them. Once African Americans were protected under the law and gained their rights, the fight to end the inequality that began with

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30. Gary Peller, *Neutral Principles in the 1950s*, 21 U. Mich. J. L. Reform 561, 564 (1988).
31. *Id*. at 567. Samuel Williston, a professor at Harvard Law School from 1890 until 1938, was among the formalists who responded to legal realism by participating in a move to find certainty in the law. Formalists founded the American Law Institute; law professors were recruited to draft treatises on the general principles of law found in their area of expertise. Williston's area was contracts; he worked on the Uniform Commercial Code section on Sales, and on the Restatement of the Law, focusing on Contracts. *See, e.g.*, Samuel Williston, Life and Law: An Autobiography (1940).
32. *Id*.
33. Although most of the Legal Defense Fund lawyers were male, there were women on their staff too. Most well known is Constance Baker Motley, who later became a judge of the Southern District in New York. *See, e.g.*, J. Clay Smith Jr., ed., Rebels in Law: Voices in History of Black Women Lawyers (1998); Constance Baker Motley, Equal Justice . . . Under Law: An Autobiography (1998).

America's slave heritage would end. Houston built up the tradition of the lawyer as activist. These lawyers inspired generations to follow.

In the same vein, the Warren Court had its own reputation in the eyes of the civil rights generation and had its own inspirational influence. As Tushnet notes, "[t]he Warren Court implemented the modern liberal agenda, enforcing norms of fair treatment and racial equality that, in their core meanings, are no longer substantially contested in American society."[34] This interpretation of the Court grew out of the *Brown* decision: "the decision invalidating segregation, culminating the first term that Warren headed the Court, established the Warren Court as a symbol of modern liberalism."[35] Although the Court took what he terms a "hands-off" approach to implementing *Brown*,[36] he argues that the Little Rock, Arkansas school desegregation crisis was resolved by *Cooper v. Aaron*,[37] a decision that only "reinforced the Court's image as a vigorous defender of racial equality . . . [T]he Court sharply criticized violent resistance to Brown and vigorously insisted that the basic desegregation ruling was the law of the land."[38]

III. Litigation: Legal Liberalism After the Civil Rights Movement

By the end of the civil rights movement in the late 1960s, legal liberals interested in judicial integrity had something in common with the political conservatives who protested against the Warren Court's brand of liberal judicial activism. These legal liberals found themselves at odds with developing trends in civil rights policy that supported expansive laws enforced by an activist court. Affirmative action policy brought them to the parting of the ways. They perceived that civil rights policy was no longer about ending inequality under the law; instead, it had become a system of spoils for people of color to gain unfair advantages over others. They asked themselves: should we stay within the civil rights coalition, or should we leave? In the eyes of those who supported expansive civil rights policies, the legal liberals who critiqued affirmative action moved toward political conservatism and supported a new formalist thinking with respect to civil rights.

This formalism contended that judicial decision-making ought to be grounded in strict adherence to neutral principles of law and procedure, not in social engineering. Formalists were interested in definitions, careful analysis

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34. Mark Tushnet, *The Warren Court as History: an Interpretation* 2, *in* The Warren Court in Historical and Political Perspective, (Mark Tushnet ed., 1993), [hereinafter *The Warren Court as History*].
35. *Id*. at 4.
36. The Supreme Court reinforced the first *Brown* decision in 349 U.S. 294 (1955). Because *Brown II* did not include a strong enforcement mechanism, historians of the case argue that the decision was weak, and only spurred massive resistance. Conservative whites in the South perceived that the decision gave them license to do whatever they wished, and they intended to resist the *Brown* desegregation mandate.
37. Cooper v. Aaron, 358 U.S. 1 (1958). Subsequent to the *Brown* decision, school officials in Little Rock, Arkansas were under court order to desegregate its schools; they did not, and another case was brought to force the officials to comply. The Supreme Court responded that *Brown* was the law as decided by the Court, that the schools must be desegregated, and that state government officials could not legally refuse to follow an order of the Court.
38. *The Warren Court as History*, *supra* note 34, at 4–5.

based upon facts and law, and in decisions narrowly tailored to the legal issues at hand. They were not interested in broadly construed readings of facts, cases, or law.

From the late 1960s through the 1980s, the trend on the Supreme Court moved away from the sociological jurisprudence approach to civil rights. Americans elected presidents who supported a new formalism in civil rights discourse. This formalism rejected liberal judicial activism aimed at social engineering. Anthony Lewis suggests a framework for understanding what was going on: judges, such as those appointed by Nixon, Ford, and Reagan,[39] were cautious. Doctrine must not be overturned on a whim, lest the Court lose its independence from the political process and judicial integrity be compromised. For that reason, they were strong supporters of the doctrine of stare decisis which proclaims that similar cases must be decided in similar fashion.

While "[it] follows logically that they should respect a precedent once established, even though they opposed the result during the process of decision,"[40] critical race theorists responded that the Justices of the Burger and Rehnquist Courts merely played lip service to respecting the precedents as decided by the Warren Court, only to whittle away at them through formalism. Derrick Bell suggested that during the Warren Court, white Americans perceived that de jure segregation compromised America's reputation abroad as a democratic society, thus the success of the desegregation cases that culminated in *Brown*.[41] However, beginning with the Burger Court, civil rights activists such as Bell noticed the development of newer trends that undermined efforts to eliminate segregation once the de jure issues had been resolved. How did the Supreme Court respond to remedies enacted to enforce equality, such as affirmative action?

In 1971, the Court set forth the standard in one of the earliest cases to determine how the Civil Rights Act would apply in hiring and promotion policies. *Griggs v. Duke Power Co.*[42] was a case in which a North Carolina power company instituted educational requirements and administered standardized tests in hiring prospective employees and in deciding upon transfers within the company. The high school diploma requirement had existed as early as 1955. However, there was no such requirement to work

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39. Warren Burger as chief justice in 1968, Lewis F. Powell and William H. Rehnquist, as associates, under Nixon. Ronald Reagan nominated some of the most notably formalist justices on the Court: Sandra Day O'Connor in 1981 and Antonin Scalia in 1986. He also made Rehnquist chief justice upon Warren Burger's retirement in 1986. George Bush nominated the justice whose candidacy garnered the most controversy: Clarence Thomas, an African American formalist on civil rights, in contrast to Thurgood Marshall, whom he replaced in 1991. Marshall was one of Houston's top students at Howard; he headed the Legal Defense Fund upon Houston's retirement in 1938 and became a member of the Supreme Court in 1967, under Lyndon B. Johnson.
40. Anthony Lewis, *Foreword* to The Burger Court: The Counter-Revolution That Wasn't viii (Vincent Blasi ed., 1983).
41. Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518–33 (1980). For further discussion, see Mary L. Dudziak, Cold War Civil Rights: Race and the Image of American Democracy (2000).
42. Griggs v. Duke Power Co., 292 F. Supp. 243 (M.D.N.C., 1968).

in the one division—the labor division—where most African Americans worked, the division which paid the least remuneration and offered the least chance for advancement. A labor division employee needed a high school diploma only if he wished to transfer from his department.

The company instituted a new policy in 1965 that required prospective hires in the labor department to pass a standardized test; employees applying for transfer to other departments had to pass two standardized tests and meet the high school diploma requirement. Those who had been employed by the company prior to 1965 to work as coal-handlers, laborers and watchmen, but who did not have high school diplomas, could transfer into other departments upon passing the tests. The trial court found that the company had a discriminatory policy of relegating African Americans to the labor division prior to 1965, but denied relief for several reasons. The Civil Rights Act of 1964 did not apply to discriminatory policies in place prior to the Act's passage; moreover, the intelligence test was a valid, non-discriminatory tool for determining skill levels among employees and prospective hires.

The Fourth Circuit Court of Appeals affirmed in part, reversed in part, and remanded.[43] It found the application of the act to be retrospective, insofar as the act could be used to remedy the effects of past discrimination. In fact, the court found that African American employees who had been hired prior to 1965 were locked into lower paying jobs, while whites hired at the same time had access to the higher paying ones. Likewise, the standardized test requirement of 1965 was problematic, since the test was used as an equivalent to holding a high school diploma and worked to the detriment of African American employees. The court found that the tests were not discriminatory in their administration and scoring. It was in agreement with the trial court that the tests were valid and did not have to be job-related to be legitimate. The court thus granted relief to the plaintiffs who had been working for the company prior to the 1965 policies but denied relief to those hired afterwards. The policy was a valid one; those who came in later were aware of the requirements they had to fulfill in order to work and advance within the company.

The plaintiffs, represented by NAACP Legal Defense Fund lawyers, successfully appealed to the Supreme Court. Civil rights lawyers celebrated the decision in which Burger "gave a broad interpretation to Title VII, the fair employment provision of the Civil Rights Act of 1964, finding the Act prohibited job qualifications that had a disparately adverse impact on covered applicants unless the requirements were shown to be closely related to job performance."[44] The statute limited an employer's ability to enact seemingly arbitrary employment standards, such as a high school diploma, which did not relate in any significant way to the level of job skill required by an employee.

But civil rights activists perceived that what the Court gave with one hand, it took with another, through formalist logic. With respect to dispa-

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43. Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir., 1970).
44. Derrick Bell, *The Burger Court's Place on the Bell Curve of Racial Jurisprudence*, *in* The Burger Court: Counter-revolution or Confirmation 57 (Bernard Schwartz, ed., 1998). *See also* Griggs v. Duke Power Co., 401 U.S. 424 (1971), *aff'd* 515 F.2d 86 (4th Cir. 1975).

rate impact determinations, plaintiffs gained relief only if they could show that an allegedly discriminatory policy had discrimination as its intent. Without intent, the policy's effects could not prove discrimination.[45] The trial court in *Washington* rejected the discrimination claims of black applicants who had been denied employment with the District of Columbia police force. In 1969, the police chief implemented new policies for recruiting police officers, which the court found increased the numbers of black police officers. The department made a systematic effort to enroll them in the police academy; thus, the court found the District of Columbia had made a good faith effort to integrate its police force.

The contention lay, however, in the use of a test developed by the Civil Service Commission and used by the department, designed to test an applicant's verbal skills and reading comprehension. The plaintiffs argued that the test did not have any relationship to job performance, but that it had an adverse impact upon black recruits. The court found that the test was directly related to job performance. Police officers needed a certain level of verbal skill and reading ability to deal with "the intricacy of police procedures, the emphasis on report writing, the need to differentiate elements of numerous offenses and legal rulings, and the subtleties of training required in behavioral sciences and related disciplines."[46]

The appellate court reversed.[47] It found that the test was not tailored specifically to police department job skill requirements, but it had a disproportionate effect upon the minority recruit's ability to gain employment with the force; forty-seven percent of blacks failed, compared to twelve percent of whites. As far as the court was concerned, the test had a positive correlation to the recruits' written exams given during a subsequent seventeen-week training period at the police academy, but there was no relationship to trainability or one's aptitude as a police officer. The Supreme Court then reversed the appellate court. It held that the test requirement had not been implemented with discrimination as its intent; everyone took the test, and it was administered fairly. The government had a right to establish standards and improve upon the skills of its police officers by making sure recruits were literate and that they would train successfully. That the District of Columbia police force had been actively seeking black recruits affirmed its good faith. Thus, race-neutral government policies that satisfied an acceptable public function could stand.

Formalist logic also lay at the heart of *Bakke*,[48] decided a few years later. Bakke was a candidate for admission to the medical school at the University of California, Davis. He applied for admission, but was rejected. He sued, claiming he had been discriminated against as a white male, because set-aside slots for students of color barred him from competing equally for a slot in the entering class. The Court said in its decision that diversity in the nation's colleges and universities was a laudable and acceptable goal, but that rigid quotas were acceptable only where the facts established there was a specific constitutional reason to do so. The

45. Wash. v. Davis, 426 U.S. 229 (1976).
46. Davis v. Wash., 348 F. Supp. 15, 17 (D.C.D.C. 1972), *rev'd*, Davis v. Wash., 512 F.2d 956 (D.C. Cir. 1975) *rev'd*, 426 U.S. 229 (1976).
47. Davis v. Wash., 512 F.2d 956 (D.C. Cir. 1975).
48. Regents of Univ. of Cal. v. Bakke, 438 U.S. 912 (1978).

use of strict quotas discriminated against white candidates such as Mr. Bakke; thus, the Davis admissions program was illegal.

Civil rights activists protested against *Bakke*. It signified a return to formalism under the Burger court, which only continued under the Rehnquist court, as in *City of Richmond v. J. A. Croson Co*.[49] In *Croson*, the city of Richmond, Virginia instituted an affirmative action program, in which a certain percentage of contracting business with the city went to minority contractors. Whenever a non-minority contractor got a job, he was required to give thirty percent of his subcontracting business to minority contractors. The city passed the ordinance based upon the general community perception that segregation and discrimination had long barred minority contractors from gaining city contracts. In a decision written by Justice O'Connor, the Court found that the ordinance was overly broad and not specifically tailored to a narrow goal. The percentage set forth was an arbitrary number, and there was no specified history of discrimination found in the industry to demonstrate the need for regulation. Use of anecdotal evidence, apparent to everyone familiar with the community's history of discrimination, was irrelevant. Sociological jurisprudence had no place in the decision.

The debate between formalism and sociological jurisprudence was a newer incarnation of one that raged during the middle part of the century over legal positivism, and whether there ought to be a role for morality in judicial decision-making. The legal realists once complained the classical formalists acted as though it was irrelevant, when it really was a significant factor that they hid behind such nebulous terms as "natural law." Formalists returned that the realist position of flexible policy interests determining legal outcomes, led to moral relativism and tolerance for fascism during the World War II era. The process theorists perceived they could protect morality in decision making by ensuring the process worked efficiently.

Formalism under the Reagan era presupposed a certain view of positivism that legal theorists had been developing since the 1960s: "It was now a theory that championed the idea that law was a system of authoritative rules and that championed a particular method to determine the content of those rules. . . . Justice William H. Rehnquist and Judge Robert H. Bork's theory of adjudication is based on a peculiar mixture of original intent and moral skepticism."[50] In their skepticism, they perceived that "adjudication could not intelligibly identify moral principles, just the majority's policies."[51] Process theory thus protected justices from having to make determinations from a moral standpoint, as formalist judges on the Supreme Court exercised judicial restraint, leaving legislation to the legislature. They would not use sociological jurisprudence to legislate from the bench.

Critical race theorists believed morality was extraordinarily important in judicial decision-making: the improvement of the condition of racial

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49. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).
50. Anthony J. Sebok, Legal Positivism in American Jurisprudence 5 (Gerald Postema ed., 1998).
51. *Id.* at 215.

minorities through the law. Hiding behind formalism was itself a moral choice, to do nothing. It amounted to a lack of understanding of the situation people of color face in American society, and was ultimately a failure to do the morally correct thing. They were suspicious that the formalist Justices on the Supreme Court were pointing a way to circumvent the Civil Rights Act of 1964 and destroy affirmative action policy. Since "policies with overtly discriminatory purposes had virtually disappeared, [they were] replaced by a vast array of race-neutral rules intended to advantage whites while excluding or greatly limiting access to blacks."[52] During the period of *Plessy*, racialist sentiment was seen as a perfectly proper means of effectuating a well-ordered society. Segregation was good and racism was not an evil. The critical race theorists found that in the contemporary period, white Americans had been persuaded that expressing one's racism was intolerable. Thus, racists became covert, and masked their tendencies in blandishments, explanations that denied racism was at the root of their behavior. In the words of liberal commentator Roger Wilkins, "Reagan's dirty little secret is that he has found a way to make racism palatable and politically potent again."[53]

Wilkins pointed to several facts. Reagan began his 1980 campaign in Philadelphia, Mississippi, the location where civil rights workers James Chaney, Anthony Goodman and Michael Schwerner were murdered in 1964. Reagan supported states' rights, the formalist proposition that the federal government ought to respect state sovereignty and eschew interference with local policy. States' rights had long been the rallying cry of Southerners' objection to national civil rights policy and the civil rights movement itself. Moreover, he supported tax exemptions for schools that discriminated on the basis of race,[54] opposed busing and affirmative action.

In the eyes of the critical race theorists, Reagan-era formalism had at its core, a racist and white supremacist agenda bent upon undermining the gains of the liberal civil rights movement. Whites benefited from superior status in society; they failed to recognize, however, the extent of their white privilege. White privilege itself was affirmative action; but they did not see it as such. Instead, they criticized affirmative action policies for people of color. Whites had the option of ignoring race, because their race was not a detriment in society. When whites failed to pay attention to the realities of race in society and argued in favor of neutrality,

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52. Bell, *supra* note 44, at 62.
53. Roger Wilkins, *Smiling Racism: Ronald Reagan's Race Policies*, Nation, Nov. 3, 1984, at 437.
54. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983), a case involving the Internal Revenue Service's decision to revoke the tax-exempt status of a Christian educational institution which prohibited its students from interracial dating. Any students doing so were expelled. The Court upheld on the grounds that the Internal Revenue Service could deny tax-exempt status to an organization whose activities were against public policy, and current public policy prohibited racial discrimination in education. Justice Rehnquist dissented from the decision written by Justice Burger, on the ground that only Congress could impose such a ban, and that the Internal Revenue Service had no such basis under the Internal Revenue Code. The United States, represented by Asst. Atty. Gen. Reynolds, argued that the IRS lacked authority to revoke Bob Jones' tax-exempt status, and sought instead to reinstate it.

they engaged in massive denial and supported the status quo that benefited them. One had to pay attention to race in order to eradicate the historical effects of race consciousness.[55] According to Jerome McCristal Culp:

> formalistic rules seldom lead to justice. The colorblind principle is such a formal rule, and the likelihood that its implementation will lead to justice is just as problematic and contingent. Adjusting color-conscious policies to reflect justice and to achieve our policy goals has the potential to alter the racial present in more appropriate ways.[56]

The critical race theorists saw Reagan's formalism take shape not only in the opinions of the Rehnquist Court during this period, but through those he appointed to chief civil rights positions. With respect to the enforcement of civil rights, "Reagan rejected the idea of a society ordered along racial lines. Instead of proportional representation and equality of results, Reagan stood for individual rights and equality of opportunity."[57] He opposed an activist government deeply involved in civil rights policy and appointed officials who shared that position. One was William Bradford Reynolds, who was in charge of the Civil Rights Division of the Department of Justice. Ending the influence of the liberal establishment that had been actively setting affirmative action policy in employment, education and voting, began with him. Born in 1942, Reynolds was a Mayflower descendant and a du Pont heir on his mother's side. His father was a patent and trademark lawyer at du Pont, and his paternal grandfather was a lawyer and judge in Tennessee. Reynolds was educated at New England private schools: Phillips Andover Academy and Yale. He attended Vanderbilt University School of Law in Tennessee. Reynolds believed that anti-discrimination meant that no one would be discriminated against because of his racial background; legal liberals, however, had turned anti-discrimination on its head to enforce government-backed racial preferences.[58]

Reynolds reined in subordinates who supported affirmative action policies. In court, he argued for a new conservative interpretation of civil rights law, a position adverse to the civil rights establishment and the law as it had been articulated by the liberal Warren Court. In his formalism, he "favored policies that were color-blind and non-discriminatory."[59] He later became active in identifying and supporting conservative judges for federal judiciary appointments, whose legal philosophy coincided with

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55. Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162–196 (1994); Charles R. Lawrence III, *The Epidemiology of Color-blindness: Learning to Think and Talk About Race, Again*, 15 B.C. Third World L.J. 1–18 (1995).
56. Culp, Jr., *supra* note 55, at 196.
57. Raymond Wolters, Right Turn: William Bradford Reynolds, the Reagan Administration and Black Civil Rights 5 (1996). *See also* Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 Rutgers L.J. 597–620 (1994).
58. Wolters, *supra* note 57, at 6–7.
59. *Id*. at 8. For further discussion of the conservative position on affirmative action, see, for example, Steven Yates, Civil Wrongs: What Went Wrong with Affirmative Action (1994).

the administration's goals. On the Supreme Court, those included Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy.[60]

Clarence Thomas wrote about his position on civil rights in an article published in honor of the 200th anniversary of the Constitution, during the fifth year of his tenure as chair of the Equal Employment Opportunity Commission. In his view, the Constitution was "color blind," notwithstanding the fact that the original Constitution, as written, included references to slavery and slave trading. Thomas was more interested in the ideals of the Constitution's framers, for example, as found in the Federalist papers. He praised Madison for admitting slavery contradicted the Constitution, when freedom provided the basis of the document: "Madison hoped that after that year [1808] the states would abolish the slave trade, as the federal government discouraged it."[61]

Political and legal conflict followed, as Southerners came to resent Northern abolitionism. In Thomas' view, the American ideal meant freedom for all, African Americans included; however, *Dred Scott* violated that principle: "the original intention of the Constitution [meant] the fulfillment of the ideals of the Declaration of Independence, as Lincoln, Frederick Douglass, and the Founders understood it."[62] Notwithstanding the failure of the early constitutional order to protect black rights, later developments brought vindication. In his view, "[i]s not the Black American's Constitution really the Bill of Rights plus the Civil War amendments and the Poll Tax amendment, which eventually struck down unjust practices and legislation affecting Blacks?"[63]

African Americans suffered when nineteenth-century politicians and judges used racist rhetoric as a basis for determining policy. In the contemporary period, Thomas thought that African American leaders ought to subscribe to a color-blind ideal and root out all race consciousness in civil rights policy, lest they use race for the same wrong-headed reason. The problem was that African Americans came to view the Constitution "simply as an efficiently functioning instrument that parcels out goods to different competing interest groups,"[64] based primarily on race. The ideals of the Constitution mattered more, as one that supported "good institutions that protect and reinforce good intentions."[65]

Thomas believed that civil rights lawyers faltered when they used arguments grounded in sociological jurisprudence: "Justice and conformity to the Constitution, not 'sensitivity,' should be the object in race rela-

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60. Wolters, *supra* note 57, at 13–14.
61. Clarence Thomas, *Toward a 'Plain Reading' of the Constitution—the Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 691, 696 (1987).
62. *Id*. at 693.
63. *Id*. at 691. In *Dred Scott v. Sanford*, Justice Taney made clear the status accorded to African Americans by the social, political and legal order of the nineteenth century. During the colonial period and at the nation's founding, subservience and enslavement defined their existence: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . ," 60 U.S. 393, 407 (1856).
64. Thomas, *supra* note 61, at 697.
65. *Id.*

tions."[66] *Plessy* and *Brown* each addressed the question of whether law and social practices influenced how African Americans perceived themselves; however, "neither opinion respects the true 'psychology' of political freedom, which rests in a view of man as the being capable of reasoning and choosing objectively."[67] Blaming slavery retarded progress, as it mired liberal thinkers in limited thinking. They did not recognize our human potential to exercise reason and excel.

The critical race theorists feared Thomas's rhetoric of freedom would entail reinforcement of white privilege, as whites argued that their freedom meant the right to maintain a status quo that protected a prevailing white superiority. Critical race theorists argued that understanding the role of neutrality in the law was important for making progress in dealing with issues of inequality, discrimination and prejudice. Because race traditionally occupied a role in determining the status of African Americans in society, the discriminatory effects of race consciousness would always remain. "Race neutrality" did not exist. Overt discrimination is easy to recognize; however, covert discrimination is harder to find; it lies in the application of rules and regulations that do not take into account the discriminatory effects of race.

The critical race theorists complained the formalists on the Supreme Court were not as concerned about historical racial realities. They did not see a connection between past experiences under slavery and Jim Crow segregation and the current situation of African Americans. The formalists argued that after the civil rights movement, race no longer mattered as a significant discriminatory force. According to their logic, American institutions reflected this new reality. When lawyers raised claims of discrimination before the Court, formalists demanded that they be specifically alleged, proven and remedied. Broad and general pronouncements and affirmative action plans were unacceptable, as the Court decided in *Bakke* and *Croson*.

Kurt Mattson suggests that *Wards Cove Packing Co. v. Atonio, Inc*.[68] took a step backward in developing employment discrimination jurisprudence. Pursuant to earlier cases, such as *Watson v. Fort Worth Bank & Trust*,[69] a plaintiff could allege discrimination under Title VII where subjective criteria were at issue in disparate impact cases, but *Wards Cove* "restricted that ruling's effect by insisting on a coupling of any statistical imbalance to a specific practice of the employer—a wider avenue, but a slower and less effective vehicle."[70] The Court erred in *Wards Cove*, however, by narrowing the necessary connection between the disputed practice and the effects: "a precise relationship between . . . statistical proof and one or more of the employer's hiring or promotion practices."[71]

In reading the majority and dissenting opinions, one can set forth an explication of formalism at work. *Wards Cove* was a class action lawsuit

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66. *Id*. at 698.
67. *Id*. at 699.
68. Wards Cove Packing Co. v. Atonio, Inc., 490 U.S. 642 (1989).
69. Watson v. Fort Worth Bank & Trust, 481 U.S. 1012 (1987).
70. Kurt Richard Mattson, *The Demise of Disparate Impact Employment Discrimination in the Rehnquist Court*, 67 N.D. L. Rev. 39, 82 (1991).
71. *Id*. at 83.

brought by non-white unskilled cannery workers who claimed that their Alaskan salmon cannery employers discriminated against them on the basis of race, insofar as the non-white workers experienced disparate treatment as a result of company policies. Primarily whites held the higher paid skilled and unskilled jobs, but non-whites held the lower paid unskilled jobs. The plaintiffs perceived that this disparity resulted from policies that favored whites: nepotism and cronyism, a preference for rehiring former employees, a failure to use objective hiring standards, and the use of different channels for finding job applicants. The living and eating quarters of the unskilled cannery workers were set apart from those of the other employees, and they were inferior. The plaintiffs filed suit in 1974; after years of litigation through the lower courts, the Supreme Court heard the case on appeal.[72]

In a majority opinion written by Justice Byron White and joined by Justices Rehnquist, O'Connor, Scalia and Kennedy, the Court ruled in favor of the canning companies, holding that the canneries did not practice intentional racial discrimination. That whites held most of the well-paying jobs did not matter, because the disparity reflected geographical and environmental conditions the company had no control over. A local union provided most of the unskilled cannery workers; others had been applicants who lived in the vicinity of the cannery. Most of them were Native Eskimo from remote parts of Alaska. White-collar workers with certain skills were not readily available in that part of the state; they came from elsewhere and were hired from Seattle.[73]

With respect to the unskilled jobs, the Court held that even though primarily whites held those jobs of "somewhat fungible" skills, there was no discrimination. There were no official barriers to nonwhite applicants, particularly since none of the plaintiffs had applied for—or would have tried for—the more desirable unskilled jobs. The method for selecting the applicants did not have a disparate impact, because the number of non-white applicants selected was not much less than the number of those nonwhites qualified to work at those jobs.[74]

Justice White admitted that nepotism in hiring and the segregation of the dormitories and eating facilities might be used to prove disparate treatment.[75] However, Justice Stevens criticized the requirement of an exact and causal relationship between specific practices and the disparate impact upon job opportunities, especially because such proof would be impossible to undertake. The Justices in the majority ignored the curative aspect of *Griggs* that required employers to modify hiring and promotion policies that reinforced discriminatory patterns, no matter how innocuous the intent might have been. Under this new standard, plaintiffs were not able to investigate the racial breakdown of a workplace to find discriminatory policies. Moreover, the decision switched the traditional burden of proof in disparate impact cases. Once the cannery companies provided evidence of business justification for their practices, the plaintiffs were

72. *Atonio*, 490 U.S. at 646–49.
73. *Id*. at 650–52.
74. *Id*. at 653.
75. *Id*. at 655 n.9.

supposed to prove that the business practices were invalid; they could also provide alternative practices which would be less discriminatory but not less efficient.[76]

Justice Stevens noticed that the trial court did not make any findings of whether any of the plaintiffs were qualified for the non-cannery jobs, particularly when various plaintiffs "testified persuasively that they were fully qualified." He found it rather suspicious that the non-cannery jobs these plaintiffs were applying for were rarely posted, that there was no opportunity for cannery workers to gain promotions into non-cannery jobs, and those who held the non-cannery jobs heard of them by word of mouth. Justice Blackmun dissented because the plaintiffs could not compare the numbers of white and nonwhite employees within the various divisions, "even where the structure of the industry in question renders any other statistical comparison meaningless," and because the decision required direct causation between practice and injury where such proof would be impossible.[77]

Civil Rights activists viewed *Wards Cove* as a blow to their efforts to end employment discrimination. They mobilized in support of a new civil rights act in the early 1990s, because the formalist Justices who wrote the majority opinion rejected the use of statistical evidence and narrowed the scope of sociological jurisprudence in Title VII employment discrimination cases. Activist efforts proved successful when Congress enacted the Civil Rights Act of 1991 after protracted struggle: the Bush administration vetoed a previous version of the bill as conservatives and representatives of corporate interests fought against "quotas." They were fearful that if plaintiffs could easily prove discrimination through analysis of the numbers, innocuous business practices would come under attack, and employers would then hire by quota in order to forestall court battles.[78]

C. Boyden Gray suggests business necessity and causation was all that remained for Congress to grapple with, because "the [Bush] administration early on agreed to shift the burden [of proof] to the defendant."[79] *Wards Cove* overruled the standard as set forth by *Griggs* and placed the burden upon plaintiffs to prove that a specific business practice caused discriminatory effects upon employment.[80] The bill as signed required plaintiffs to prove the disparate impact of each challenged practice or of the practices as a whole if they could not be separated one from each other. Direct causality was not a requirement.[81]

The *Wards Cove* plaintiffs could not cite statistics on the racial breakdown of the workforce to demonstrate that their employers' hiring practices had a disparate impact on the number of minorities hired. The de-

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76. *Id*. at 662–73.
77. *Id*. at 674.
78. *See* Glen D. Nager & Julia M. Broas, *Enforcement Issues: A Practical Overview* and C. Boyden Gray, *Disparate Impact: History and Consequences*, *in* Symposium, *The Civil Rights Act of 1991*, 54 La. L. Rev. 1473–86, 1487–1505 (1994); *see also* Robert A. Robertson, *The Civil Rights Act of 1991: Congress Provides Guidelines for Title VII Disparate Impact Cases*, 3 Geo. Mason U. Civ. Rts. L. J. 1–65 (1992).
79. Gray, *supra* note 78, at 1489.
80. *Id*. at 1487–89.
81. *Id*. at 1499.

fendant canning companies could claim that their methods for hiring workers in the different divisions made good business sense. They did not have the burden of proof; the Supreme Court left that to the plaintiffs to prove that each practice led to discrimination. Under the Civil Rights Act of 1991, the plaintiffs could prevail, upon a showing that the employment practices as a whole had a tendency to block out minority access to those jobs. The employer had to prove business necessity. Nager and Broas explain this standard as one that required an employer to prove that the practice was "job related for the position in question and consistent with business necessity."[82]

Although the new civil rights act might have offered some activists a measure of optimism, Culp was not celebrating. In his view, judges, particularly the Justices of the Supreme Court who set the standards for lower courts to follow, failed to address certain questions when adjudicating Title VII employment discrimination cases. Thus, prospects for the future looked dim. Judges presumed that cases ought to be decided in a racially neutral fashion, without any consciousness of racial issues, lest racial minorities be accorded special status under the law. For that reason, the very laws meant to benefit African Americans and end discrimination have been curtailed: "this view of law and race, blind to the history of past wrongs against black Americans and ever vigilant against future benefits toward those same citizens and their descendants, remains the chief perspective on race and the law . . . ."[83]

In the eyes of formalist justices, any attention to race was improper and illegal; the law was supposed to be color-blind. This view, however, forgot about the restorative aspects to which the law could be used: "Title VII can be effective in altering the economic position of black Americans, but its effectiveness is tied to the interpretation of that law by federal judges."[84] But judges were not asking how race issues—discrimination in the historic and contemporary period, and their effects—systemic inequalities—have impacted the status of African Americans. Instead, they were concerned about special treatment for blacks and discrimination against whites.[85] Moreover, the Supreme Court did not support measures

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82. Nager & Broas, *supra* note 78, at 1477. But note that if the plaintiff can demonstrate "the availability of a less discriminatory alternative business practice which the defendant refuses to adopt," the Act still imposes liability: Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 Ga. L. Rev. 387, 392 (1996).
83. Jerome McCristal Culp, Jr., *Neutrality, The Race Question, and the 1991 Civil Rights Act: The Impossibility of Permanent Reform*, 45 Rutgers L. Rev. 965, 978 (1993).
84. *Id*. at 970.
85. *Id*. at 971–72, McCulp's discussion of *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). He suggested that a collective bargaining agreement entered into by a local school board to protect newly hired black workers was improperly overturned by the Court. Since the agreement was entered into by a majority of the white workers and was seen by the district court as a fair compensatory measure to eradicate past discrimination, the agreement should have taken precedence. Justice Powell was concerned that innocent white workers were discriminated against. McCulp criticized the decision for ignoring the interests of the black workers who relied upon the agreement. *See also id.* at 978, Culp's critique of the *Regents of the Univ. of Cal. v. Bakke* decision, 438 U.S. 265 (1978), in which admission seats set aside for the children of

designed to encourage employers to comply with Title VII, for fear that quotas would follow: "The Court balances the concerns of employers not to be overburdened by Title VII requirements with their rights to define the rules of the work place."[86] This formalism, Culp insisted, only protected the interests of employers over that of discrimination's victims.

Kimberlé Crenshaw explained formalist civil rights doctrine and its development. Formalists looked at the gains of the civil rights movement and perceived that "the extension of formal equality to all Americans regardless of color—ha[d] already been achieved."[87] They thus viewed as wrong-headed those who proclaimed the struggle never ended. The goal of the movement was to ensure equality of the process, not necessarily equality of outcome; this view of the movement, she suggested, was a restrictive view of what the movement was supposed to have done. The formalists were the intellectual descendents of the process theorists of the 1950s.

Crenshaw adhered to an expansive view of the movement, which "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."[88] She was interested in using sociological evidence to prove that discrimination persisted. Because formalists adhered to the restrictive view, they criticized affirmative action policies as leading to "reverse discrimination," insofar as it utilized color-consciousness in the distribution of benefits within society. It was a color-consciousness that worked in the reverse of the old pattern of discrimination that once kept minorities out of the marketplace. Formalists argued that it worked to their benefit instead, as others suffered discrimination.

Since both the expansive and restrictive views of the civil rights movement agenda could coexist, antidiscrimination law and policy remained ambiguous—both camps could claim to be in favor of equal opportunity, and "societal adoption of racial equality rhetoric does not itself entail a commitment to end racial inequality."[89] But those formalists who jumped onto the color-blind/equal process bandwagon forgot a crucial fact: African Americans "had actually been treated differently historically," and "the effects of this difference in treatment continued into the present."[90]

The quandary faced by civil rights activists lay in the fact that the formal barriers to African American progress—the de jure discrimination they suffered for generations—had been removed. Because the official

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primarily (white) alumni were protected, but seats set aside for minority applicants were not.

86. *Id*. at 999. *See also,* discussion of *Watson v. Forth Worth Bank & Trust*, 487 U.S. 977, 993–98 (1988) (Justice O'Connor feared that applying disparate impact analysis and broad use of statistics to subjective and discretionary employment criteria might lead to use of quotas. Plaintiffs must identify the specific practices alleged to cause the disparity and explain the causation).
87. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1334 (1988).
88. *Id*. at 1341.
89. *Id*. at 1346.
90. *Id*. at 1345.

barriers had been torn away, it seemed as though the problems of entry had been long resolved; however, the effects of those ancient barriers remained significant. What appeared to be "an unambiguous commitment to antidiscrimination"[91] was in reality, a murky morass of competing interests, where the "conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it."[92] But since the formal barriers were gone, many thought enough had been done and did not see the need to do anything further. Among this group were those formalists who thought affirmative action was preferential treatment.

Definitions of justice and equality were no longer cut and dry from the days of *Brown*, when simple de jure discrimination was the direct cause of African Americans' inequality. By the 1980s, ideology determined the stance one took towards answering the question of just what caused racial inequality within society. Were current day inequalities between blacks and whites fueled by the effects of historical racism? At what point does one decide that the government has done all it could by removing official barriers to entry, and that henceforth, the individual is responsible for making his own way without the aid of affirmative action? The critical race theorists believed that not enough had been done, while formalists were concerned that civil rights policy placed government in the position of instituting discrimination; it ought to remove itself from social engineering.

Due to the ambiguity of rights rhetoric in the post-civil rights era, it became difficult to identify the problems of race in society. Crenshaw perceived that racism continued to thrive, but the relative success of middle class African Americans masked the existence of the problem, lending truth to the proposition that each person has the potential to succeed. The enemy was no longer a "whites only" sign; it thus became harder to organize African Americans to fight the contemporary battles, since they had different interpretations of what the real problems were. For an African American scholar like Thomas Sowell, the success of the middle class proved that the poor could do the same; racism had nothing to do with the failure of poor African Americans to thrive.

But the critical race theorists were fighting against that very integrationist ideal of the 1950s and 1960s because they thought it was a pipe dream. The liberals of that earlier period envisioned a color-blind society, where blacks and other racial groups would not be treated differently from whites just because of their skin color. They believed American society could be completely overhauled through the promise of *Brown* and the force of litigation. The civil rights protest movement as a grassroots effort coincided with the liberal trend, in that protesters engaged in an extensive battle to abrogate segregation and force compliance with the law. In the eyes of the critical race theorists, however, it was not a fully successful endeavor.

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91. *Id.* at 1348.
92. *Id*.

Once de jure segregation ended with passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the civil rights movement was in search of a new direction. Radicals counterpoised themselves against the integrationists and their white liberal allies with the rallying cry of "Black Power." They feared that integrating into white society would do no good for the greater community: "black nationalists asserted a positive and liberating role for race consciousness, as a source of community, culture, and solidarity to build upon rather than transcend."[93] And at a time when integration seemed to offer only illusory benefits to the community as a whole, black nationalism seemed to be the answer.

The mainstream could not accept such blatant race consciousness, because it seemed reminiscent of the white race consciousness that comprised the bedrock of white supremacy—racism and discrimination—in this country. The movement had been fighting so hard to undermine its influence; black race consciousness seemed to be a step in the wrong direction. It sounded just like what the white supremacists were trying to do, except that the theme was black supremacy. In the contemporary period, "[t]he reappearance and refinement of race consciousness in many critical race theory works symbolize[d] the break with the dominant civil rights discourse."[94] Critical race theory represented a nationalist trend within the legal academy.

Led by early critics of legal liberalism, including Derrick Bell, the critical race theorists carefully and consciously articulated a rhetoric of race and the law, based upon their perceptions of the role race played in determining legal status within society. They were nationalists because they did not believe the law could do anything to end racism. History was their proof; they recounted the times when people of color found that whites used the law against them. Race consciousness was their means of facing the reality of race. By using racial analysis, they could build models for using the law in a way to help people of color.

Their position as scholars of color gave them many privileges—high salaries, and a secure middle class status. But with the privileges came responsibility: dedication to the civil rights movement that defined their youth and provided the opportunities for them to become members of an educated elite. They had a responsibility to other people of color in society; shared cultural bonds as a people aware of their heritage as outsiders in American society demanded no less, for "culture serves to mediate not only political and social meaning, but also legal meaning."[95]

IV. The Falling Apart of the African American Liberal Coalition on Civil Rights

One factor significant for the rise of formalism and political conservatism lay in the breakup of the liberal African American coalition on civil rights. As civil rights leaders grappled with the question of affirmative action, some took the position that it was an invalid policy, one that replaced the evil of segregation and

93. Gary Peller, *Race Consciousness*, 1990 Duke L.J. 758, 761.
94. *Id*. at 759.
95. John O. Calmore, *Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129, 2144 (1992).

discrimination with another one, racial preferences for people of color. Those supportive of expansive civil rights policies and affirmative action within the legal academy became critical race theorists. Those who rejected affirmative action became linked to the neo-conservative political movement.

Stephen Steinberg suggests that by the time of the passage of the Voting Rights Act in 1965, "there was a growing awareness among black leaders that political rights did not go far enough to compensate for past wrongs."[96] The issue became affirmative action, and whether one thought it was an appropriate method for bringing African Americans into equality within society. Legal liberals found that affirmative action divided them, based upon their dedication to formalism, whether they believed the movement had done what it was supposed to do in removing artificial barriers to access, or whether civil rights meant putting in place machinery designed to ensure access. The conflict "was an early sign of the imminent breakup of the liberal coalition that had functioned as a bulwark of the civil rights movement. One faction would gravitate to the nascent neo-conservative movement. Another faction would remain in the liberal camp, committed in principle to both liberal reform and racial justice."[97]

Within the academy and in the world of civil rights practice, African Americans were in the midst of this breakup of the liberal coalition, as African American scholars and lawyers gravitated toward formalism and neo-conservatism, as in the case of Clarence Thomas, or toward radicalism and critical race theory, as in the case of Derrick Bell. Others just remained liberals dedicated to civil rights. The critical race theorists identified neo-conservatives like Thomas as the threat. Formalism was the dividing line.

In a period when African American intellectuals of the civil rights era were gaining a newfound visibility, because race and cultural issues were at the forefront of the minds of many, the critical race theorists were staking their claim to authenticity. Who were the real spokespeople? Scholars of color created and offered a key to understanding issues of race and empowerment at different levels of the divide. They quickly developed ideas about what tactics were useful and appropriate, especially "[o]nce the anti-discrimination laws were passed in the mid-sixties, [and] no single issue remained to mobilize the black intellectual community as a whole."[98]

Indeed, African American scholars of the post-civil rights era were free to consider what the effects of the movement had been, whether the struggle against anti-discrimination had done anything worthwhile. Many of them had been activists during the movement. If discrimination was quickly becoming a thing of the past, did race matter as much? What factors caused discrepancies between white and black achievement? Who

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96. Stephen Steinberg, Turning Back: The Retreat from Racial Justice in American Thought and Policy 109 (1995); *See also id.* at 107–08.
97. *Id*. at 112.
98. William M. Banks, Black Intellectuals: Race and Responsibility in American Life 228 (1996).

or what was responsible for the problems African Americans experienced within American society?

The radicals blamed the historical effects of American slavery, and the racism which had not ended with the Emancipation Proclamation and the Civil Rights Amendments of the Reconstruction era: "crime and violence, drug abuse, educational underperformance, and family instability all were attributed directly or indirectly to white oppression."[99] Others who were not as militant claimed that their own experiences exemplified the true reality. These scholars proclaimed that they knew about poverty and discrimination. They were once working class and poor; they grew up under the constraints of de jure segregation prior to the civil rights movement. Nonetheless, they survived and prospered.

Within the legal academy and on the bench, this less militant group became African American formalists and conservatives who proclaimed that success was possible, as long as one was willing to take initiative, work hard, and refuse to adopt a victim mentality. Each person was responsible for his own fate. The effects of slavery upon earlier generations of African Americans did not excuse the behavior of their contemporary descendants. Justice Clarence Thomas was the most influential proponent of this view of civil rights discourse. The militant radicals responded by "tout[ing] black self-help to deflect attention from white privilege and the social inequality rooted in such privilege."[100]

The critical race theorists and the neo-conservatives of the civil rights era were signs of legal liberalism's success. Both proved that through hard work and access to opportunity, African Americans could thrive within society. They became highly educated and privileged professionals. But that did not mean that all could do the same. In the view of the critical race theorists, conservatives propounded the "boot strap" approach as a remedy for societal problems, while ignoring that historical inequities and ancient patterns of discrimination had ramifications for contemporary African Americans. How could one expect a downtrodden person to pull himself up when many factors worked to keep him down? Success under those circumstances would be miraculous; those who failed should not be castigated.

Thus, Crenshaw claimed that the movement helped some more than others. According to her, "[t]he eradication of formal barriers meant more to those whose oppression was primarily symbolic than to those who suffered lasting material disadvantage."[101] Those who had economic privileges under segregation were those for whom oppression was symbolic. They were like whites of comparable backgrounds. Only racism held them back. For that reason, Crenshaw suggested that primarily middle class African Americans benefited from the movement's gains. They had the professional and educational standing to take advantage of new access to training and well-paying white-collar and professional jobs. But as for the majority who did not fit into this category, structural racism hindered their progress: "[t]he white norm, however, has not disappeared; it

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99. *Id.* at 168.
100. *Id*. at 169.
101. Crenshaw, *supra* note 87, at 1378.

has only been submerged in popular consciousness. It continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it."[102]

In Crenshaw's view, neo-conservatives blamed the alleged cultural inferiority of poor blacks to explain their failure to thrive. They did not adopt the values of the white Protestant ethic of success through hard work, delayed gratification and discipline. They did not develop the skills necessary for success, in the way members of immigrant groups have done. According to this neo-conservative view, overtly racist policies no longer exist and official barriers to entry have been removed; thus racism does not explain their failure: "any possible connection between past racial subordination and the present situation has been severed by the formal repudiation of the old race-conscious policies."[103]

Banks suggests the new debate was over the most significant factors that determined African American upward mobility: Did an individual's communal values and drive to succeed lead her to take advantage of opportunities within the greater society? Did institutional racism exist? If it did exist, what was its role in determining African American progress? Should the government provide opportunities through affirmative action? Were the new anti-discrimination laws enough? The African American liberal consensus of the civil rights movement was falling apart as neo-conservatism developed, even though liberals had the most influence in the community, and those who dared to question the prevailing liberal view faced ostracism from the mainstream.

Conservatives thought the civil rights movement and its aftermath gave African Americans the opportunity to overcome the barriers racism had placed in their way for so long. So many of the barriers had been removed that African Americans could no longer claim that race was a detriment; one's class position, determined by family background and education, was the greater determinant of success. Thomas Sowell, an African American economist, agreed. Civil rights meant that "all individuals should be treated the same under the law, regardless of their race, religion, sex or other such social categories."[104] Equal opportunity, insofar as no one would be denied a chance to compete with others, was what movement activists intended from the time of the *Brown* decision, up to the Civil Rights Act of 1964. But problems erupted when activists started promoting what he called "equality of results:" any unequal result indicated an inequality of opportunity, and no one wondered what caused it. They only wanted to raise "the less fortunate to their just position."[105]

Affirmative action thus meant that those who once protested vehemently against discrimination would be "judged with regard to their group membership, receiving preferential or compensatory treatment in some cases to achieve a more proportional 'representation' in various institutions and occupations."[106] They were using the same arguments they had once used to dismantle segregation and force integration. Family

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102. *Id*. at 1379.
103. *Id.*
104. Thomas Sowell, Civil Rights: Rhetoric or Reality 37 (1984).
105. *Id*. at 42.
106. *Id*. at 38.

background within a cultural heritage that promoted a strong work ethic had a greater effect upon one's ambition and ability.

Harold Cruse presaged the significance of this struggle in the late 1960s. Black nationalists wanted "black power," and revolutionaries were arguing that African Americans should get that power by force and violence if necessary. The legal approach to civil rights became ineffective due to whites' violent resistance to integration. Litigation, protest and civil disobedience did nothing to change the structure of American society and uproot the effects of slavery, segregation and discrimination. Hope lay in attempting the revolutionary approach of the African liberation movements and the communists in Cuba. But Cruse perceived that revolutionary tactics would not work in this country. The American Dream enthralled too many, because the leaders of protest movements were middle class, or had aspirations for upward mobility. They were not true revolutionaries seeking to overturn society. Their only complaint lay in how society's rules applied to them:

> Effective social movements require educated people with knowledge and technical skills which the proletariat, or the masses, do not possess. It is only the educated, trained, and technically-qualified who can deal directly with the state apparatus. In America, when members of the masses acquire education and skills, they cease, forthwith, to be proletarians.[107]

The debate that Cruse described is one that existed among African Americans throughout the twentieth century. In the early twentieth century the debate was between accommodation and protest. Put simply, Booker T. Washington eschewed political participation, advocating self-help, vocational training and the cultivation of values, while the Dubois camp favored the development of a well-educated elite trained to fight for civil rights. Those in the Dubois camp led the struggle for civil rights in the courts, once politics failed them. Thus, Dubois was a founding member of the NAACP in the early 1900s, when blacks were fighting the white Southerners who used the political system to deny civil rights.[108]

In a period of increasing social and political conservatism, the debate between the African American neo-conservatives and critical race theorists was similar to that between the Dubois and Washington camps at the turn of the century. Highly educated African American academics wondered about the way they should go. Both groups believed in upward mobility for people of color. Both believed that people of color should make it into the mainstream. The differences lay in the approach they believed should be taken. The neo-conservatives wondered how individual and community values might cooperate in the struggle for upward mobility. Had the community failed to inculcate the right values in its most

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107. Harold Cruse, The Crisis of the Negro Intellectual: From its Origins to the Present 378–79, 544–65 (1967). For further discussion of black nationalism and black power, see, for example, Robert L. Allen, A Guide to Black Power in America: An Historical Analysis (1970); William L. Van Deburg, ed., Modern Black Nationalism: From Marcus Garvey to Louis Farrakhan (1997).

108. *See* Black Protest Thought in the Twentieth Century xix–lxiii (August Meier et al. eds., Bobbs Merrill Educational Publ'g 2d ed. 1980) (1971).

downtrodden members? Did race still matter? Was racism still a potent force? The critical race theorists responded that the neo-conservatives were naive and out of touch with racial reality. Race consciousness was the answer, when the risks of discrimination were great, since white Americans maintained their prejudices against black people.

Although the critical race theorists were arguably highly educated insiders within the legal academy, they identified themselves as outsiders more in touch with the issues facing people of color at the bottom of society. They pointed to their attempts to keep the movement alive, when it seemed to be dead in the face of formalist onslaughts from white conservatives and the people of color allied with them. They defined themselves as victims within the legal academy who were suffering too, notwithstanding their privileges. Their status did not shield them from racism, and attacks against affirmative action affected them too. The critical race theorists attempted to establish a moral high ground on civil rights and validated the suspicions of Africans Americans wary of Republicans who seemed to use conservative theory as a mask for overt racism. The neo-conservative ideology threatened to bring back the days of Jim Crow segregation and violence.

The critical race theorists accused their adversaries of becoming complacent about racism. African American neo-conservatives in the academy and on the bench were comfortable in the privileges they had gained from the civil rights movement. They acted as though they did not see the society around them. Because they were blind to racial reality, they did the unconscionable. They provided a mouthpiece for conservative whites eager to find a person of color to validate their racist theories. They consorted with the enemy, to the detriment of people of color nationwide who were at risk from conservative onslaughts against civil rights. They became formalists who twisted civil rights rhetoric to the detriment of their communities.

Both the neo-conservatives and the critical race theorists had been legal liberals interested in using the law to effect societal change; each eventually became critical of it, but for different reasons. The neo-conservatives claimed legal liberalism as it developed through affirmative action led to more racism. The critical race theorists complained that legal liberalism became vulnerable to political machinations on the Supreme Court. In the previous century, the legal system limited the effects of political changes wrought during Reconstruction. But in the mid-twentieth-century, new approaches to jurisprudence seemed to signal that the legal system would always uphold African Americans' legal and political rights where it had once seemed impossible. By the 1990s, the conservatives proved that was not the case, as formalism staked its claim upon civil rights law.

Radical legal scholars of color, such as Derrick Bell, who saw formalism gain headway upon the end of the movement, argued the continuing salience of race. They were part of the politically mediated black middle class; they also perceived that racism was not over, because race consciousness persisted. Just because the Supreme Court and Congress said discrimination was illegal did not mean it died. Political, social, and cultural events of the day proved that integration had not worked. Racism and race-consciousness remained a significant factor in determining Afri-

can American status in society; liberal judicial activism did not change anything at all.

V. Storytelling: Derrick Bell, From Legal Liberal to Critical Race Theory Trailblazer

Derrick Bell is a crucial figure for understanding the development of critical race theory from the 1970s through the 1990s. Initially a legal liberal, he was an attorney with the NAACP Legal Defense Fund in the 1950s to the 1960s. In 1969, he became one of the first African American law professors at a mainstream law school, when he joined the faculty at Harvard Law School. During the 1970s, he began a critique of legal liberalism and civil rights formalism in response to their failures to live up to the promises of the civil rights movement. His writings and unorthodox approach to civil rights scholarship formed the basis for critical race theory in the 1980s. He was the first of the critical race theorists to use storytelling in the revolt against formalism in civil rights. As a professor, he was a colleague and mentor to other critical race theorists, particularly those who were students of his at Harvard, such as Kimberlé Williams Crenshaw and Patricia Williams.

Affirmative action opened up African American access to elite institutions of higher education. Thus, more and more African American scholars started teaching at white colleges and universities in the 1970s. Matriculating at well-known colleges and universities, earning undergraduate, graduate, and professional degrees, gave African Americans skills that they took into high-paying jobs in the public and private sectors and in universities. At the same time, African American militant students led the struggle to bring an African American perspective into the academy. African American students were attending white universities in greater numbers; they demanded professors who could teach the African American experience and provide mentoring: "Black students regarded personal counseling, advocacy, political advice and cultural invigoration as essential to the black academic's role."[109] On the other hand, African American faculty added diversity, especially when they were interested in topics related to race and its role in society. They contributed a valuable presence through their research. They helped the mainstream society become aware of what the problems were within the African American community and offered solutions.

Derrick Bell was one of those scholars. He credits Rev. Martin Luther King, Jr.'s death in 1968 with making law teaching an option available to him. Although he had been interested in switching from law practice to academia prior to this, his earlier attempts were fruitless. Few African Americans had ever taught at a white law school; beyond that, he did not have the traditional credentials law schools looked for when seeking prospective hires. He had not graduated from a major law school and did not serve as a judicial clerk to a Supreme Court justice. Almost ten years of law practice were irrelevant; what mattered most to hiring committees

109. William M. Banks, Black Intellectuals: Race and Responsibility in American Life 174 (1996).

was what he had done as a law school student in the 1950s, not what he did as a licensed attorney litigating major civil rights cases in the 1960s.[110]

By 1968, however, things changed. King had been assassinated, and urban unrest followed: "the message most policy-makers gained from King's death and the urban insurrections that followed it was that there had been too little change in patterns of employment and education."[111] African Americans wanted jobs and opportunities; they wanted to be a part of the greater society. The *Brown v. Board of Education* decisions[112] and the Civil Rights Act of 1964[113] provided the impetus; now was the time to effect real change. But Bell considered the changes insignificant. Hiring a few African Americans was seen as progress; but those "who felt the deepest despair," those with no opportunities, and no skills in the face of unemployment, did not experience the benefits.[114]

Nonetheless, granting some African Americans access to power and opportunities was supposed to diffuse the threat of urban unrest. An African American presence at the nation's elite law schools also satisfied the desires of young African American law students to have faculty members who could address their concerns. In early 1969, various law schools started to become interested in Bell, and he began teaching at Harvard that spring. His civil rights background made him appealing. He "viewed teaching as an opportunity to continue [his] civil rights work in a new arena."[115] He developed a new class on civil rights entitled "Race, Racism and American Law," and became a mentor to African American students. He was a pioneer.

When Bell began teaching at Harvard, "Race, Racism and American Law" was one of his first classes. The course packet of photocopied materials was the basis of the casebook he wrote and published at a later date.[116] In putting together his materials for the class, Bell drew heavily upon his experiences as a civil rights lawyer. Equally important were the current events within American society and in the civil rights community that led activists to question the worth of civil rights litigation in the struggle for African American rights. These influences determined what materials Bell assigned, how he taught the class, the assignments he gave his students, and the lessons his students learned. His classes on civil rights law and practice were legendary and drew students who were at Harvard in the 1970s and 1980s. These classes became the foundation from which Bell's protégés, law students such as Patricia Williams and Kimberlé Crenshaw, built their developing critique of civil rights policy and strategies. Lani Guinier, who matriculated at Yale and earned her undergraduate degree at Harvard, was not one of his law students. But Bell

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110. *See* Derrick Bell, Confronting Authority: Reflections of an Ardent Protester 29–31 (1994).
111. *Id*. at 32.
112. 347 U.S. 483 (1954); 349 U.S. 294 (1955).
113. 42 U.S.C. § 2000 (1964).
114. Bell, *supra* note 110, at 33.
115. *Id*. at 34.
116. Derrick A. Bell, Race, Racism and American Law (1973); the following subsequent editions were also released: 2d ed., 1980; 3d ed., 1992; 4th ed., 2000.

advised her, nonetheless.[117] Bell's students felt inspired by his textbook on racism and American law.

On the first page of the textbook was the famous photograph of African American athletes Thomas Smith and John Carlos raising their fists in the black power salute while accepting their medals at the 1968 Summer Olympics in Mexico City. Bell interpreted the event in a poem he appended, which discussed the significance of the fact that they did it during the playing of the American national anthem. The athletes were black men who won awards in the name of a nation who would have preferred that its international representatives be white. But since they were not, their achievements were lauded, while they themselves were neglected. They, in their "simple gesture . . . Symbolize a people whose patience With exploitation will expire with The dignity and certainty With which it has been endured . . . Too long."[118]

Twenty years later, that picture would be made available to students in the form of the "Bell Commemorative Poster." It celebrated his activism, placing him in the ranks of "those who throughout America's history have risked its wrath to protest its faults."[119] The profits were given to various non-profit projects, including a fund for student fellowships at the law school and the United Negro College Fund. For the students and younger scholars who were to become part of the critical race theory vanguard, Bell was the one they gravitated toward for mentoring: "the Smith-Carlos photograph . . . suggested a link between his work and the Black Power movements . . . whose political insights and aspirations went far beyond what could be articulated in the reigning language of the legal profession and the legal studies [they] were pursuing."[120]

Bell's casebook demonstrates fully how his background as a civil rights advocate colored his teaching philosophy. He saw himself as an instructor of future activist lawyers who were interested in learning about how African American civil rights were treated by the American judiciary of past eras, and who wondered "what factors prevent[ed] civil rights laws from being more vigorously enforced"[121] in the contemporary period. His students were budding lawyers who were "attempting to solve

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117. In the early 1980s, Bell cautioned Guinier against working for the Justice Department: "Lani, you need to get out and travel through the South. You will learn how to be a lawyer if you stay at Justice, but you won't learn how to be a civil rights advocate. Justice Department lawyers know their craft. They are superb technicians. But they are also anonymous bureaucrats who rarely learn from the people with whom they work . . . ."; Guinier took his advice; Jack Greenberg, director-counsel of the NAACP, hired her in 1981. She worked on voting rights issues; it became her area of expertise. Lani Guinier, Lift Every Voice: Turning a Civil Rights Setback into a New Vision of Social Justice 70–71 (1998). Ms. Guinier is currently the only African American female law professor at Harvard University. In 1993 President Clinton nominated her to be Assistant Attorney General for Civil Rights at the Department of Justice, but retreated in response to conservative attacks that Ms. Guinier supported the use of quotas in affirmative action.
118. Bell, *supra* note 116, at iv.
119. Derrick Bell, Advertisement, Harv. L. Rec., Nov. 22, 1991, at 12.
120. Critical Race Theory: The Key Writings that Formed the Movement xix–xx (Kimberlé Crenshaw, et al. eds., 1995).
121. Derrick Bell, Jr., "Race Racism and American Law," Harvard Law School, 1973, iii. (on file with author)

problems and fashion legal remedies for black clients, who, having won the symbols, [sought] now the substance of equal opportunity."[122] They collaborated with their colleagues in the class; together, they wrote briefs and judicial opinions in resolution of hypothetical problems Bell posed to them. They discovered through their work, "a sense of what can be expected from the courts or other government bodies when racial minorities seek redress of grievances resulting from racist policies."[123]

The class provided Bell an opportunity to work out a problem that nagged at him: whether the law could really do anything to resolve racism. At this stage, he wondered how activist lawyers would fulfill their responsibilities to their communities in the future. He imagined that they would all learn together: "by organizing this course so that each student obtains maximum opportunity to participate both as student and teacher, perhaps we will gain new insight into the meaning and role of law in forthcoming racial confrontations."[124]

Although Bell was uncertain at this juncture, within ten years, he had found greater certainty. The law never solved anything—attempts to go beyond mere symbolism were fruitless. Racism always played a role in the fate of African Americans under the law; current efforts for redress remained a long battle, where activists saw that progress was not always uphill. It was interspersed with backward steps, stalemates and digression. By the 1980s, Bell feared for the future and thought legal institutions had been useless in the struggle. But in the early 1970s, he was cautious; he perceived that his students would eventually learn, through law practice and advocacy, just what the limits were. Bell was aware of the failures of the past and the struggles of the present; nonetheless, he perceived there was still some hope, as his young activists marched ahead and continued from where his generation ended.

Bell began formulating ideas about voice analysis in interpreting and analyzing civil rights cases. Voice analysis would become a crucial tool for critical race theory storytelling a decade or so later, and it was grounded in sociological jurisprudence. He included within his casebook numerous non-legal sources, because "other professionals, psychologists, psychiatrists, and historians, are able to convey a far keener, clearer view of the racism that permeates our society than do lawyers and legal writers. And any number of black writers, although without advanced degrees, possess this ability,"[125] including such writers as Eldridge Cleaver and Malcolm X. Lawyers and traditional legal scholars were too caught up in "legalese" to ever understand why one's voice mattered: they were interested in "the citation to a controlling case-in-point, the reference to an appropriate statute, and a tight, analytically-sound argument that [was] as devoid as possible of any reference to the political, sociological and psychological pressures that [would] likely play a major part in the decision of the case."[126]

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122. *Id*.
123. *Id*. at vi.
124. *Id*. at v.
125. *Id*.
126. *Id.*

Reliance upon traditional views of the "rule of law" masked important factors that mattered in the resolution of civil rights cases. In this instance, Bell was concerned about white race consciousness and the limits of prescribed legal doctrine. The voices of activists interpreting the role of race and the law were paramount. These individuals brought to the table the voices of those who had been traditionally silenced or ignored, in the search for objective standards, the "rule of law."

African American history provided Bell's best evidence of the silencing phenomenon. America's slave heritage defined the African American experience for all eternity. Slavery promoted the self-interest of whites and propagated the racism which aided the country's growth and development. Unpaid slave labor made slaveholders rich. Thus, slave-holding whites and their allies willingly demanded and fought for their rights as free men, but their freedom was predicated upon "the suppression of those rights for blacks, free and slave, living in their midst."[127]

Slavery built the Southern agricultural economy and provided lucrative revenues to Northerners who shipped slaves and goods produced by slave labor. The Founding Fathers were, in Bell's opinion, overly enamored of protecting their rights in private property; for that reason, they built a political and economic order reflective of their interests. The legal order reinforced those interests in property; as a result, whenever slaves sought their freedom through litigation, courts "almost uniformly favored the 'peculiar institution' and gave precedence to the interests of slave owners." [128] *Dred Scott v. Sanford*[129] was the perfect example. Justice Taney made clear the status accorded to African Americans by the social, political and legal orders of the day. During the colonial period and at the nation's founding, subservience and enslavement defined their existence.

Although legal liberals argued that Taney's attitude toward blacks had long since been rejected, Bell perceived that those propensities pointed to a historical reality that had not died within American legal history. Bell cautioned that those who proclaimed that the Supreme Court had grown beyond the racist constraints of the nineteenth century to become the most supportive advocate of black rights should remember the past. The patterns of earlier times were repeating themselves. He conceded that during the period when Earl Warren and Warren Burger served as Chief Justices of the United States Supreme Court, the Court "[was] much more supportive of blacks seeking racial justice than any of their predecessors."[130] However, the contemporary Supreme Court under Rehnquist was busy turning back the clock and denying blacks protection under the law, in the same way the Taney court denied blacks protection more than a century ago.

Because liberals believed in progress, they perceived that twentieth-century history proved that African American status was promoted because of changes in the law. As a result, they limited slavery and its effect to an older time and denied the contemporary relevance of *Dred Scott*.

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127. *Id.* at 48; *See also id.* at 2.
128. *Id*. at 64; *See also id.* at 51, 57.
129. Dred Scott v. Sanford, 60 U.S. 393 (1856).
130. Bell, *supra* note 44, at 58.

They believed that American society had surmounted the barriers of the past that darkened earlier stages of its history; since then, a new era had dawned to overshadow the past and enlighten the present. And when liberals or conservatives opposed affirmative action, they perceived that no one was to blame for present circumstances, because all the actors of the past were dead, and there was no need for reparations. No one in the current era had any moral responsibility for America's ancient heritage.[131]

For that reason, African Americans' reliance on the law proved foolhardy in the long run; the Supreme Court was not going to enforce any moral obligation upon contemporary whites to remedy the effects of the past, although blacks had once placed great hope in the Warren Court. Indeed, for liberals of the civil rights era, the Warren court was, in the words of Laura Kalman, "the glory days." Liberals celebrated an activist state involved in eradicating the evils of society and balancing conditions for the sake of fairness. The courts were their tool for enforcing this social vision.[132]

Nonetheless, something was missing: the Supreme Court under Warren and Burger implemented form over substance. The Court "was far more ready to invalidate overtly discriminatory policies that ended indefensible restrictions on the rights of blacks than it was willing to tackle the more subtle rules that do not create blatant racial classifications but in their racist administration are as pernicious as the most flagrant Jim Crow signs."[133] Thus, the Court held that de jure segregation in the public schools was unconstitutional, but set forth an "all deliberate speed" requirement that did nothing but encourage stonewalling. By the 1970s, de facto segregation persisted, even though de jure segregation ended: "when policies under review were not so blatant as to embarrass whites as well as discriminate against blacks," ostensibly race-neutral rules gave advantages to whites over blacks.[134]

Bell explained that the Supreme Court decided to overturn *Plessy v. Ferguson* and end official court-sanctioned segregation in *Brown*, because it was in a unique position to make a statement to the country and to the world about America's commitment to racial equality. Segregation was an embarrassment, not only to individual whites who believed racial inequality to be immoral, but to "those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation."[135] The Court could make a moral statement to benefit blacks, but with little sacrifice to whites. White and black interests converged in *Brown*, according to Bell's formula for understanding the relationship between black people and the greater society under the law, in that blacks took the moral high ground and persuaded whites that discrimination was wrong. But they received little more than uplifting rhetoric and unenforceable remedies: "the morality

131. Bell, *supra* note 121, at 105.
132. Kalman, *supra* note 27, at 42–43.
133. Bell, *supra* note 44, at 58.
134. *Id*. at 62.
135. Bell, *supra* note 41, at 524.

does exist, but it is a minor concern to the dominant force which is the preservation and furtherance of majority interests and welfare."[136]

And yet, this most celebrated decision of the civil rights era failed to address the true interests of African Americans. *Brown* was supposed to end segregation under the law and open up a society that had been closed to African Americans. No longer would African Americans be defined as second-class citizens; instead, they would be seen as true inheritors of America's birthright of freedom and equality for all. But that did not happen, as African American intellectuals of the post-civil rights era discovered. In the words of Robert L. Carter, former general counsel of the NAACP Legal Defense Fund, who was on the team arguing the *Brown* cases before the Supreme Court: "the holding that the segregation of blacks in the nation's public schools [was] a denial of the Constitution's command implie[d] that all racial segregation in American public life [was] invalid—that all racial discrimination sponsored, supported, or encouraged by government [was] unconstitutional."[137]

Later school desegregation cases[138] demonstrated that the Court would protect black interests but only to the point that they did not sacrifice elite white interests or those of other whites. Bell found evidence of this trend during the Reconstruction and Progressive eras of the late nineteenth century. In the twenty years subsequent to the end of the Civil War, Bell noticed that the Supreme Court "became in these decades the major protector of propertied interests. Courts formulated due process and freedom of contract doctrine to shield business from state regulation, [deny] rights to labor, [outlaw] the federal income tax, and [water] down the Sherman Anti-trust laws."[139] In this period, the justices of the Supreme Court were bent upon preserving the interests of an elite that was fearful of populism and black political power: "the courts were the espousers of conservative sentiment. Though eager to countermand state regulation in the economic realm, the justices were satisfied to leave state regulation of race relations untrammeled during those years."[140]

The controversy over affirmative action was simply an example of interest-convergence debate. In seeking to rectify the harm that African Americans experienced throughout their history of discrimination, the issues have been modified to incorporate "the cost to whites of racial remedies rather than on the necessity of relief for minorities,"[141] a debate for discussion within the white community only. Under those circumstances, Bell theorized: "the interest of blacks in achieving racial equality

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136. Bell, *supra* note 121, at 103.
137. Robert L. Carter, *The Warren Court and Desegregation*, 67 Mich. L. Rev. 237, 246 (1968).
138. Bell, *supra* note 41, at 526. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (Chief Justice Burger spoke of the "reconciliation of competing values" in desegregation cases); Milliken v. Bradley, 418 U.S. 717 (1974) (limited power of federal courts to treat a primarily black urban school district and largely white suburban districts as a single unit in mandating desegregation).
139. Derrick Bell, *The Racial Imperative in American Law*, *in* The Age of Segregation: Race Relations in the South, 1890–1945 8 (Robert Haws ed., 1978).
140. *Id*. Bell is referring here to the following decisions: The Civil Rights Cases, 109 U.S. 3 (1883), and Plessy v. Ferguson, 163 U.S. 537 (1896).
141. Derrick Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 Cal. L. Rev. 3, 4 (1979). *See also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

will be accommodated only when it converges with the interests of whites . . . . The fourteenth amendment . . . will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites."[142]

For example, in *Bakke* the Court held that the Davis medical school affirmative action plan was illegal, because it set aside specific seats for minorities in a separate admissions system that precluded whites from competing for those seats. *Bakke* demonstrated that the Court was interested in placating whites who complained that they suffered because of affirmative action. African Americans' legitimate interest in redress was ignored; instead, they became the scapegoat, the enemy, when in reality the enemy was the privileged few who benefited from class and race privilege, such as the children of elites who are regularly admitted to their parents' colleges and universities.

The affirmative action question united whites to sacrifice black interests. Bell argued that when conservative white elite privilege is protected, it deflects anger onto unprivileged people of color and prevents white class warfare. Elite whites thus keep the "goodies" for themselves. Because white racial privilege promises poorer whites the possibility of upward mobility, they gain a stake in the system. For that reason, they are fooled into seeing people of color as the enemy.

Bell complained that the Regents took the *Bakke* case to the Supreme Court over the protests of minority rights groups throughout the country. Amicus curiae briefs filed by such groups as the National Conference of Black Lawyers suggested that the lower court records had been inadequately prepared, "on the pleadings, declarations, interrogatories, and the deposition of the Davis medical school admissions officer."[143] Thus, the real parties in interest, presumably minorities who gained entrance to the medical school under affirmative action, or those seeking admission, did not contribute to the official debate in the courts; no minority interests were represented by any of the parties to the litigation.

As a result of these shortcomings, the Court never learned about allegations of past and present discrimination within the California school system, or about past patterns of discrimination engaged in by the Davis medical school admissions officers. Moreover, the Medical College Admission Test taken by all applicants did not adequately predict performance in medical school. For those reasons, the Davis medical school admissions officers were justified in implementing an affirmative action policy.[144] The past patterns of discrimination amounted, in effect, to a quota system in favor of white applicants; affirmative action only rectified past discriminatory patterns: "the Framers struggled over whether slavery should be legitimized under the new government's fundamental law, [but] those who would be the victims of provisions that recognized and protected the 'peculiar institution' were neither represented nor heard."[145]

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142. Bell, *supra* note 41, at 523.
143. Bell, *supra* note 141, at 5.
144. *Id*. at 6.
145. *Id.* at 7.

Because of interest-convergence, Bell wondered throughout the 1980s whether school desegregation, the mandate of *Brown*, had been worthwhile after all. In the thirty years since the Warren Court handed down the decision, "the statistical scorecard" left no room for optimism. He reasoned that although the dual system of education no longer existed, integration of Southern schools took place primarily after 1972. But, "in recent years, the South has become slightly more segregated. School boards in several areas are in court trying to eliminate busing and other school desegregation procedures."[146]

The problems ran even deeper, however. Intense residential segregation compounded the situation, because in black poverty-stricken neighborhoods, "effective education" mattered most, but facilities were inadequate. There did not seem to be any solutions to the problem. Civil rights advocates still insisted that the *Brown* mandate ought to be followed through by full integration of school facilities; however, in the 1970s, the Burger Court rejected remedies that might have permitted such a solution.

The Supreme Court rejected metropolitan-wide school desegregation remedies in *Milliken v. Bradley*.[147] Moreover, school boards could only be held liable and responsible for desegregation provided the school officials had "intentionally segregated the schools in order to discriminate invidiously against minority children."[148] Suburban school districts would not be ordered to participate in urban public school districts' desegregation efforts. To do so would destroy the tradition of local autonomy over schools, placing district courts in an unreasonable administrative position they had no capacity to handle.

Bell was adamant: strict racial balance was the "suicidal strategy" engaged in by civil rights activists. The Supreme Court was more interested in "weighing the interests of racial balance remedies asserted by civil rights lawyers on behalf of minority children against the interests of white children and their parents in attending public schools of their selection."[149] The activists were acting as though segregation, ipso facto, was the symptom of massive resistance the movement fought in the early period subsequent to *Brown*. Segregation exposed white Southerners' crafty intransigence, as seen for example, in *Green v. County School Board of New Kent County*,[150] where "freedom of choice plans" designed to perpetuate the dual system of education and resist desegregation were unconstitutional. However, in the contemporary period, "there [were] no de jure segregated school systems in the overt, pre-1954 sense."[151] For that reason, forcing integration made no sense.

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146. Derrick Bell, *Learning from our Losses: Is School Desegregation Still Feasible in the 1980s?*, 64 Phi Delta Kappan 572 (Apr. 1983).
147. Milliken v. Bradley, 418 U.S. 717 (1974).
148. Derrick Bell, *Civil Rights Commitment and the Challenge of Changing Conditions in Urban School Cases*, *in* Race and Schooling in the City 196 (Adam Yarmolinsky et al. eds., 1981).
149. *Id*.
150. Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968).
151. *Id*. at 200.

The activists were fighting a battle where there was no easily identifiable enemy. Granted, when Northern schools had no pattern of de jure segregation but engaged in de facto discrimination, the Supreme Court was willing to force desegregation;[152] however, could school boards be blamed for segregation when residential patterns determined school attendance patterns? Should parents be forced to send their children to schools outside of their community, all in the name of integration? The Court answered in the negative. Forcing desegregation through busing seemed to be an extraordinary remedy, when school boards were not culpable for segregation. Moreover, busing placed an unreasonable burden upon parents who did not want civil rights litigators and courts to determine where their children would attend school. The "integration at all costs" strategy forced black parents to support strategies they did not subscribe to: "it is the school board that asserts substantive, educationally rational decisions for not racially balancing their schools, while plaintiffs increasingly must take the position that racial balance is necessary even if expensive, disruptive, educationally nonproductive and temporary."[153]

Activists did not consider just what the real issues were. Instead, they focused on the form of remedy, not the substance of the problems signified by segregated schools. Notwithstanding integration, black children still suffered: "the real evil was and is the persistent pattern of giving priority to the needs and interests of whites in a school system without regard to whether such a priority pattern disadvantages blacks . . . . Equally damaging is the exclusion of nonwhites from meaningful involvement in school policymaking . . . ."[154] In schools that are predominantly white, the parents of black schoolchildren are not in the majority in determining policy; their interests are not represented. The administration is white, and they determine policy based upon their own perceptions and needs. He charged that administrators did not consider "Black children's needs when personnel [were] selected, curriculum [was] chosen, or cultural values [were] exhibited."[155]

Civil rights lawyers were too formalistic in their approach to the law and in their use of legal precedent. They acted as though "even the attaining of academic skills [was] worthless unless those skills [were] acquired in the presence of white students."[156] This attitude demonstrated that "*Brown v. Board of Education* has been so constricted even by advocates that its goal—equal educational opportunity—is rendered inaccessible, even unwanted, unless it can be obtained through racial balancing of the school population."[157] They forgot the real issue in the *Brown* cases: how to end the dual system of education which forced an inferior learning environment upon African American children and prevented them from reaching their true potential. Thus, instead of focusing upon inte-

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152. Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189 (1973).
153. *Id.*
154. Derrick Bell, *Defining Brown's Integration Remedy for Urban School Systems*, *in* New Perspectives on School Integration, 28–29 (Murray Friedman et al. eds., 1979).
155. Derrick Bell, *The Remedy in Brown is Effective Schooling for Black Children*, 15 Social Policy 8, 9 (Fall 1984).
156. Bell, *supra* note 154, at 24.
157. *Id.*

grating African American children into white schools, their lawyers should have focused upon equalizing conditions between white and black schools: "forgotten in the turmoil were the Black schools and their administrators, who, despite the disadvantages of the 'separate but equal' era, had . . . developed public schools of high quality."[158]

Civil rights lawyers saw majority-black schools and categorized them as inferior and emblematic of segregationist evil. As the dual system of education became dismantled in the South, African American schoolchildren attended schools that once permitted only white children to attend. Black teachers and administrators were dismissed or demoted, as the Court permitted in *Swann v. Charlotte-Mecklenburg Board of Education.*[159] Because civil rights lawyers had limited vision, their litigation strategy resulted in the closing of all-black schools; the community lost an important institution as a result. With full integration and the end of the ostensible evil—*de jure* segregation in all-black schools—the problems should have been resolved. But they persisted.

Thus, although *Brown* was grounded in sociological jurisprudence, it was of the wrong type, and the implementation strategy ignored social realities as they were developing in the period subsequent to the decision. It was fine that civil rights lawyers carefully documented evidence explaining the disparities between black and white schools; however, they should have focused upon gaining resources for black schools. The civil rights lawyers used a wrong-headed strategy that did not benefit the community in the end.

With the sharper turn to formalist jurisprudence during the Rehnquist Court, one commentator argued that *Brown* was wrongly decided. By trying to equalize education through the formalist remedy of integration, civil rights lawyers left black schools vulnerable to dismantling, as Bell suggested. But under a formalist regime, they became even more vulnerable as the Supreme Court made the dismantling of African American institutions official policy. Pointing to *United States v. Fordice*,

> the Supreme Court found de facto discrimination in Mississippi's post-secondary educational system, but rejected an effort by African American plaintiffs to obtain funding for publicly supported historical black colleges and universities equal to that afforded Mississippi's historically white colleges. As a result of *Fordice*, it appears that these historically black colleges will be merged into Mississippi's white colleges, all under the guise of "integration."[160]

In analyzing the problem of forcing compliance with *Brown* in an era in which it seemed less and less feasible, Bell identified the problem as one rooted in the vision of civil rights lawyers coming into conflict with their clients' interests. It led him to ask several questions. Who was "the client" in school desegregation litigation? Since civil rights lawyers brought the cases as class action suits, who comprised the "class?" Did

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158. Bell, *supra* note 155, at 11.
159. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
160. Alex M. Johnson, *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 Cal. L. Rev. 1401, 1402 (1993). *See also* United States v. Fordice, 505 U.S. 717 (1992).

class action practice adequately represent all class interests? How might civil rights lawyers negotiate policy issues in litigation among clients, constituencies, and directors of national civil rights organizations? Might civil rights litigation practice demand that attorneys adhere to stricter ethics rules than those required of the American Bar Association Model Code of Professional Conduct?[161]

Bell explained that because the NAACP Legal Defense Fund had a long history of civil rights litigation within a bureaucratic model, the organization had in place a uniform policy for tackling school desegregation. *Brown* was to be enforced at all costs. Client interests were often lost in the process because the model for litigation was a bureaucratic one in which the central office determined strategy and supervised its implementation throughout the country. They were too removed from interaction with their attorneys. Each was an anonymous and faceless member of a class represented by a few named plaintiffs who might not have represented their interests. In fact, class members might have had different perceptions of what equality of education meant, and they did not necessarily support desegregation as the only method of enforcement.

Bell discovered examples of this phenomenon in the Boston school desegregation crisis of the mid-1970s, and in Milwaukee during the 1980s. African American community activists fought against busing, demonstrating the disservice done by civil rights lawyers and policy makers who demanded strict integration as the sole means of complying with *Brown*.[162] Once again, *Brown*'s enforcers did not focus upon effective schooling, but relied instead upon integration as a formalist doctrine. Once again, Bell claimed busing did nothing to benefit African American schoolchildren. When administrators undertook it as a remedy, African American parents in Milwaukee became removed from the educational process as administrators forced children into schools outside of their communities, propelling them into alien and possibly hostile environments. Bell imagined that "the educational interests of black children might have been better advanced had the Supreme Court, after having declaring segregated schools unconstitutional in 1954, ordered a deferral of school desegregation for several years."[163]

In hindsight, Bell realized that the effort to enforce the "all deliberate speed" provisions of *Brown*[164] only resulted in a decade of litigation with little progress. Instead, "the Court could have ordered the immediate and total equalization of school facilities and resources."[165] Segregation in and of itself was not the true evil to be eradicated, he argued. The issue lay in white dominance over blacks in public education, in which whites made all the determinations for their benefit but ignored the interests of black

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161. For a discussion of these questions, see Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470–516 (1976).
162. Derrick Bell, *The Case for a Separate Black School System, Manifesto for New Directions in the Education of Black Children in the City of Milwaukee*, 144–45, *in* Black Education: A Quest for Equity and Excellence (Willy DeMarcell Smith et al. eds., 1989). For discussion of the Boston desegregation crisis, see Bell, *supra* note 161, at 482–83.
163. Bell, *The Case for a Separate Black School System*, *supra* note 162, at 137.
164. Brown v. Bd. of Educ., 349 U.S. 294 (1955).
165. Bell, *The Case for a Separate Black School System*, *supra* note 162, at 137.

children and their parents. Bell imagined that if the evil as it truly existed had been erased, "the Court would have required that blacks immediately be provided representation on school boards and other policymaking bodies in each school system in percentages equal to the number of black students in the particular system."[166]

The regrettable fact was that civil rights lawyers of the period were not pragmatic enough. They imagined that they only had to place black children in classrooms next to white children, and as if by magic, they would get the results they desired—an end to second-class treatment in education. Their naiveté endangered them further, in that they believed the law would always enforce equality, and that the courts would be the tool. Harkening back to the early twentieth-century jurisprudential struggles between the legal realists and the formalists, Bell wanted to give present-day activists a dose of what he called "racial realism." In the same way legal realists battled with formalism and "challenged the classical structure of law as a formal group of common-law rules that, if properly applied to any given situation, lead to a right—and therefore just—result,"[167] activists struggled with formalism in the contemporary period. Notwithstanding what civil rights lawyers learned in law school, "abstract principles lead to legal results that harm blacks and perpetuate their inferior status; moreover, racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise."[168]

Thus, although the legal realists were successful at breaking down the walls of formalist thought and demonstrated that "judges settled cases not by deductive reasoning, but rather by reliance on value-laden, personal beliefs,"[169] vestiges of formalism still remained: "[r]eliance on rigid application of the law is no less damaging or ineffectual simply because it is done for the sake of ending racially discriminatory practices."[170] There was still work to be done, because the law and courts were "instruments for preserving the status quo" which "only periodically and unpredictably serv[ed] as a refuge of oppressed people."[171] On the whole, formalists presumed that the power structure was legitimate; there was no reason to change anything.[172]

In the contemporary period, the Supreme Court was becoming more and more formalist in its approach to adjudicating civil rights cases. The Burger court decision in *Bakke* demonstrated that formalism still retained power. The Court relied on formalistic language within the Fourteenth Amendment, disregarding the sociological jurisprudence ramifications: "following a Realist approach, the Court would have observed the social landscape and noticed the skewed representation of minority medical

166. *Id.*
167. Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 364 (1992).
168. *Id*. at 369.
169. *Id*. at 365.
170. *Id*. at 364.
171. *Id*.
172. *Id*. at 376.

school students. It would have reflected on the possible reasons for these demographics.[173]

Thus, Bell agreed with the realist approach to litigation, as found, for example, in *Brown*: "analytical distinctions could be drawn between . . . factual and policy analysis to inform legislative choice or to uphold legislation as constitutional."[174] The early NAACP Legal Defense Fund lawyers were trained in realist methods and approaches at Howard Law School, and they used this approach in litigation; however, there was room for improvement. Their strategies ought to have reflected changing notions of justice and changing perceptions of what might be effective. Bell was once on the Legal Defense Fund staff: "law, even constitutional law, was social policy . . . . The sociological argument was that, if one looked beyond material endowments to social consequences, separate schools were inevitably unequal."[175]

Bell was interested, however, in end results rather than grounded formalist logic. But his vision failed to come into fruition, because of a problem greater than the civil rights lawyers' short-sighted policy-making: judges impeded the civil rights agenda by using 'legalese' to reinforce their own values and policy positions. Abstraction made it easier for judges to make biased decisions and absolve themselves from culpability, since the end result was ostensibly just.[176] Judges did not need to be overt in voicing their discriminatory policies, or their apparent dislike of remedies that would benefit African Americans and "enable the victims of the segregation era to recover and make their way."[177]

Thus, affirmative action came under attack even though it was a policy that did not benefit all African Americans, especially those at the bottom and truly in need of help. Moreover, those at the top, the extraordinarily successful African Americans, were a tiny proportion of the entire African American population. The Court had become overly doctrinal and conservative, quite protective of white privilege: "reliance on racial remedies . . . prevented us from recognizing that abstract legal rights, such as equality, could do little more than bring about the cessation of one form of discriminatory conduct that soon appeared in a more subtle though no less discriminatory form."[178]

Bell's racial realism was borne out of despair, his perception that the situation of African Americans would never improve to the level that he and other civil rights activists once hoped would occur. In the 1970s and through the 1990s, the glaring discrimination of de jure segregation was non-existent. This led whites to believe racism no longer existed. Society had apparently become "race-neutral." Once de jure segregation ended and integration began, progress apparently stilled the fires of activism: activists quieted down, because they thought they had won, and whites

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173. *Id*. at 369.
174. Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925–1950 118 (1987).
175. *Id*.
176. Bell, *supra* note 167, at 369.
177. Derrick Bell, *The Dilemma of the Responsible Law Reform Lawyer in the Post-Free Enterprise Era*, 4 Law & Ineq. 231, 240 (1986).
178. Bell, *supra* note 167, at 373.

perceived calm as the formal movement came to an end. As Bell viewed the formalist turn of the Rehnquist Court, however, he saw just how vulnerable were the precedents he once fought for, as evisceration carried the day. African Americans as a group were in a worse economic condition than before, as proportionally more were poor than in the past. Racial realism would force activists to face a basic reality: "those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies." Freed from despair, they could continue the struggle.[179]

Nonetheless, his despair was counterbalanced by his faith that it was right to protest injustice and work for African American empowerment. Self-esteem demanded no less, even though he realized that activism might not change much. He perceived that doing and saying nothing in the face of the racial problems African Americans experienced in society did no one any good. He was an African American attorney with a long history of fighting for the underdog, the underprivileged,and downtrodden blacks stuck at the bottom of society. He could not afford to sit back and feel comfortable in his privileged position as an academic removed from civil rights practice.

VI. Storytelling: Writing Within and Without the Law

Civil rights activists in the legal academy resented the turn to formalism on the Supreme Court. Calling themselves critical race theorists, they saw themselves as pragmatic and radical. They were believers in sociological jurisprudence who understood the workings of the law and the role of race in society. They knew the historical antecedents that made equal opportunity impossible for people of color in America, and vehemently argued that affirmative action was essential to dismantling the effects of racism in society. They hoped to destroy the formalism that had made civil rights progress difficult in the past, and which they claimed was continuing to do so. In the legal academy, they developed new approaches to pedagogy and scholarship to articulate their support of sociological jurisprudence and a liberal to radical activist civil rights agenda. They used storytelling to raise consciousness of the voices of those historically dispossessed within society, people of color at the margins of legal discourse.

Derrick Bell began a trend of popularizing civil rights discourse through storytelling. He quarreled with conservatives about the true nature of civil rights, in the form of fiction written for the general public. Drawing upon historical trends, Bell argued that activists ought to be watchful and actively engaged; the civil rights cause of the 1980s demanded diligent struggle. Formalism was taking root, and neoconservatives opposed to expansive civil rights policy were bent upon eviscerating the gains once won. They discounted the influence of societal structures in implementing class and racial hierarchy. Instead, they blamed the victims of discrimination for failing to help themselves.

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179. *Id.* at 374–75.

Bell admitted that he became established professionally at a time when it was advantageous for the "first blacks" to make progress. Diversity and affirmative action demonstrated the good faith efforts of the white power structure to integrate American society. White elites were expressing their commitment to equalizing opportunity and making amends for past discrimination. Thus, others of his generation achieved much, through individual accomplishment, but as a result of the civil rights policy too. In his opinion, successful blacks must not forget the roots of their success; they ought not criticize others who were not as fortunate. Not everyone had the advantages he had; therefore, the self-help argument raised by neo-conservatives did not resonate.

As an African American law professor, he saw it as his responsibility to teach students his experiences as a civil rights lawyer who actively litigated cases during the civil rights era. He trained his students in analysis of civil rights law and the forces of racism, whether of the historical period, or of the present day. He taught them to critique civil rights law practice as an effective means of ensuring equality and to observe the significance of changing social and cultural climates that affected in turn, the politics of law as played out on the Supreme Court. He gave them the tools to fight the formalist attack on civil rights.

His students followed in his footsteps in the late 1980s and addressed the problems he identified in the 1970s and early 1980s but which persisted in the subsequent decade. In the 1980s, it was the social and cultural mythologies that mattered most. Neo-conservatives blamed downtrodden African Americans for their condition, viewing them as shiftless and lazy. They refused to find work but relied on welfare. Critical race theorists addressed civil rights issues within academia, but then broadened their reach into the public sphere, for it was popular perceptions of African Americans in society that must be dealt with. If popular perceptions of African American failure influenced perceptions of the civil rights cause, then Bell's position as an academic compelled him to deal with this situation. He reached the public through a media they could relate to, and spoke to them in a language they could understand. He wrote fiction.

The critical race theorists were dealing with a different legal world in the 1980s that the legal liberals had not experienced in the 1950s and 1960s. At the time of *Brown*, the black-letter law was the sole issue. *Plessy v. Ferguson* made segregation legal. Now that the law no longer said as much, the challenge lay in addressing the world views which supported white supremacy, through demonstrating the significance of racism—both of the conscious and unconscious types. Bell hoped the greater society would realize that narrow formalist interpretations of civil rights led to further problems through discrimination and entrenchment of a racialist status quo. Thus, storytelling became an important new development.

Bell's *And We Are Not Saved: The Elusive Quest for Racial Justice* developed out of his experimentation with an unorthodox approach to legal academic writing. He noted in the preface that he had been invited by the editorial board of the *Harvard Law Review* to write a foreword to the Supreme Court issue in 1985.[180] He decided to focus his inquiry upon the

180. Bell, And We Are Not Saved: The Elusive Quest for Racial Justice xi (1987).

civil rights movement since the *Brown* decision and consider just what the effects of the decision and the movement had been: "I doubted whether they would take kindly to a radical departure from doctrinal analysis of the Supreme Court's work, an analysis that previous authors have undertaken with great competence."[181]

Bell wanted to tell a story about the civil rights movement:

> The movement is a spiritual manifestation of the continuing faith of a people who have never truly gained their rights in a nation committed by its basic law to the freedom of all. For my foreword, then, I sought a method of expression adequate to the phenomenon of rights gained, then lost, then gained again—a phenomenon that continues to surprise even though the cyclical experience of blacks in this country predates the Constitution by more than one hundred years.[182]

Bell wrote short stories that explained this history of civil rights success and failure. Geneva Crenshaw was the heroine. She was a civil rights lawyer who knew the narrator Bell in his younger days as a civil rights lawyer. She fought in the trenches with him but disappeared after her car was run off the road by Southern whites angered by lawyer activists. She had been ill; some thought she had died. Nonetheless, she reappeared and "came back to life," but with supernatural powers that gave her a greater understanding of civil rights issues.

Crenshaw became Bell's Nemesis, a seer and prophet, full of tales to tell and theories to develop: she had a different view from the "accepted view of how blacks gain, or might gain, from civil rights laws and policies."[183] Crenshaw presented a more radical view, while Bell as narrator held a more traditional stance in his faith in the power of law. Bell acted as her sounding board, providing his professorial expertise in civil rights law subsequent to the 1960s, combined with his knowledge of Supreme Court politics. Crenshaw as alter ego articulated the cynical and radical views Bell had been developing since the 1970s through the 1980s; she worked with Bell in trying to determine what an effective civil rights strategy might be in the contemporary period.

Bell had a special responsibility, to interpret visions that Crenshaw had. She returned to the world and came back in secret. In an e-mail, she communicated with Bell: "My mind [was] filled with allegorical visions, that, taking me out of our topsyturvy world and into a strange and a more rational existence, have revealed to me new truths about the dilemma of blacks in this country. To be made real, to be potent, these visions—or Chronicles, as I call them—must be interpreted."[184] She had gained supernatural powers and accessed a higher world where true knowledge could be found.

Bell was reunited with Crenshaw in a cottage in Virginia, not far away from Thomas Jefferson's Monticello. This beginning is apt, since she ap-

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181. *Id.*
182. *Id*.
183. *Id*. at xi–xii; Derrick Bell, The Supreme Court 1984 Term, Foreword: The Civil Rights Chronicles, 99 Harv L. Rev. 4 (1985).
184. Bell, *supra* note 180, at 22.

parently was a descendent of slaves who lived and worked there, and the first Chronicle entails her appearance at the Constitutional Convention in 1787.[185] Her duty was to intercede just as the Framers were about to sign the document and explain to them just what the Constitution would mean to the country. The delegates refused to abolish slavery, in the name of protecting the property rights of Southerners, whose agrarian economy was dependent upon slave labor, particularly when the plantation economy fueled the Northern economy too.

Predictions of apocalypse did not matter to them. Founding a national government more powerful than that established by the Articles of Confederation required compromise with slaveholders' interests. Crenshaw beseeches the delegates to recognize the true import of the liberty and property rights they espouse: "Do you not mind that your slogans of liberty and individual rights are basically guarantees that neither a strong government nor the masses will be able to interfere with your property rights and those of your class?"[186] Her pleas fell on death ears. The Framers had developed a language of freedom and liberty, juxtaposed with one of slavery. Nothing could have prevented them from supporting slavery, notwithstanding the arguments of slavery opponents at the Convention. Slave owners were protective of their African American property interests. Their failure to accord equal value to the lives of blacks set the foundation for legal liberalism and equal rights in the nineteenth and twentieth centuries.

In spite of the deficiency of the Constitution as an instrument of racial justice, civil rights activists of the 1960s fell victim to an overly optimistic stance, putting all their faith in the Supreme Court as the ultimate protector of black rights. As Bell suggested in the second chronicle, African Americans relied too much on the Court's ability to reform rather than regulate—although this position may have seemed necessary at the time: "the judicial role as reformer rather than regulator may be overemphasized by representatives of relatively powerless groups who, lacking either economic or political power, feel they must rely on the courts for both the correction of injustices and their elevation to equal status in the society."[187] Bell was disturbed by reliance on the Court because the "history of civil rights law teaches that reliance on courts for so heavy a responsibility will lead to disappointment[.]"[188]

The question remained whether African Americans should retain their faith in the law or seek other methods, such as mass protest or revolution. Ultimately, Bell argued that the law was the best and most effective means of gaining rights, even though there were bound to be setbacks. Using the law to gain civil rights when the political system proved ineffective was an approach most Americans could understand. The task lay, first of all, in trying to gain more power for African Americans through the elective process, and, secondly, in attempts to "move the Court beyond its current reluctance to redress racial harm in the absence

185. *Id*. at 26.
186. *Id*. at 31.
187. *Id*. at 59.
188. *Id*.

of discriminatory intent . . . ."[189] Using a discriminatory intent standard only reinforced the status quo while obscuring the possibility that seemingly neutral standards might actually protect white privilege.

Barbara Flagg offered an explanation of how neutrality could be used to subordinate people of color. Because whites in society comprise the majority, they do not have a distinct sense of whiteness. They become conscious of race only when they come into contact with non-whites. Yet, whites live in a race conscious society with other whites whose experiences and worldviews are affected by their whiteness, by their positions as members of a majority privileged by racial caste. Race is not an issue for them; discrimination is not something they experience. Thus, whiteness is experienced as a neutral factor. Flagg calls this the "transparency phenomenon," insofar as whiteness is normative, but is not recognized as such. The majority white experience and viewpoint define the rules and determine the standards by which all are judged, non-whites included. But because whiteness is not recognized as defining the norm, the standards appear to be neutral. The goal, says Flagg, ought to be recognition of how white experiences define the norm.[190]

But even though the transparency phenomenon might be uprooted from civil rights jurisprudence, Bell perceived that judges were conservative and thus incapable of instituting global change. The Supreme Court protected white interests in stability and upheld the political and social orders over the interests of blacks in dismantling the effects of institutional racism. As a result, the Warren Court imposed the "all deliberate speed" requirement in the second *Brown* decision.[191] It was a standard that had no enforcement mechanism and thus did not lead to an immediate end to segregation in Southern schools. The decisions ultimately reflected the wishes of the white majority. People of color can emerge victorious only as long as civil rights protections are acceptable to that majority and Southern whites were not going to accept immediate integration. Civil rights activists were therefore forced to accept civil rights remedies that did not effectuate the ultimate goal: desegregation and equality of education.

In the case of desegregated education, the interests of black children were sacrificed as community leaders went chasing after legalisms, bent upon pursuing a litigation strategy that did not result in effective schooling. In the Chronicle, "Neither Separate Schools Nor Mixed Schools: The Chronicle of the Sacrificed Black Schoolchildren," Bell told a story in which many of the school children slated for desegregation "disappeared." None of the black children who were supposed to integrate white schools showed up on the first day of class and no one knew what had happened to them. Bell used this story to explain just how expensive desegregation efforts were.

Once the children disappeared, it came to light the amount of money white school administrators would have gained through implementing

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189. *Id*. at 72.

190. Barbara J. Flagg, Was Blind, But Now I See: White Race Consciousness & the Law 1–9 (1998).

191. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

integration, thus indicating the extent to which Bell believed black schoolchildren did not gain direct benefits from school desegregation efforts. Civil rights lawyers earned attorneys fees and government bureaucrats gave white educators remuneration. Officials allocated "increased funding for training, teacher salaries, research and development, and new school construction."[192]

White educational policy makers gave resources to white schools, but the interests of black children were secondary. Integration did not necessarily result in quality education. Instead, it deprived black children of community institutions that had been of value—black schools and teachers within the black community—and placed them into white environments where white hostility to desegregation could still be found. Their black schools were closed as part of the integration effort and the community lost the black schoolteachers as they went into the white school system. In the *Chronicle of the Sacrificed Black Schoolchildren*, Bell suggested that black children were "the casualties of desegregation, their schooling irreparably damaged even though they themselves did not dramatically disappear."[193]

Because Bell taught by telling stories, he was concerned about how these stories might be interpreted. He included an appendix for classroom discussion when he republished the collection in 1989. As a legal storytelling tool, the text was a method for presenting fact patterns, legal questions and dilemmas to grapple with. In his note to the appendix, Bell suggested that students reflect on the questions generated from "reviews, letters, and student comments on the issues presented . . . ."[194] in the first edition. In true storytelling fashion, Bell proposed: "Subject matter in story form can gain and hold students' attention, and the very telling of a story evokes ideas and images about the subject matter that broaden and deepen the issues for discussion."[195]

Bell continued to tell stories. He invoked awareness of race consciousness in American society and the failure of the law to end racial subordination. In *Faces at the Bottom of the Well*, Bell considered the question of what African Americans ought to do, to challenge a culture of ongoing and perpetual racism: "Here, I again enlist the use of literary models as a more helpful vehicle than legal precedent in a continuing quest for new directions in our struggle for racial justice, a struggle we must continue even if—as I contend here—racism is an integral, permanent, and indestructible component of this society."[196]

Thus began Bell's new collection of short stories. This collection of essays went beyond the scope of civil rights remedies and was not written primarily for a scholarly audience capable of understanding litigation strategy and civil rights jurisprudence. He addressed the American public instead and pondered America's dilemma of race: "[t]he fact of slavery refuses to fade, along with the deeply embedded personal attitudes and

192. Bell, *supra* note 180, at 108.
193. *Id*. at 107.
194. *Id*. at 259.
195. *Id*.
196. Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism ix (1992).

public policy assumptions that supported it for so long. Indeed, the racism that made slavery feasible is far from dead in the last decade of twentieth-century America; and the civil rights gains, so hard won, are being steadily eroded."[197] He based his arguments on statistics: unemployment among African Americans was almost three times that of whites, their per capita income was lower, and more of them lived under the poverty level. The end result was despair and self-destruction: "Drug-related crime, teenaged parenthood, and disrupted and disrupting family life all are manifestations of a despair that feeds on self."[198]

In the wake of ever-growing political conservatism and formalist influences upon civil rights law throughout the 1980s and the early 1990s, he charged: "Few whites are able to identify with blacks as a group—the essential prerequisite for feeling empathy with, rather than aversion from, blacks' self-inflicted suffering . . . because of an irrational but easily roused fear that any social reform will unjustly benefit blacks, whites fail to support the programs this country desperately needs to address the ever-widening gap between the rich and the poor, both black and white."[199] In his mind, whites just shook their heads or blamed the victim; African Americans were incapable of competing in society, or were just unwilling to try.

Within the formalist and neo-conservative pantheon, black conservatives were celebrated: "Whites eagerly embrace black conservatives' homilies to self-help, however grossly unrealistic such messages are in an economy where millions, white as well as black, are unemployed . . . ."[200] In a context where the threat of job discrimination had become more powerful with setbacks on the Supreme Court, Bell criticized the mantra of "self-help." It was now time for civil rights activists like him to figure out what to do next, and that meant getting "real" and reassessing the cause and their approach: "[M]ore than a decade of civil rights setbacks in the White House, in the courts, and in the critical realm of media-nurtured public opinion has forced retrenchment in the tattered civil rights ranks."[201]

In Bell's view, the lessoning of blatant signs of discrimination led some to believe that racism no longer existed in any form, that America had in fact become race-neutral: "On the other hand," wrote Bell "the general use of so-called neutral standards to continue exclusionary practices reduces the effectiveness of traditional civil rights laws, while rendering discriminatory actions more oppressive than ever."[202]

African Americans of higher status thus were unable to escape the burdens of discrimination under the law. He proposed that whites integrated when they perceived a loss to themselves or other whites; they did not integrate unless there were no costs to them to do so.[203] However, "even when non-racist practices might bring a benefit, whites may rely on

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197. *Id*. at 3.
198. *Id*. at 4.
199. *Id*.
200. *Id*. at 5.
201. *Id*.
202. *Id*. at 6.
203. Bell, *supra* note 196, at 7.

discrimination against blacks as a unifying factor and a safety valve for frustrations during economic hard times."[204]

Thus, as the country experienced recession, whites, particularly those who were poor and working class, incorrectly identified blacks as the enemy—they were gaining unfair entitlements wrought by the civil rights movement: "Whites, rather than acknowledge the similarity of their disadvantage, particularly when compared with that of better-off whites, are easily detoured into protecting their sense of entitlement vis-à-vis blacks for all things of value."[205] Disgruntled whites forgot that the capitalist system was to blame, a system in which elites held much of the country's wealth: "Crucial to this situation is the unstated understanding by the mass of whites that they will accept large disparities in economic opportunities respect to other whites as long as they have a priority over blacks and other people of color for access to the few opportunities available."[206]

This racial order always existed, according to Bell. Whites of all classes have consistently united to deny access to blacks, in the name of racial loyalty. It happened during slavery, during Reconstruction, and, Bell claims, it was because of the tradition dating back to slavery whereby whites bartered with each other over the extent of African American rights, Bell remained fearful of what white America might do in the future.[207] It led him to propose the thesis of the book, that full equality was an impossible dream, insofar as throughout America's history, every bit of civil rights success wrought by advocates ultimately become "*no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance*."[208]

Bell considered the themes that drove the African American civil rights quest for justice: protest, legal advocacy, and the enduring question of black nationalism—just where was home? In developing his discussion of racial themes, Bell claimed that national holidays, as found, for example, in celebrations honoring Martin Luther King, were only cosmetic. Such holidays were a prime example of the symbolic change that protest wrought. It gave the appearance of progress, even though there was no corresponding substantive change. Government officials gained from the "feel-good spirit," but felt no obligation to make real changes in society, and legal advocacy was not going to spearhead those changes.[209] Without substantive change, the civil rights dream was a hoax that disinherited those who suffered the most.

African Americans experiencing despair longed for a place to call home, since they did not feel that they belonged "in their home." *The Afrolantica Awakening* story reflected this dream, that there might be a place somewhere, a promised land they could call "home."[210] In this instance, it was a mass of land that rose up from the Atlantic Ocean floor, off the coast of South Carolina. The land was beautiful, full of resources.

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204. Bell, *supra* note 196, at 7.
205. *Id*.
206. *Id*. at 9.
207. *Id*. at 8–12.
208. *Id*. at 12. *See* Bell, *supra* note 167.
209. Bell, *supra* note 196, at 15–31.
210. *Id*. at 32.

But when the United States sought to claim it, as did other countries, explorers found that "strange air pressures" made landing impossible.[211] Only blacks, however, did not experience them. Instead, they had "an invigorating experience of heightened self-esteem, of liberation, of waking up."[212] This was a place where they could escape the debilitating effects of racism and thrive.

The quandary remained whether African Americans should immigrate to this new territory. Some blacks believed they should go, that America had always been too hostile; others argued against emigration, claiming progress had been made, that America belonged to them as much as to anyone else. America was "home."[213] Like those who opposed colonization efforts to Liberia in the nineteenth century, they wanted African Americans to remain and finish off the work of liberation in the United States. In the end, the land mass returned back to the bottom of the sea, and none were able to land at all. Bell explained that those who tried to emigrate did not despair as they saw the "homeland" disappear from them. Making the effort to liberate themselves had galvanized them; they found the resources within themselves that they hoped emigration would offer them: freedom, courage and determination. They freed themselves from mental bondage. Their "Afrolantica" was in America.[214]

And yet, America might never become their promised land. In light of the rise of white supremacist groups on the far right fringe, such as the Aryan Nation, the times seemed even more dangerous. What if organized racial violence became more of a reality, as in the heyday of the KKK? In "*Divining a Racial Realism Theory*," Bell imagined himself back in Oregon, where he once served as dean of the law school.[215] He went out to a national park in order to relax and do some writing. Suddenly, shots rang out. He was almost shot by Erika Wechsler, a white woman wearing camouflage fatigues who was a founding member of an underground militia group called White Citizens for Black Survival. They were training whites "to build a nationwide network of secret shelters to house and feed black people in the event of a black holocaust or some other all-out attack on America's historic scapegoats."[216]

Bell's use of the Erika Wechsler character demonstrates the significance of Bell's civil rights background. In the 1950s, Herbert Wechsler was a law professor who criticized *Brown*[217] for its anti-majoritarian principles, proposing in process-theory fashion that the true means of eradicating racial injustice under the law lay in the legislature, not in the courts.[218] Thus, Erika Wechsler was the daughter of a law professor. She rejected formalism and voiced Bell's notion of "racial realism," a racial realism far different from that of 1950s and 1960s liberal faith in the law: "all the for-

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211. *Id*. at 35.
212. *Id*. at 35.
213. *Id*. at 36.
214. *Id*. at 45–46.
215. *Id*. at 89.
216. *Id*. at 93.
217. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
218. Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

mal or aspirational structure in the world can't mask the racial reality of the last three centuries."[219]

Racial realism proposed that white supremacy was the foundation of American society; thus, racism would always exist.[220] Civil rights activists could not give up the struggle, because it was an ongoing process that would never end. They must not forget that although the symbols of segregation and discrimination were no longer present, their effects persisted in the true status of blacks within society: African Americans "need[ed] less discussion of ethics and more discussion of economics—much more. Ideals must not be allowed to obscure the blacks' real position in the socioeconomic realm, which happens to be the real indicator of power in this country."[221]

Bell's "The Racial Preference Licensing Act"[222] was itself an example of racial realism, in its pragmatic approach to dealing with discrimination. Bell used a conservative flaw and economics model to propose that since racism never ended with the enactment of civil rights laws outlawing segregation, whites who wish to discriminate ought to be able to license their preferences.[223] In Geneva's short story, the President, elected as a "racial moderate," proposed the act as a "realistic advance in race relations," but without a return to the days of Jim Crow segregation.[224] He believed in racial realism and proposed that, as a society, we ought to admit that some white Americans harbor prejudices against blacks.

The President's act "proclaim[ed] its commitment to racial justice through the working of a marketplace that recognize[d] and [sought] to balance the rights of our black citizens to fair treatment and the no less important right of some whites to an unfettered choice of customers, employees, and contractees."[225] Those who wished to exercise their preferences for discrimination could purchase a license to be prominently displayed in their places of business. The license would be expensive, but would not operate as a deterrent to operating a business. All funds collected would be "used to underwrite black businesses, to offer no-interest

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219. BELL, *supra* note 196, at 197.
220. BELL, *supra* note 167, at 363–79.
221. BELL, *supra* note 196, at 97.
222. *Id*. at 47–64. It also appeared as Derrick Bell, *The Racial Preference Licensing Act: A Fable About the Politics of Hate*, 78 A.B.A.J. 50 (1992).
223. Some law and economics scholars interested in civil rights use economic theory to argue that civil rights law as it now exists, in which litigation founds the basis to end discrimination—buttressed by statutes and a civil rights infrastructure—have only resulted in inefficiency and misallocation of resources. They argue that economic incentives ought to be used instead, or that the proper workings of the market will eventually lead to an end to discriminatory behavior, since those with irrational choice preferences for discrimination will eventually find that their preferences are expensive. This a very simplified explanation of one aspect of the law and economics approach. The scholars and sources are many; for a basic introduction to law and economics scholarship, see, for example, NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM (1997). For a view explaining law and economics as a conservative development with antecedents in legal realism, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 77–85, (1996).
224. BELL, *supra* note 196, at 47.
225. *Id*.

mortgage loans for black home buyers, and to provide scholarships for black students seeking college and vocational education."[226]

Bell's underlying premise was that racism and discrimination far from being irrational forces within American society, have been the rational bases upon which whites built this country from its colonial days, to the founding, and into the present. Blacks have suffered the costs of discrimination, and the machinery for enforcing civil rights laws and improving their condition has not been effective. Why not let whites discriminate, but with a cost—payment to offset the expense? African Americans had never been paid for what slavery, racism and discrimination had cost them. Bell was arguing, in effect, for reparations.[227] In his view, a license to discriminate would pay the black community the costs they incurred due to racism,[228] as prejudiced whites gave them money to improve the community's resources. They would be able to start businesses, buy houses and gain educations. But African Americans never gained reparations, he suggested; instead, their rights were consistently sacrificed.

In introducing what was a very controversial story in the collection, Bell admitted that its inspiration of "The Space Traders" laid in his fears that whites might decide once again, as in slavery, "that a major benefit to the nation justified an ultimate sacrifice of black rights—or lives."[229] He imagined a scenario in which aliens came to earth from outer space, offering enough resources to solve all America's problems: "gold, to bail out the almost bankrupt federal, state, and local governments; special chemicals capable of unpolluting the environment . . . and a totally safe nuclear engine and fuel, to relieve the nation's all-but-depleted supply of fossil fuel."[230]

The aliens demanded only that the United States turn over all its African American citizens; however, they never revealed why they wanted them. Would white America demand that African Americans pay the cost by losing their freedom through forced expulsion? Bell imagined that white Americans would be in support of the trade, perceiving that there would be no harm in it, that the aliens were friendly. Bell stated that he wanted to shake Americans out of their complacent notion that all racial problems would be solved over time. Too many retained hope in continuing civil rights strategies: "we have worked for substantive reform then settled for weakly worded and poorly enforced legislation, indeterminate judicial decisions, token government positions, even holidays."[231]

And yet, Bell wondered about the role of lawyers in the movement, in the same way other liberals once wondered whether the movement had

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226. *Id*. at 48–49.
227. Critical race theorists have long addressed the issue of reparations to people of color for the costs discrimination and racism have placed on their communities. *See, e.g.*, Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987). The following year, the New York Law School sponsored a symposium on the topic of reparations, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L. Sch. J. Hum. Rts. 229 (1988).
228. For a discussion of this argument, see Derrick Bell, *White Supremacy in America: Its Legal Legacy, Its Economic Costs*, 33 Vill. L. Rev. 767.
229. Bell, *supra* note 196, at 13.
230. *Id*. at 159–60.
231. *Id*. at 13–14.

let them down in a period of redeveloped racism. Bell wondered whether African American civil rights lawyers had betrayed the very community they once worked so hard to help. In one story, he imagined himself as being mocked by Algonquin J. Calhoun, a character in "the old 'Amos 'n Andy' radio show, which was enormously popular back in the 1930s and 1940s . . . ."[232] Bell explained who Calhoun was: "He is a loud-talking, self-promoting buffoon, [whose] vehemence in defending a friend or a client is counteracted by his readiness to retreat in the face of any risk whatsoever."[233]

Calhoun seemed to address Bell's own self-doubts: "In urging the use of law and litigation as the major means to end racial discrimination, we acted in good faith. We failed, however, to recognize that even the most clearly stated protections in law can be undermined when a substantial portion of the population determines to ignore them."[234] Notwithstanding the fact that civil rights might be ignored, more significant was civil rights scholars' lack of accountability. They professed to activism, and the public respected their expertise. As a result, self-aggrandizement threatened to seduce them from their purpose. Bell realized that African American scholars could be compromised: "Through their writings, lectures, and television appearances, some of them have more influence on public opinion and policy-making than do all but the top, Black elected officials. And yet, while Black academics are viewed as spokespersons for the race, they are neither elected by blacks nor held accountable to them."[235]

But those who were not public intellectuals invariably experienced the tenure process, in which their colleagues, most of whom were primarily white, judged their ability as scholars and teachers and decided whether to grant them permanent positions on college and university faculties. For that reason, "This fact translates into a not so subtle pressure to take positions in our writing that will not upset the mostly white faculty and college administration who hire and promote us. It goes without saying that those doing the selecting tend to be attracted to minority candidates who appear as much like them as possible, and are most happy if the minority person's research and writing are comforting rather than confrontative."[236] And as for those scholars of color whose writings were more "comforting," Bell urged "not self-censorship, but restraint."[237] The risks were too great that their scholarship might be used for reasons they never intended, for they have an authority that could be misused to reward those expectations which should not be rewarded, at the expense of those expectations which were more worthy of support.[238]

In the midst of failure, the question remained whether civil rights activists only aggrandized themselves in the end: "we, despite our best efforts, ended up advancing our professional careers far more than we im-

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232. Derrick Bell, Gospel Choirs: Psalms of Survival in an Alien Land Called Home 50 (1996).
233. *Id*. at 52–53.
234. *Id*. at 53.
235. Derrick Bell, Afrolantica Legacies, "The Black Sedition Papers," 137 (1998).
236. *Id*.
237. *Id*. at 138.
238. *Id*. at 139.

proved the lives of our clients—and of black people generally."[239] But notwithstanding his doubts, Bell believed his intentions were good, his heart was in the right place. He could not be blamed for the shortsightedness and blindness that affected his generation of civil rights activists. Notwithstanding the failures of the past, he was still fighting "the good fight." He was an activist, but using a different approach and technique: writing to inform Americans of the real story behind civil rights law and policy.

Bell realized in writing fiction for a greater audience that poor and illiterate blacks might not read his stories at all, since more educated people learned about his books through book reviews aimed at the educated reader, or through legal publications. He wrote, however, because he perceived that whites needed to hear what he had to say. He was creating an audience outside of academia, within the general public, and not just among lawyers with access to the *American Bar Association Journal*, the national publication of the country's most influential lawyers' association. But within the legal tradition, he had to explain himself: he was unorthodox, insofar as he did not write in a scholarly format. He felt compelled to, because his "experience as a black man in this society is rather unique . . . . The great challenge is how to communicate that gift."[240] Fiction writing was his tool.

Critical race theory storytelling caught on among other law professors of color who had been developing their own critique of the new formalism in civil rights jurisprudence. They found in it a means of bringing sociological jurisprudence back into civil rights law. Storytelling was grounded in experience, and aimed to change the formalist consciousness of those law professors, lawyers and judges who did not have the consciousness of people of color oppressed by the law. Although legal scholars had been discussing using literature as an interdisciplinary approach to the study of law prior to this, it was not until Bell wrote his groundbreaking work in critical race theory storytelling that law and literature became an approach to civil rights legal scholarship among the critical race theorists. Richard Delgado, a cohort of Bell, made the call for a symposium on storytelling. In attendance were professors from different interdisciplinary law backgrounds, and two Harvard alumnae, Patricia J. Williams and Mari J. Matsuda.

Critical race theory storytellers started off writing for an academic audience, by explaining why storytelling was necessary, even bringing in their own stories as people of color within an elite profession but with experiences grounded in the reality of race. They had allegiances to people of color struggling for civil rights. Over time, however, critical race theory reached beyond the confines of the legal academy. Bell, Delgado and Williams began writing critical race theory storytelling for a broader audience, to academics outside of their discipline, but in particular, to those in the general public who shared an interest in race and the law.

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239. Bell, *supra* note 232, at 54.
240. Stephanie Goldberg, *Who's Afraid of Derrick Bell: A Conversation on Harvard, Storytelling, and the Meaning of Color*, 78 A.B.A.J. 56, 57 (1992).

They were searching for an understanding of controversial racial issues of the day and the critical race theorists gave them answers.

Delgado believed narrative was important as an analytical approach to understanding the law and gaining insight into ideology.[241] In the case of people of color, the law had long built, maintained and justified a hierarchy that subordinated them to whites. But the cultural mythology spoke of justice and color-blindness, presupposing that equality existed. Storytellers engaged consciousness of the mythologies that lay at the foundation of law, proposed alternatives and explained the realities of the subordinated. This storytelling explained the differences between insiders and outsiders, as played out by lawmakers, judges, witnesses and juries. The storytellers explained how legal rules affected different communities. The outsiders are those whose truths are disregarded, and the insiders are those whose stories fit within the ideological framework of "truth," which meant that outsiders had the right to question the legitimacy of the prevailing truth. Those perceived as credible "have the power to create fact; those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions."[242]

The law operated to legitimate certain perceptions of reality and reify them into official stories. The adversarial system as developed by the common law presumed that in any specific legal case, there was only one true story. The truth is found through cross-examination. Lawyers develop "theories of the case," competing stories presented by their clients and witnesses which, when weighed by judge and jury, are expected to result in the most favorable outcome. A judge can grant a dismissal upon motion, based upon the relationship between law and fact, or a jury can find for one party or another at the close of the case. Trial court judges oversee the fact-finding process, within legal rules of evidence that permit only certain types of questioning of witnesses and which bar admission of evidence deemed improper. Appellate judges only hear arguments on the law as applied by trial court judges; findings of fact are presumed to be as the trial court found them.[243]

One problem lay in the "interpretive standards" used by courts in determining how the law should be applied. In the era of a formalist Supreme Court, Patricia Williams perceived that the Court disregarded American history and knowledge of American society in making its determinations. The Court in *Croson*[244] brushed off Richmond's acknowledgment of its legacy of discrimination against African Americans, and held unconstitutional a set-aside program to increase the number of minority-owned firms doing business with the municipality. Although the city admitted "local, state and national patterns of discrimination had resulted in all but complete denial of access for minority-owned businesses," the Court found that there was no compelling interest in apportioning public contracts based upon race. The Court feared that using a rigid system designed to counteract past discriminatory patterns might

241. Kim Lane Scheppele, *Foreword: Telling Stories*, 87 Mich. L. Rev. 2073, 2075 (1989).
242. *Id*. at 2079–80.
243. *Id*. at 2085–97.
244. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

open the door for every conceivable disadvantaged group to sue for its share of contract money.[245]

Williams likened the Court's logic to that used in resolving contract disputes under the Parol Evidence Rule, "which . . . limits the meaning of documents or words by placing beyond the bounds of reference anything that is inconsistent, or depending on the circumstances, even that which is supplementary."[246] The logic amounted to a "lawyerly language game of exclusion and omission."[247] Minority contractors had been locked out of the market for lucrative jobs, and using the law to rectify the condition was appropriate. The story of segregation and discrimination was an old one, but it was one the Court found inapposite.

Storytellers wanted to broaden the field of narratives deemed acceptable within the law:

> Outsiders often have a different history, a different set of background experiences and a different set of understandings than insiders . . . . So when taken outside of their context, outsiders' actions often look bizarre, strange, and not what the insider listening to the story would do under similar circumstances.[248]

Feminist legal scholars noticed this, for example, in the reasonable man standard used by judges to determine appropriate behavior. The reasonable man under the law was not a woman, and women's realities have historically been different.[249] Moreover, as scholars of race and the law claimed, the reasonable man had the mindset of a white, middle- to upper-class man.

But it was as a result of activism that lawyers could bring before the courts those alternative realities that explained why the story of the "reasonable man" ought to be broadened. The justices of the Warren Court began to hear and decide cases according to the realities of "outsiders." As Scheppele noted, activists in the civil rights movement and the women's movement raised the nation's consciousness to societal racism and sex-based discrimination. In the 1980s, however, the Warren Court was history, a memory to live on in the minds of those activists old enough to remember. The Court no longer seemed to be as pro-active as it had once been. As a lawyer activist, Delgado felt compelled to bring forth the outsider stories that some of the justices seemed unaware of. They did not demonstrate any awareness that people of color sometimes experience reality differently from whites.[250]

Storytelling provided an alternative view of reality to this established narrative, where the Supreme Court was comprised of men and women

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245. Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128–51 (1989).
246. *Id*. at 2130.
247. *Id*.
248. Scheppele, *supra* note 241, at 2096.
249. *See e.g.*, Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1–72 (1988). This difference becomes apparent in accounts of rape cases, which Scheppele discusses in *Foreword: Telling Stories*, and in *The Re-vision of Rape Law*, 54 U. Chi. L. Rev. 1095–116 (1987).
250. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411–41 (1989).

with a white male consciousness. This viewpoint excluded more than it included; thus, storytelling was necessary. The views of too many judges reflected the perception of a white man in a position of worth and power. The privileges of his race, gender and class shaped his awareness. His worldview was not grounded in the experiences of most people of color. Critical race theorists imagined that most people of color do not feel a sense of privilege; they are aware of the historical and contemporary racial realities that have victimized them. Because whites in power had a narrow view of the world, Delgado wanted them to hear stories and gain a broader perception of the social realities lived by people not like them.

By the 1980s and into the 1990s, critical race theorists were telling the story of disillusionment. The law established injustice but failed to remedy it, notwithstanding the progress wrought by civil rights struggle. They told this story in an approach to scholarship that was unorthodox. In the eyes of the symposium organizers, stories captured emotions and demonstrated the stark realities of race. Each article generated by the critical race theorists was significant. These scholars were thought-provoking. They questioned legal discourse and challenged the traditional: "[their articles] are not like law review articles you have ever seen before; others may look traditional, but they carry unconventional messages."[251] For these scholars, the personal was political, in the adage of post-civil rights radical rhetoric. How they experienced their lives and interpreted events around them had political meaning. Thus, they linked their experiences of race and gender to the historical realities of people of color and the contemporary realities of race that grew out of that heritage. They understood contemporary political struggles in light of those realities.

Scholars of law and literature have long noted the possibilities for using literature in teaching law, whether through the study of literary texts, or through submitting statutes and law cases to literary exegesis. Ian Ward describes "the familiar distinction taken in law and literature studies" as "between 'law in literature,' and 'law as literature.' Essentially, 'law in literature' examines the possible relevance of literary texts, particularly those which present themselves as telling a legal story, as texts appropriate for study by legal scholars . . . . Law as literature, on the other hand, seeks to apply the techniques of literary criticism to legal texts."[252]

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251. Scheppele, *supra* note 241, at 2074. Derrick Bell's article *The Final Report: Harvard's Affirmative Action Allegory* was one of them. It was based upon an October 1988 affirmative action report Bell and other faculty members at Harvard presented to the University. He asked the question: what if a tragedy took the lives of the President and all the black faculty and administrators? What if Harvard administrators had been planning to implement a wide-reaching affirmative action plan at the time of their death? Would the university follow the plan in memorial to those who died? The report gained widespread attention outside the law school. The *New York Times* covered it, as did the *Chronicle of Higher Education*. Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 Mich. L. Rev. 2382 (1989).

252. Ian Ward, Law and Literature: Possibilities and Perspectives 3 (1995). *See also* Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. Cinn. L. Rev. 95–164 (1994). Stanley Fish is known for writing about "law as literature." *See, e.g.*, Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989); Costas Douzinas, Ronnie War-

These techniques brought tools of postmodern literary theory to bear upon analysis of text—philosophy, political theory and criticism—in search of the writer as both actor and subject, with a voice, rhetoric and even a hegemonic agenda. One approach is called structuralism and semiotics: "Instead of examining the effects or results of language—the communicative function of language—structural and semiotic analyses attempt to examine the conditions that allow language and meaning to arise in the first place."[253] Applied to the law, the proposition was that the law had its own internal language, logic and culture that reified it and provided its structure and legitimacy. Critical race theorists focused their attention upon the ultimate goal: "a deconstructive critique [that] examines and tests the assumptions supporting intellectual insight in order to interrogate the 'self-evident' truths they are based on."[254]

Jacques Derrida was responsible for developing the deconstruction technique in reading literary texts: he noted that both "traditional embodiments" and "abstract versions" of authority "have been taken to be self-evident in their absolute rightness," and yet, "meanings and values, by their very nature, are so mutually interdependent in systems of thought as to be continually destabilizing to each other and even to themselves."[255] Deconstructionists thus presuppose that all meaning is unstable and is in constant flux. There is "a dramatic and decisive shift in traditional relations to authority, what might be termed a radical challenge to all authority."[256] Deconstructive technique reversed the traditional embodiment of authority in order to destroy hierarchy and elevate an oppositional stance. Within the law world, the critical legal theorists used this approach in "trashing" law cases to expose what they viewed as the false gods behind such terms as justice, truth and neutrality.[257]

Critical race theory storytelling falls within the "law in literature" category, although some critical race theorists considered law to be a literature, filled with its own logic and techniques of textual analysis. Critical race theorists wrote fiction and essays where their literary works pointed to the quandaries inherent to questions of justice within American society. They asked whether the law could liberate, when it had historically acted to disempower African Americans politically, culturally,

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rington & Shaun McVeigh, Postmodern Jurisprudence: The Law of Text in the Texts of Law (1991); Stephen M. Feldman, American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage (2000).

253. Robert Con Davis & Ronald Schleifer, Contemporary Literary Criticism: Literary and Cultural Studies 143 (2d ed. 1989).

254. *Id*.

255. *Id*. at 206.

256. *Id*.

257. Patricia J. Williams uses this technique in her writings. *See, e.g.*, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. Law Rev. 401–33 (1987); *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 Mich. L. Rev. 2128–51 (1989); *Commercial Rights and Constitutional Wrongs*, 49 Md. L. Rev. 293–313 (1990); *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 Fla. L. Rev. 81–94 (1990). All these articles appeared in some form in Alchemy of Race and Rights: Diary of a Law Professor (1991). Williams critiques those legal and societal norms as indicated in legal cases, in everyday interactions, and in the media, which affect our perceptions but which do not take into account the significance of race and class in creating those perceptions.

socially and legally. The law legitimated white supremacy and ensured its survival. Even when discriminatory laws were no longer in effect, seemingly race-neutral legal standards upheld the status quo.

James Boyd White, a law and literature scholar interested in both the "law in literature" and "law as literature" genres, suggests that literature has much to offer lawyers, not in the sense of "propositions of fact upon which new policies can be based or for methods of interpretation to be employed by lawyers . . . it teaches in a different way: it expands one's sympathy, it complicates one's sense of oneself and the world . . . ."[258] Gaining a greater sense of 'other ways of thinking and being and imagining the world'[259] led in turn to 'a literary rather than conceptual understanding of language and to the mind . . . our reading not only of "literature' but of all the texts that make up our world."[260] White taught young law students a heightened consciousness of the use of language in law cases and legal writing.[261] Thus, he argues: "the law is a language, a set of resources for expression and social action, and that, accordingly, the life of the lawyer is at heart a literary one—a life both of reading the compositions of others (especially those authoritative compositions that declare the law) and of making compositions of one's own."[262]

But one other aspect of White's theory on the use of literature informs the critical race theory approach to storytelling, in the sense that critical race theory writers encouraged the general public to learn "legal literacy." White defined it as "that degree of competence in legal discourse required for meaningful and active life in our increasingly legalistic and litigious culture."[263] A person who has some measure of legal literacy might be able "not only to follow but to evaluate news reports and periodical literature dealing with legal matters, from Supreme Court decisions to House Committee Reports . . . . The ideal is that of a fully competent and engaged citizen."[264]

The critical race theorists decided legal literacy was crucial in an age when civil rights discourse was shifting and newer paradigms were developing. They perceived the legal and political orders were in upheaval. Formalism on the Supreme Court meant that their work and interests as civil rights activists were falling into disfavor. In order to stem the tide, they cultivated an audience capable of seeing the world in the way they did. Such an audience would reject the formalists who were doing their very best to cultivate that same audience in repudiating an ongoing, in-

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258. James Boyd White, *Law and Literature: No Manifesto*, 39 Mercer L. Rev. 739, 740–41 (1988). White's paper served as an introduction to a symposium on law and literature held at the law school.
259. *Id*. at 744. In that regard, literature can be used as a basis for discussion of ethical issues in the law. *See, e.g.*, Literature and Legal Problem Solving: Law and Literature as Ethical Discourse (Paul J. Heald ed. 1998).
260. White, *supra* note 258, at 744–45.
261. *See, e.g.*, James Boyd White, Justice as Translation: An Essay in Cultural and Legal Criticism (1990); From Expectation to Experience: Essays on Law and Legal Education (1999).
262. James Boyd White, Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 77 (1985).
263. *Id*. at 61.
264. *Id*.

terventionist and liberal civil rights agenda. This newly enlightened audience would then become supportive of an activist executive, legislature and judiciary dedicated to expanding civil rights.

The critical race theorists hoped through legal literacy to make intelligible what often seemed unintelligible, in that lawyers spoke a language of their own, one that outsiders could not understand: "the language is, if possible, worse than merely foreign: it is an unpredictable, exasperating, and shifting mixture of the foreign and the familiar . . . at any moment things can change without notice . . . and the non-lawyer has no idea how or why the shift occurred. This is powerfully frustrating, to say the least."[265] The critical race theorists found it frustrating too, the way formalists were capable of utilizing civil rights language to reflect their own political and legal agendas. They imagined just how lay people might become even more confused. And if they weren't confused, they ought to be. The critical race theorists thus undertook upon themselves the role of interpreter to demonstrate that they understood the process by which what made sense all of a sudden made no sense at all. By addressing the shifting paradigms in civil rights rhetoric through a venue and language easily understood by all, they demonstrated their ongoing commitment to civil rights and brought their activism into another realm, where the general public resided.

Critical race theorists belonged to a community of lawyers; they were law professors with a role within their community. They trained future generations of lawyers and scholars. In addition, they entered into dialogue with others in their field with respect to the meaning of law through writing law reviews read by other law professors, practicing lawyers and judges. Stanley Fish proposes that the meanings a reader gives to a text will depend upon the "interpretive community" she belongs to.[266] Thus, lawyers reading law texts can interpret them any number of ways; however, the rules of the community of lawyers will determine the standard. The critical race theorists were trying to affect the community standards on civil rights discourse through their academic and non-academic writings. This becomes apparent in some critical race theory storytelling, where one can find those stories that address a legal audience within the "interpretive community" lawyers share.

But in those instances where the rhetoric of an "interpretive community" was changing, due to the falling apart of the liberal consensus and the rise of legal formalism and political conservatism, the critical race theorists found in storytelling a means of advocating a different interpretive vision in the public realm. When politicians, lawyers and policymakers sought to shape public opinion and gain support for policy, the critical race theorists took upon themselves the responsibility of pointing out the shortcomings of formalist rhetoric.

Richard Delgado was a critical race theory storyteller who built upon Bell's approach. Delgado borrowed Geneva Crenshaw from Bell and developed a character who had "much to say about all the matters that

265. *Id*. at 62.
266. Davis & Schleifer, *supra* note 253, at 71.

trouble me and my countrymen."[267] As a man of Mexican descent, Delgado wanted a character who could relate that experience to his readers. Thus, Delgado envisioned that Geneva had a brother, part black and part Latin. His name was Rodrigo, and he spent his teen and college years in Italy. He became a lawyer and returned to the United States for the first time since he was a child, in the hope of pursuing an LL.M. degree[268] at an American law school and becoming a law professor. Rodrigo saw American culture and law with an outsider's view, although he was an American. He was in effect, an "American immigrant."

The *Rodrigo Chronicles* comprise a collection of eight stories, and the final one, in which Rodrigo and the professor discuss "Critical Race Theory (with as little jargon as possible), how two typical intellectuals of color talk to each other . . . about quite consequential things like racial justice, economic fairness, the black left, the rise of the black right, and black crime."[269] Delgado described Rodrigo as an alter ego, a younger version of himself who served as a sounding board and character to use in discussing and developing theories of law, society and civil rights. The professor was another alter ego, that of a disillusioned civil rights warrior. The two characters learned from each other. The professor saw in the young and vibrant Rodrigo, hope for the future. He acted as a mentor, offering guidance: "Like Rodrigo, the professor is a civil rights scholar and activist, but unlike the young man, has suffered scars and disappointments from years in the trenches."[270]

The professor is Rodrigo's mentor, teaching him the pitfalls of life in an American law school for a student or faculty member of color, because Rodrigo is a neophyte. He has been out of the country too long, and grew up in a different culture. He is well read, however. He knows a lot about legal theory and pedagogy, but doesn't understand how they fit into the critical race theory view of American racial reality. The professor explains the various new schools of legal thought that arose in the wake of the civil rights movement, such as feminist theory and law and economics.

Like the reader, who needs background in understanding the critical race theory view of the world, Rodrigo needs a crash course in what has been happening in the United States since he last lived here, around the time Geneva had her car accident. The professor explained to him that the civil rights movement ended, and that activists were retrenching, because formalist and conservative forces were trying to eviscerate the gains they had won. People of color were experiencing greater inequities: poverty and increased discrimination left the activists in despair for the future.

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267. Richard Delgado, The Rodrigo Chronicles: Conversations about America and Race xix (1995). The Chronicles were first published as law review articles dating back to 1992 and 1994.
268. Someone who has earned a law degree, such as the J.D. (Doctor of Jurisprudence) or its equivalent, but who is interested in advanced study of a particular topic might pursue the LL.M. (Master of Law) degree. Rodrigo already had a law degree, but from an Italian law school within the civil law tradition. He thus needed training in the American common law. The LL.M. would have been an appropriate program for him, although there are schools that offer a Master's in Comparative Jurisprudence, the M.C.J., for students who are not trained in the American common law.
269. Delgado, *supra* note 267, at xvii.
270. *Id*. at xix.

Employment rates were increasing, as were crime rates. Activists wondered whether they would ever make progress in improving conditions for people of color. The professor explained that the critical race theorists were under attack in the legal academy, because of storytelling: "Stories are a great device for probing the dominant mindset . . . to examine presupposition, the body of received wisdoms that pass as truth but actually are contingent, power-serving and drastically disadvantage our people."[271]

Delgado defended affirmative action and raised the cry against ostensibly neutral standards in hiring that only amounted to affirmative action for whites: "white males have benefited from affirmative action, an unjustified preference in jobs, promotions and other social benefits for over two hundred years. Opening the doors to women and minorities should mean that the quality of workers and students will go up, not down, when the unearned preference men received from the old-boy system is eliminated."[272] In addition, he defended storytelling. Ideology and politics intersected as Delgado wrote scholarship that waged the civil rights struggle from within the law school and supported the use of narrative. But critical race theorists taught in an environment in which intolerance posed a threat to their academic freedom.[273]

Bell thought, however, that civil rights struggle demanded more than scholarship. He took a leave from Harvard Law School in 1990, in protest of "the school's failure to put an African-American woman on its permanent faculty."[274] Bell supported the candidacies of black women at Harvard because he respected them as scholars, and because he believed that they could contribute greatly to the intellectual environment of the law school. As women of color, they were in a position to mentor young women of color law students entering into the legal profession. Bell could not do as good a job in mentoring young women. His sensitivity to this issue points to the growing significance of critical race feminism. These female scholars of color came to the conclusion that anti-discrimination law within critical race theory and feminist theory did not address the issues of women of color. Several groundbreaking articles signaled that the critical race feminist framework for understanding civil rights law would become important.[275]

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271. Delgado, *supra* note 267, at 192.
272. Richard Delgado, *Approach-Avoidance in Law School Hiring: Is the Law a WASP?*, 34 St. Louis U. L. J. 631, 639 (1990).
273. Derrick A. Bell, *Diversity and Academic Freedom*, 43 J. Legal Educ. 371, 373 (1993).
274. Goldberg, *supra* note 240. *See also* Bell, *supra* note 110, 49–65. Bell termed this "A Campaign that Failed," in which he claimed that although various black female law professors visited Harvard Law School, none were offered tenure, even though they had levels of achievement comparable to white scholars who had also visited and received tenure. Bell claimed discrimination was the cause. The last incident happened in the academic year 1989–1990 and led to his protest. Regina Austin was the candidate.
275. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9–44 (1989). Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139–67. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581–616 (1990). Crenshaw's article was later published in *The Politics of Law: A Progressive Critique*, (David

Patricia J. Williams's essays forced the issue of black women's stories to the forefront of public consciousness, by taking them to the world outside of legal academia, but in a way different from the approaches taken by Bell and Delgado. Where the others used fiction, she used the first person narrative form; her first book was a collection of stories, vignettes written as though they were in a journal; her musings on her identity, her perceptions of the greater society and the legal culture.[276] Williams wrote about her identity as a lawyer, the perceptions she gained as a privileged and trained professional, for law school was not only a professionalization process, in which the student learned to "think like a lawyer." It was also one of socialization, which Lani Guinier described as becoming a "gentleman," a term professors used in referring to law students: "Gentlemen of the bar maintain distance from their clients, are capable of arguing both sides of any issue, and, while situated in a white male perspective, are ignorant of differences of culture, gender and race."[277]

Her law professors' ideal ignored her race and gender identities. Neither Guinier nor Williams could become gentlemen, because they were too cognizant of the dissonance between their identities as lawyers and their identities as African American women. Williams could not forget that the law had fueled what she termed the "unifying cultural memory of black people" under slavery, when they were deemed three-fifths of a white person, chattel to be bought, sold and used at will. It was in the memory of her great-great-grandmother, a slave who had been impregnated at the age of twelve by the white male lawyer who owned her. It was in the memory of attending law school in the 1970s, when black students were under attack while *Bakke*[278] was pending before the Supreme Court. Although some might have perceived her as an undeserving affirmative action beneficiary, the distant memory of her white lawyer ancestor established a tenuous sense of belonging: "In ironic, perverse obeisance to the rationalizations of this bitter ancestral mix, the image of this self-centered child molester became the fuel to my survival in the dispossessed limbo of my years at Harvard . . . . I got through law school, quietly driven by the false idol of white-man-within-me, and absorbed much of the knowledge and values that had enslaved my foremothers."[279]

Through critical race feminist writing, women of color could speak in their own voices. They spoke in ways the gentleman's perspective could not fathom:

> Legal writing presumes a methodology that is highly stylized, precedential, and based on deductive reasoning . . . . My writing is an intentional departure from that. I use a model of inductive empiricism . . . in order to enliven thought about complex social problems. I want to look at legal issues within a framework in-

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Kairys ed., 2d ed 1990). The reader was first published in 1982, and Crenshaw's article was the first on critical race feminism to appear. Harris's article appeared in the third edition, published in 1998.

276. Williams, Alchemy, *supra* note 257.
277. Lani Guinier, *Of Gentlemen and Role Models*, 6 Berkeley Women's L.J., 93–106 (1991).
278. Regents of the Univ. of Cal. v. Bakke, 438 U.S 265 (1978).
279. Williams, Alchemy, *supra* note 257 at 155.

> scribed not just within the four corners of a document—be it contract or the Constitution—but the disciplines of psychology, sociology, history, criticism, and philosophy.[280]

The reader thus discovers Williams's perceptions of the world around her, as the gentleman's voice struggled with that of a black woman whose legal sensibilities offered her a heightened awareness of the relationships between class, race and gender in society. She understood the role law had in determining those relationships and the hierarchies it imposed.

Williams saw what was seen, listened to what was said, and heard what was not said. She pondered the major news stories of the day, the crises of the late 1980s in New York City—Tawana Brawley, Eleanor Bumpers, Howard Beach, Bernhard Goetz—and thought about how the language of law only served to obfuscate the realities of race and made the illogical logical. Public policy, notions of rights, politics, court decisions, it all made no sense. She thought about the highly stylized and rational mode of legal reasoning and felt as though she were living in a world turned upside down. The dual voices of the gentleman and the slave girl shaped her sense of responsibility as a law teacher training future generations of law students. She went against the grain of traditional law school teaching and scholarship to bring her message forth to them and to those outside of the law school. She made legal doctrine accessible to non-lawyers, explaining how it worked in real life.

In *The Rooster's Egg*, Williams continued her critique of the role of law in society but broadened it to encompass criticism of the institutions that influenced public opinion, namely the media. As legal formalists, political conservatives and liberals continued to struggle for public opinion on civil rights policy, the media played a central role: "There are any number of junctures in history where a shift in the boundaries of law or some political movement has been signaled by very particular uses of rhetoric, peculiar twists of the popular imagination."[281] The media could rise to its heights or fall down into the depths. She realized that so many people relied on the media—radio, television and the newspapers—for their sources of information: "it is quite clear that radio and television have the power to change the course of history, have the power to proselytize and to coalesce not merely the good and the noble but also the very worst in human nature."[282] When media portrayal of events and issues sensationalized the newsworthy, was biased, or did not encourage thorough debate, it fell short; public discourse became superficial and geared toward attracting the greatest market share: "The degree to which the major media, the culture-creators in our society, are owned by the few or are subsidiaries of one another's financial interests, must be confronted as a skewing of the way in which cultural information is collected and distributed."[283]

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280. *Id*. at 7.
281. Patricia J. Williams, The Rooster's Egg: On the Persistence of Prejudice 69 (1995).
282. *Id*. at 45.
283. *Id*. at 78.

Once again, Williams undertook the tasks of interpretation and critique. In the hands of right-wing personalities such as Rush Limbaugh, the radio became a means of manufacturing not only "the specific intolerance of such hot topics as race and gender but a much more general contempt for the world, a verbal stoning of anything different."[284] It reeked of fascism, not the populism of people with valid complaints against government policy. His show became a haven where people with limited exposure and knowledge of feminism and people of color could rant about what they perceived liberals were doing to them in the name of civil rights policy. The show encouraged no debate, as liberals were squelched and misinformation reigned: "The media watchdog organization Fairness and Accuracy in Reporting has issued a series of lists of substantial errors purveyed by Limbaugh's show."[285] Limbaugh told his supporters their enemies were the policy makers of the liberal left who were taking away jobs in the name of affirmative action, spending tax dollars in support of social services to the poor, and indoctrinating in the name of diversity and multiculturalism.

But Williams wondered in the midst of the right-wing radio onslaught: "How real is the driving perception that white men are an oppressed minority, with no power and no opportunity in the land that they made great?" [286] The real culprit was a capitalist system that endorsed greater opportunity and privilege for the very wealthy, as others lost out. In her view, white men have always had privilege as a group, occupying most positions of influence and power across all institutions, in the major corporations, and in the political arena. It could be that recession might explain the contracting job market. Nonetheless, Limbaugh offered women and people of color as scapegoats for a societal problem that disempowered minorities did not control.

The Lani Guinier debacle provided Williams the perfect example of just how much the media disserved the American public when it permitted the sound bite to take the place of open discourse. In 1993, Guinier had been President Clinton's nominee for director of the Civil Rights Division of the Department of Justice. Her nomination failed and her name was withdrawn upon allegations that she believed in "quotas" and would support racial gerrymandering in elections. Williams charged conservative forces with propagating "one of the most effective rumor-milled smear campaigns Washington has ever seen,"[287] fueled by innuendo and mischaracterization of Guinier's scholarship: "The degree to which all of this was completely unsubstantiated only began to come out after the nomination had gone down in flames, and Guinier emerged as an impressive and—if belatedly and without the power of office—respected spokeswoman on issues of race."[288]

The television and print media were both responsible for silencing her, in Williams's view. When the accusations began, no one went as far as to investigate Guinier's writings on their own, accepting supposition as

284. *Id*. at 47.
285. *Id*. at 51.
286. *Id*. at 54.
287. *Id*. at 138.
288. *Id*. at 139.

gospel. No one believed her own characterization of what she meant. She became in effect "a visual aid reinforcing a stereotype. The ubiquity of her image and the suppression of her words enabled the public imagination to run wild,"[289] making her into "a crazy radical" everyone should be afraid of, liberals and conservatives alike.

Williams perceived that debates on equality had been reshaped by law and economics scholars to the point that inequality and prejudice could be excused: "The debate about equality has shifted to one of free speech; legal discussions involving housing, employment, and schooling have shifted from the domain of civil rights to that of the market and thus have become 'ungovernable,' mere consumption preference."[290] Law and economics drove the move to privatization of public services in what Williams described as "laissez-faire exclusion."[291] No one heard what Derrick Bell had been saying since the 1970s: "The continuing struggle for racial justice is tied up with the degree to which segregation and the outright denial of black humanity have been *naturalized* in our civilization."[292] Thus, when "preferences" became the way of looking at civil rights, and formalists started considering the burdens of discrimination remedies, valid discussion of key policy issues became lost.

Moreover, the one institution capable of generating national discussion, the media, did not do an adequate job at educating the public. Instead, talk shows made the profound into something superficial, particularly in discussion of social issues: "we must begin to wonder if the energy for public debate is not being siphoned off into a market for public spectacle . . . . Talk shows as town meetings leave one with the impression of having had a full airing of all viewpoints, no matter how weird, and of having reached a nobler plane, a higher level of illumination, of having wrestled with something till we've exhausted it."[293] In reality, there was no real debate.

Williams suggested the debate lay in the universities, in the struggle over "political correctness."[294] Women and people of color, both students and faculty, raised social awareness in the classroom. They told stories. Conservatives fought back, arguing that liberals and radicals were politicizing the academy and exercising thought control. They were not teaching the true canon. Williams saw diversity instead as being more inclusive and not exclusive at all.[295] In entering the political correctness debate, she came out on the side of exposing alternatives to the progressive view of American history. Diversity contributed to our understanding of American culture and society. Searching for a universal and neutral history could not be achieved "by assuming away the particularity of painful

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289. *Id*. at 144.
290. *Id*. at 17–18.
291. *Id*. at 25.
292. *Id*. at 20.
293. *Id*. at 112.
294. *Id*. at 24.
295. *Id*. at 26–27. *See also* Allan Bloom, The Closing of the American Mind (1987); Dinesh D'Souza, The End of Racism (1995); James Seaton, Cultural Conservatism, Political Liberalism: From Criticism to Cultural Studies (1996).

past and present inequalities. The creation of a false sense of consensus about 'our common heritage' is not the same as equality."[296]

In Williams's interpretation of the law and economics model, all speech had equal weight in the marketplace of ideas; thus, hate speech could be protected. She invoked reminiscences of Mari Matsuda: "it is as if the First Amendment has become severed from any discussion of the actual limits and effects of political, commercial, defamatory, perjurious, or any other of the myriad classifications of speech. It is as if expressions that carry a particularly volatile payload of hate become automatically privileged as political and, moreover, get to invoke the First Amendment . . . ."[297] She argued that only through our knowledge of history could we generate debate over what constitutes political speech and what constitutes hate speech.

Political conservatism spelled for Williams "a new rising Global Right,"[298] "the second great backlash" to the civil rights movement, "disguised as a fight about reverse discrimination and 'quotas' but in truth directed against the hard-won principles of equal opportunity in the workplace and in universities as feeders for the workplace."[299] But when formalists and conservatives spoke of reverse discrimination, Williams couldn't see where it existed, when "women and minorities are underrepresented in all spheres except the very lowest service sectors of the economy, the welfare rolls, and the ranks of the homeless."[300] She argued that since blacks make up only twelve percent of the population, they never edged whites out, since they did not represent a disproportionate segment of the workforce.[301] If anything, in an economy beset by recession, many whites were competing for jobs with each other, and not everybody could be hired. Conservatives propagated misinformation based upon unfounded stereotypes for the sake of garnering political support for their policies.

The critical race theorists of the 1980s and 1990s fought neoconservatism in the executive office, the Congress, and formalism in the courts. Bell's approach lay in the jeremiad; his was the voice calling out in the wilderness. He urged whites to admit their inheritance of racism, and he hoped all would recognize that Americans have had a long history of victimizing people of color for the sake of their own self-aggrandizement. White privilege always existed within a white hegemony that united whites of all class backgrounds against the interests of people of color. Racism would always exist, and the civil rights movement did not end it. Lawyer activists could only continue the struggle, knowing that they will never succeed. Their resistance is what mattered, that they remained constantly vigilant of racism.

Delgado offered in turn, an understanding of how critical race theorists looked at questions of law within society and how they impacted issues of race. Through Rodrigo and his conversations with the professor,

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296. Williams, *supra* note 281, at 28.
297. *Id*. at 29.
298. *Id*. at 24.
299. *Id*. at 35.
300. *Id*. at 96.
301. *Id*. at 99.

the reader is able to see the view of the world held by critical race theorists, and the logic they use in supporting or protesting specific policy proposals. Delgado offered an insider's look at the world of law, of legal scholarship, theory, and law professors. The reader saw what critical race theorists were thinking, and how they came to think that way.

Rodrigo and the professor argued for new concepts in civil rights jurisprudence, based upon evidence—scholarly sources on civil rights law and sociological evidence that demonstrated the position of people of color in society. All of this supported Delgado's position on the shortcomings of the liberal faith in the law. Rodrigo pointed to newer directions for civil rights strategy. Thus, critical race theorists proposed that people of color should use what Rodrigo referred to as legal instrumentalism in civil rights strategy, similar to Bell's racial realism: "Under it, subordinated people would acknowledge that in many eras and in many courts, success is not really possible. At these times, it is better to look elsewhere for relief."[302] That could mean political activism, or protest, as in the early civil rights movement, when massive resistance made it impossible for activists to force compliance with the law. But Williams perceived that the key lay in considering how to counteract resistance to liberal activism in the American imagination.

Williams's use of the essay format brought the reader a look at the conversation within. Her approach was very personal, in that she took the reader on a journey inside of her head, so that one could see the paradoxes of law and race in American society as she experienced them. She offered a personal critique of her world of law, through the eyes of a politicized and knowledgeable critical race feminist. For the layperson aware of shifting political and social winds that signified declension from the civil rights agenda, Williams explained how the legal mind worked. She made the incomprehensible understandable.

To the extent that Williams analyzed cultural institutions in light of her theoretical knowledge, she appears as more of a cultural critic than the others.[303] She voiced her dissatisfaction with the tone of American cultural life, the institutions that shaped public opinion. She was interested in raising culture to a higher point, in order that true political discourse might follow at this higher plane. Popular culture simplified complicated issues, thus minimizing the effect of any discourse. Americans were too reliant upon stereotypes and misinformation in making value judgments and in formulating opinions on public policy, due to the sway

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302. Richard Delgado, The Coming Race War? And other Apocalyptic Tales of America after Affirmative Action and Welfare 41–42 (1996).

303. For example, Ben Agger, Cultural Studies as Critical Theory (1992), in which he defines cultural studies as an analysis and critique of popular culture. He describes various approaches cultural studies critics take, including among others, that of the Frankfurt School, in which critics are interested in the commodification of culture by elites bent upon social control. *See* Agger 62–70, "The Frankfurt School's Aesthetic Politics." An analysis of Patricia Williams's essays in *The Rooster's Egg* fits most closely with this model. *See also* Arthur Asa Berger, Cultural Criticism: A Primer of Key Concepts (1995); Legal Studies as Cultural Studies: A Reader in (Post) Modern Critical Theory (Jerry Leonard & Marie Ashe eds., Albany, N.Y.: SUNY Press, 1995); Richard K. Sherwin, When Law Goes Pop: The Vanishing Line Between Law and Popular Culture (2000).

of media influences. This tendency to simplify was especially pernicious. In Williams view, it led to greater intolerance, ignorance of prejudice and racism. Thus, in the post-civil rights era, she claimed racism persisted, but it needed to be exposed and explained, since nobody claimed to be racist. Society no longer tolerated the vitriol of Massive Resistance. Instead, attitudes and perceptions hinted at class bias, white race consciousness and discrimination. Williams found in her cultural critique a means of offering this interpretation to the greater society.

Each of the critical race theorists who reached out to the greater public through storytelling protested the insularity of the world of law and formalism. They perceived that legal institutions possessed their own truths and passwords: lawyers and judges used a logic hidden from the rest of society. As was the case with most institutions in society, the critical race theorists argued that racism lay at the foundation, whether it was of the conscious type, or whether it resided in unconscious attitudes that supported white supremacy. They protested the realities of academic life, claiming that law teaching encouraged the lawyer to hide within the academy, dealing only with other law professors and students. Law professors only spoke to each other, and did not make their work truly applicable to the problems besetting society.

The critical race theorists had a different vision. Their scholarship reflected the needs of their communities. They focused upon solutions to the problems people of color experienced in society. Their activism shaped their interest in reaching out. Their work need not be found only in the law reviews. They took their law review articles and published them in a media accessible to lay people, in the hope of shaping public discourse on race, the law and civil rights policy.

VII. Protest: A National Debate on Affirmative Action, Race and the Law

Within the legal academy, the critical race theorists' protest against formalism put them into conflict with the traditionalists who rejected the unorthodox critical race theory approach to scholarship. As traditionalists, they had specific ideas about the responsibilities of law professors to their students, the legal profession, and to society as a whole. Law professors ought to contribute to scholarly legal discourse and train law students to become good lawyers who respected the law and upheld its institutions. The critical race theorists rejected the formalist and traditionalist projects, proposing a new vision of the law, that of the "voice of color." The voice of color would expose the truth of white supremacy in law and destroy it. Refusing to give up storytelling, they brought their cause to the general public, in an attempt to raise consciousness of race and the law and lead the protest against formalism. They became public intellectuals and cultural critics.

Critical race theory storytellers told the public that traditionalism and formalism were tools in a strategy to support political conservatism and white supremacy. At Harvard, it led to Bell's protest leave and student protest against the administration over its failure to tenure a woman of color. Thus, the issue no longer remained simply one of how to judge new and unorthodox scholarship within the academy. Instead, it became one

of defining and determining public understanding of race and gender questions.

In his autobiographical work on his life as an activist, Bell recognized "the difficulty and, often the futility of trying to propagate [his] views about racial discrimination to those who already possessed quite different, and equally deeply held views about white entitlement."[304] For that reason, his protest leave from Harvard, "might annoy, but they would seldom undermine the authority or power of those I confronted."[305] His victories left him feeling vindicated, that he stood up for what was right; however, they were pyrrhic. He could not change the white power structure responsible for the subordination of blacks that he saw all around him.

In his view, and in the view of his student followers, Harvard Law School was part and parcel of the problem. Communities of color needed the lawyers Harvard could train; female students of color needed mentors and role models. By offering tenure to only a few white women and men of color, Harvard failed to desegregate its faculty, and it remained an exclusive white male club. Thus, students of color at Harvard became critical when the law school failed to tenure professors of color such as Regina Austin in 1990, and Anita Allen in 1991. Advocates claimed the administration applied selective use of policy in rejecting them, through use of the "year away" rule, in which those considered for tenure after visiting would be voted upon the year after they visited. Nonetheless, the rule was rescinded in 1992, to give tenure to four white male professors, three of whom were visitors.[306]

Bell notified the Law School of his protest leave in the spring of 1990, and that fall, members of the Black Law Students Association held a symposium on October 19 and 20 in his honor. They were dedicated to a man who was not afraid to "speak up," "stand up" and "fight hard."[307] Bell realized he would be missed, and that students who hoped to study with him would not be able to take his classes. He believed in the righteousness of their cause, and thought diversity could only strengthen the law school, because "we would gain the benefits of the more diverse faculty students want and need to prepare for professional life in an increasingly heterogeneous world."[308]

Student supporters, members of the Coalition for Civil Rights, filed a lawsuit in November of 1990 against the law school in Massachusetts state court, claiming they were damaged as a result of alleged discriminatory hiring practices.[309] The students saw themselves as litigating the *Brown* case of the 1990s. Although the students sued pro se, they had support from various groups who submitted amicus curiae briefs, such as the Boston Bar Association Lawyer's Committee for Civil Rights, the Na-

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304. Bell, *supra* note 110, at 148.
305. *Id*.
306. *HLS Diversity: A Celebration of the Movement*, October 30, 1998, Washington D.C., "Protest Yields Results: A History," page unnumbered.
307. *HLS Diversity*, "A Symposium to Honor Professor Derrick A. Bell Jr."
308. *Id*. Bell's letter to student friends, April 15, 1991.
309. Harvard Law School Coalition for Civil Rights v. President and Fellows of Harvard College, 595 N.E. 2d. 316 (Mass. 1992).

tional Lawyers' Guild, the National Conference of Black Lawyers and the Center for Constitutional Rights.

The students alleged that they were denied the benefit of an integrated faculty, due to the failure of the law school to hire minorities, females and disabled persons. They were missing something: the white male professors who taught them did not have any consciousness of racism and sexism. Thus, their instruction was inadequate, particularly when professors made insensitive remarks in class and alienated students of color. The law school acted as though students of color and women did not belong. These students needed interactions with those who understood them and who shared their frame of reference. The students compared their case to that of Rosa Parks. Women students of color were being told by Harvard Law through its failure to hire students who looked like them that they had no place in the front of the classroom.

Harvard moved to dismiss, and oral argument was heard on February 15, 1991. The lower court dismissed for lack of standing, and the students appealed. Two female law students, one black and the other white, members of the class of 1992, argued for the members of the Coalition at oral argument heard on March 3, 1992. The appellate Supreme Judicial Court, Middlesex County affirmed the dismissal, on the basis that the students had no standing; they were not employees or prospective employees of Harvard. Moreover, they were incidental beneficiaries to any employment contracts Harvard had with any professors or prospective hires. Their alleged injuries, denial of perspectives, life experiences and access to role models, "[were] not within the area of concern of the statute."[310]

In that same spring of 1992, an event occurred that affirmed the students' perception that the Law School was an inhospitable place; it spurred their protest that the law school administration should do more to hire women and professors of color. Some members of the Harvard Law Review published a parody of an article written by Mary Joe Frug, a noted feminist legal scholar who was murdered in Cambridge on April 4, 1991. Professor Frug taught at the New England College of Law. Her widower was Gerald Frug, a Harvard Law School professor. Feminist law students blamed Kenneth Fenyo and Craig Cohen, two white male law students who authored "a Manifesto of Post-Mortem Legal *Feminism*," under the byline "Mary Doe, Rigor-Mortis Professor of Law."[311] It was distributed on April 4, the first anniversary of her murder: "the result was a five-page, footnote-laden parody, saturated with inside jokes and sexual innuendoes. The article was purportedly dictated 'from beyond the grave.'"[312]

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310. *Id*. at 77.
311. Linda Matchan, *Harvard Law Students' Parody of Slain Professor's Text Decried*, Boston Globe, Apr. 13, 1992, at 18. *See also* Andrea Estes, *Cracks Form in Staid Harvard Institution*, Boston Herald, Apr. 25, 1992, at 1; David Margolick, *At The Bar: In Attacking the Work of a Slain Professor, Harvard's Elite Themselves Become a Target*, N.Y. Times, Apr. 17, 1992, at B16. The original article was published posthumously that March as an unfinished draft: Mary Joe Frug, *A Post-modern Feminist Legal Manifesto*, 105 Harv. L. Rev. 1045–75 (1992). In the article, she discussed the various ways she perceived the law as upholding the oppression of women and permitting men to abuse them.
312. Margolick, *supra* note 311, at B16.

Among the faculty and the student body, some thought the student editors who drafted the parody were simply callous. Others thought the students' actions were emblematic of a greater trend within the law school, the sexism they believed permeated the environment. The parody was misogynous; its authors were not just in disagreement over whether a radical feminist piece should have been published by the *Harvard Law Review*. Members of the *Law Review* were elite law school students who often went on to clerk for judges and become professors. Some might eventually become judges. How would they view cases where women were victims of violence? How would they address issues of gender in the law when they had such disrespect for a murdered woman? The question of diversity was not limited to the confines of the law school.

The students protesting against the lack of diversity at Harvard found that they were not helped any when Dean Robert Clark stated in a *Wall Street Journal* editorial that law students of color at Harvard were self-conscious, in that they worried about the role affirmative action played in admitting them: "The minority students need a sense of validation and encouragement, with the fundamental problem being a need for self-confidence that plays itself out as, 'Why doesn't Harvard Law School have more teachers who look like me,?' in a sense we're dealing here with one of the symptoms of affirmative action. This means this debate could be a recurring theme through the 1990s or until we get to some equilibrium."[313]

Fifteen law professors asked the dean to dissolve its appointment committee and institute a new one that would have diversification of the faculty as its goal.[314] In their letter, the faculty members condemned the parody issue of the law review as an example of the sexism and racism that pervaded the law school, for the issue included more than just a parody of Frug's article, but included an article questioning the scholarship of two Black tenure-track professors. They criticized the dean for failing to discipline the authors of the parody. He refused, perceiving that the students were exercising their freedom of expression. In his view, the students did not contribute to any tone of racist and sexist hostility. This position was contrary to the critical race theory opinion that the law school environment created intolerance.

Critical race theory became a subject for the daily news, as the critical race theorists began to take their cause to the public, whether through Derrick Bell's protest leave, or through the popular fiction he and others had been publishing. Critical race theory was no longer a debate discussed in the law reviews; popular intellectual journals began publishing pieces about it and published reviews of critical race theory storytelling texts. The intellectual press picked up the debate over formalism; whether liberal or conservative, the press formulated the terms of the debate. Their reports on critical race theory were narrowly presented or caricatured, for the purpose of directing their constituencies to choose sides.

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313. L. Gordon Crovitz, *Harvard Law School Finds its Counterrevolutionary*, Wall Street J., Mar. 25, 1992, at A13.
314. Natasha H. Leland, *Law Profs Urge New Faculty Hiring Process*, Harvard Crimson, Apr. 21, 1992.

In the African American popular press, however, the critical race theorists were heroes, modern day civil rights activists, fighting the cause within the academy. And in the wake of events that brought race and the law issues to the forefront of the American consciousness, such as the Rodney King beating, or the O. J. Simpson murder trial, the critical race theorists emerged to explain the dangers formalism posed not just within the legal academy, but to African Americans and the society at large. This was the end result of the national debate on critical race theory.

Nonetheless, prior to Bell's protest leave and the ensuing national debate, black conservatives found it necessary to explain why they did not agree with the critical race theory position on civil rights. Clarence Thomas, then chair of the Equal Employment Opportunity Commission, wrote a review of Derrick Bell's first book of critical race theory storytelling. He set forth a black conservative position on the civil rights issue. He did not discuss critical race theory directly, because the debate over its existence had not reached the public imagination at this point. That would come later. Thus, although Thomas described the book and its contents, insofar as he discussed the chronicles, his primary goal was criticism of civil rights discourse as it developed in the African American community. He was dissatisfied with the fact that Bell considered civil rights questions as one of alleviating group problems; indeed, that was the theme of the book.

In Thomas's view, too many civil rights activists infused civil rights discourse with color consciousness. The Constitution, he believed, was colorblind, in that it protected the rights of individuals. Society could never be colorblind, in that color could never be erased. One's racial identity and color were private matters that should never invade political discourse. When private passions infused the political realm, however, problems ensued: "it would destroy limited government and liberal democracy to confuse the private, societal realm . . . and the public political realm. Obscuring the difference between public and private would allow private passions (including racial ones) to be given full vent in public life and overwhelm reason."[315]

Thomas thought segregation was a national tragedy because it legitimated prejudice and the public regulation of race relations. With the end of legalized segregation and discrimination, the danger of government-sponsored prejudice was removed. However, the civil rights trend toward heightened race consciousness in the form of affirmative action was just as dangerous, because once again, it brought race in where it did not belong, treating people as members of a racial group, stereotyping them, when the individual mattered most. Racial justice was thus an oxymoron; there could only be justice for individuals and their individual freedoms. He perceived that too many African Americans saw themselves as members of a group first, not as "members of society." They became members of the liberal coalition, bent upon "supporting expanded government."

The tragedy was that too many African Americans followed the established liberal party line and did not reflect a diversity of opinion. If

315. Clarence Thomas, *The Black Experience: Rage and Reality*, Wall Street J., Oct. 12, 1987, at 20. This was a review of *And We Are Not Saved*.

they began to see themselves as individuals, they would then feel free to exercise the individual freedoms granted to them under the Constitution, and pursue their own paths to happiness. Thus, Thomas perceived that expanded government limited rights and made African Americans hostage to a group mentality that only corralled them. It prevented them from finding their own sense of fulfillment, as they became ever more dependent upon others to do for them. At this juncture, conservatives like Thomas saw Bell as only contributing to liberal error on civil rights.

But five years later, conservatives labeled Bell the leader of a radical fringe, because he was adamant in his view that racism was a permanent force within American society.[316] He was racist in his portrayal of whites, describing them as morally depraved by America's heritage of slavery. In his fatalism and pessimism, he downplayed the role of progress in American society and its successes in removing racial stigmas that had limited black achievement in the past. Notwithstanding the civil rights movement, Bell proclaimed that nothing changed. His critics responded that much had changed. Through the efforts of the Supreme Court and Congress, white Americans had removed racial barriers and became more tolerant on racial matters.

Bell's critics thought he was dangerous. He made inflammatory statements and arguments not based in fact. He used hyperbole, much to the chagrin of formalists: "Storytelling not only makes palatable what otherwise might seem unacceptable. It relieves Bell of the necessity of making logical arguments sustained by evidence. Unsubstantiated—and indeed indefensible—assertions litter the book."[317] He was paranoid, and his public appeal posed a problem, insofar as he told whites they were "the scum of the earth, while describing blacks as morally superior yet seriously and permanently incapacitated."[318] He stereotyped whole groups of people and destroyed any belief that Americans could be part of a unified and integrated society, as he pitted blacks against whites. Bell was leading a "crusade to make race-based analysis a legitimate methodology in legal scholarship,"[319] where it presumably had no place.

Critical race theory simplified became demonized—commentators conflated it with legal realism in the most basic sense: it had in common with legal realism "a disdain for logic . . . which leads its adherents to view principles such as individual rights as merely 'beguiling but misleading conceptual categories' that 'lead to legal results that harm blacks and perpetuate their inferior status.'"[320] Delgado presented the "Cliff Notes" on "critical race theory, feminist legal theory, poststructuralism and other gimcracks of the postmodern legal academy,"[321] where contradictions in each train of logic could be found.

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316. Abigail Thernstrom, *Almost ad Nauseam*, Nat'l Rev., Nov. 16, 1992, at 58. The article was a review of *Faces at the Bottom of the Well*.
317. *Id*. at 59.
318. *Id*.
319. Anne Wortham, *American Blacks as 'Immutable Outsiders,'* Wall Street J., Dec. 4, 1992, at A7.
320. *Id*.
321. Marc Arkin, *A Crash Course in the Latest Legalese*, Wall Street J., Sept. 1, 1995, at A5. This was a review of *The Rodrigo Chronicles*.

Playing upon the postmodernist view that reality is socially constructed, Marc Arkin found that outsider narratives had no "greater claim to validity than any other perspective. And yet, the critical race theorists proposed that the perspectives of outsiders had greater claims to validity. For that reason, Arkin perceived that critical race theory was nihilistic: power was the ultimate equalizer, as the outsider scholars sought to gain power within the legal academy. They were demagogues; their emphasis on race consciousness and arguments for a minority voice in the law placed them beyond the pale. Their supporters were buying into "political correctness," a term which implied thought control and uncritical acceptance of marginality. A *National Review* article caricatured Williams as speaking "mumbo-jumbo," writing incomprehensible and dense prose that no one could understand. Described by the British press as a "militant black feminist from Columbia University," she spoke "about a subject which liberals love—unadmitted racial prejudice." Conservative editors implied she was incapable of dealing with serious academic debate, inarticulate, and shielded herself by charging that critics stereotyped and victimized her.[322]

Thus, formalists and political conservatives viewed Bell's protest leave as nothing more than grandstanding and race-bating. Neutral standards required that the best qualified candidates be hired: "faculties should not feel that they cannot scrutinize the credentials of minority candidates. Truly qualified minority candidates are in short supply at this level, and demand is high."[323] Political conservatives proposed that Harvard would love to hire a qualified black woman as professor; however, when affirmative action demanded that candidates with lower qualifications be hired, the line ought to be drawn. No hiring committee should reward low performance, and Harvard was right to take a stand, lest the wrong message be given: "the right race and the right gender will push [candidates] up the ladder regardless," not hard work.[324]

A conservative law student argued that the struggle for diversity was fraudulent. Supporters of diversity claimed that black people think differently from white people, which was "a racist premise." At the same time they condemned the law for its formalism, they proposed "so formalistic a view of diversity," when race was only one factor that determined a person's viewpoints and background. Diversity ought to mean diversity of opinion in the true sense, not a diversity which sought to attract people of only a narrow political spectrum: liberals and radicals, all in the hope of retaining "control of the liberal avant-garde that has dominated institutions like Harvard Law School for the past two decades."[325]

But there once was "acceptance and understanding of HLS practices," according to Professor Clark Byse. In the 1970s, however, the faculty began hiring more scholars on the left, in response to national political

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322. Patricia Williams, *A Very British Murder*, Nat'l Rev., Feb. 24, 1997, at 18. Her critics were discussing her 1997 Reith lectures, sponsored by the British Broadcasting Company. They were later published: Patricia J. Williams, Seeing a Color-Blind Future: The Paradox of Race (1997).
323. Editorial, *For Whom Bell Tolls*, New Republic, May 21, 1990, at 8.
324. *Id*.
325. Brian Timmons, *Fraudulent Diversity*, Newsweek, Nov. 12, 1990, at 8.

trends and a newer generation of scholars. One faculty member explained the significance of this trend: "Although the new staff were brought on to increase scholarship, they engaged in politicizing the school instead," particularly when it came to faculty appointments.[326] They were quite outspoken against what Duncan Kennedy called "the centrist consensus." But most importantly, "we began to teach legal doctrine as though it were a significant locus of political struggle, thereby challenging the [Harvard Law School] black-letter-plus policy."[327] This was a view scholars on the right did not agree with: politics and social status had nothing to do with judicial decision-making.[328] Leftists brought politics into their scholarship and into the classroom.

Patricia Williams argued that the politics of law mattered. Exposure to professors of color and scholarship about people of color was crucial. In the law school environment, formalist notions of teaching neutral principles divorced constitutional law instruction from civil rights discourse and thus made discussion of civil rights an optional matter: "the process of legal education mirrored the social resistance to anti-discrimination principles. Subject matter considered to be 'optional' is ultimately swept away as uneconomical 'special' interests—as thoughtlessly in real life as it has been in law schools."[329] The cry for "neutral principles" meant "avoiding the very hard work that moral judgment in any sphere requires, the constant balancing—whether we act as voters, jurors, parents, lawyers, or lay people—of rules, precepts, principles and context."[330]

The critical race theorists articulated the historical and contemporary fears of African Americans on the civil rights question. At America's universities, hate crimes were on the increase and students of color were under attack. At American law schools, students feared what treatment they might experience when they interviewed for jobs at law firms. They wondered whether overt prejudice would bar their entry, just as their elders were considering the notion of a "glass ceiling" putting a cap upon their opportunities. Critical race theory provided a means of understanding and articulating their perceptions of the law and the world around them.

Police brutality became a serious issue as the nation was rocked by the Rodney King police beatings in Los Angeles and the rioting that followed. Critical race theorists offered a credible explanation for why African Americans felt they were under seige.[331] American popular culture encouraged whites to view blacks as lawless and criminal. White demand

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326. Miguel Rodriguez, *Faculty Divisions Spark Pointed Debate*, Harv. L. Rec., Mar. 2, 1984, at 6.
327. *Id*.
328. *Id*.
329. Patricia J. Williams, *Blockbusting the Canon*, Ms. Mag., Sept./Oct. 1991, at 61.
330. *Id*.
331. See, for example, a colloquium held at the Denver University Law School, entitled *Racism in the Wake of the Los Angeles Riots,* in which several articles were published. The Hon. A. Leon Higginbotham, Jr. gave the introduction. Jerome McCristal Culp., Jr. presented: *Notes from California: Rodney King and the Race Question*, 70 Denv. L. Rev. 199–212 (1993). Deborah Waire Post wrote *Race, Riots and the Rule of Law,* 70 Denv. L. Rev. 237–63 (1993), and Kimberlé Crenshaw wrote with Gary Peller, *Reel Time/Real Justice*, 70 Denv. L. Rev. 283–96 (1993). Anthony Cook presented *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 Denv. L. Rev. 297–311 (1993).

for law and order excused police behavior. Thus, a white jury saw a video of Rodney King being beaten by white police officers and found the officers not guilty of police brutality. Political conservatism signified rejection of black civil rights and support of formalism. Formalists claimed the law was color blind, but whites continued to see color. Political conservatives who supported formalism seemed to be aligned with the forces of racism, bent upon turning the clock back to an earlier time. Formalists who claimed to be liberals seemed disingenuous. In the minds of the critical race theorists, formalism meant that civil rights protections were being watered down and eviscerated, all through a logic of neutral principles that excused racism. Excusing racism gave a green light to racists eager to voice their anger and hatred of blacks and other minorities.

Politically conservative critics did not seem to realize that African Americans and other people of color perceived that the society was in grave danger. The critical race theorists argued that multiculturalism could stem the tide of prejudice that threatened to deluge all of American society, as we learned the history of disempowered groups. But the conservatives' support of formalism placed them on the opposite side of a growing divide, as they claimed that race consciousness was the real problem. In their view, race consciousness made African Americans illogical and prejudicial, corralling them in an irrational tribalism that led them to support any African American perceived as threatened by the greater society, all in the name of protecting the ranks. Thus, African Americans supported O. J. Simpson in his murder trial and celebrated his acquittal, although conservative whites argued that his guilt was obvious and should have led to a guilty verdict.[332]

That a political conservative blamed critical race theory for the acquittal points to the significance of the struggle for the public imagination. This contest had not existed ten years before, when the debate raged solely within academia. Jeffrey Rosen argued that O. J. Simpson's trial lawyers used precepts grounded in critical race theory in their defense of Simpson for the murders of his ex-wife Nicole and Ronald Goldman. Rosen pointed to A. Leon Higginbotham as a sympathizer to critical race theory, insofar as the premises of his two books on American slave law were precursors to critical race theory thinking: that the legal system has always operated to enforce white supremacy and keep blacks powerless, all the while protecting white property rights in their slaves and in their slaves' labor.[333]

The critical race theorists did not agree that "formal equality" changed the status of African Americans. Instead, racism was something all African Americans "experience[d] as normal rather than exceptional." This position meant that critical race theorists believed in what Rosen called "a vulgar racial essentialism."[334] Blacks saw things differently from whites; as such, the law as promulgated by whites did not apply to them.

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332. Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, 215 New Republic, Dec. 9, 1996, at 27–42.
333. *See* A. Leon Higginbotham, Shades of Freedom: Racial Politics and Presumptions of the American Legal Process 196 (1996); In the Matter of Color: Race and the American Legal Process, the Colonial Period (1978).
334. Rosen, *supra* note 332, at 30.

Their stories of disfranchisement and oppression under the law ought to weigh more before courts of law than evidence presented by whites. Formalist evidentiary rules ought not apply to them. For that reason, Simpson's defense team presented the story of Simpson as a black man wrongfully accused by bungling, inept and racist police officers of the Los Angeles Police Department. Black racialist thinking, fueled by critical race theory, led the jurors to ignore the evidence and vote their race passions, and Cochran was to blame, in that he manipulated the African American jury: "He set out, through storytelling and the manipulation of racial iconography, to create a narrative that transformed O. J. from a coddled celebrity into the civil rights martyr of a racist police force."[335]

In Rosen's eyes, critical race theory thus went from being "an academic movement that lurked only a few years ago at the fringes of society" to gaining an influence that "resonated so forcefully with our legal and popular culture . . . ."[336] The critical race theorists were responsible for "denying the possibility of objectivity and further fraying the already frayed comity of American society."[337] They were responsible for the failure of the integration dream, that color would become irrelevant, that Americans would all become one. They peddled the race card within the African American community, in the academy, and in society, as they inserted race into public discourse where it did not belong.

Kimberlé Crenshaw analyzed the mainstream media's response to O. J. Simpson's defense and subsequent acquittal for the murder of his ex-wife Nicole and her friend Ronald Goldman, in light of her thoughts on legal liberalism. She found that the colorblindness argument "reflected the logic of liberal race reform and the particular ways in which it constructs racism and racial justice . . . . Although elites diverged on the question of whether remedial uses of race consciousness were legitimate, there was broad agreement that colorblindness was the eventual goal of racial justice."[338] Nonetheless, "at the structural level, the broad-scale institutional reforms that would have been necessary to eradicate patterns of white dominance and black subordination were only tentatively approached and eventually discarded."[339] She explained the ideology of colorblindness.

> The goal of a color-blind world is one in which race is precluded as a source of identification or analysis; its antithesis is color consciousness of any sort. Pursuant to this understanding, the moral force of racial equality is mobilized within contemporary settings to stigmatize not only apartheid-era practices but also efforts to

335. *Id*. at 34.
336. *Id*. at 27.
337. *Id*. at 34.
338. Kimberlé Williams Crenshaw, *Colorblind Dreams and Racial Nightmares: Reconfiguring Racism in the Post-Civil Rights Era*, *in* Birth of a Nation'hood: Gaze, Script, and Spectacle in the O.J. Simpson Case, 101 (Toni Morrison & Claudia Brodsky Lacour eds. New York: Random House, 1997).
339. *Id*. at 102.

> identify and challenge manifestations of institutionalized racial power.[340]

Thus, just saying race was not an issue did not make it so, in her view. Burying race "neither forestalls the redeployment of racist discourses nor buries the color line beyond discovery. As revealed in the proliferation of commentary that framed Simpson's acquittal in terms of black lawlessness and irresponsibility, traditional articulations of black otherness are easily recovered."[341] She perceived that those in the mainstream pointed to the jury who acquitted him as a monolith of irrational blackness, although there were whites on the panel who did not believe the prosecution's case. Some proposed that an all-white jury from a more affluent venue would have been neutral, less biased, and would have convicted. Crenshaw did not agree. Such a jury would have disregarded the evidence and convicted Simpson out of prejudice. Crenshaw did not believe white racism ever disappeared, notwithstanding the appearance of color-blindness: "a residual degree of racist sentiment among a substantial part of the white population remains amenable to appropriately coded racial appeals."[342]

In addition, "racism is represented as isolated, aberrational, and relegated to a distant past,"[343] and evoking it, according to the "race card" analogy, "presum[ed] a social terrain devoid of race until it is (illegitimately) introduced."[344] And for that reason, what Crenshaw saw as a legitimate defense strategy, questioning the actions and biases of the police officers involved in the investigation, became in the eyes of the mainstream, something altogether improper: "Under the metaphor of the 'race card,' raising the issue of racism was characterized as a disingenuous act that was especially dangerous and unethical in circumstances surrounding the trial."[345]

Instead of questioning the actions of a police department notorious for its "troubling culture . . . that condoned racist behavior and jeopardized the rights of the people of Los Angeles, particularly African Americans and Latinos,"[346] Crenshaw accused commentators critical of the defense as going on the offensive: "Los Angeles, it was argued, was rife with racial tension following the Rodney King beating, the acquittal of the officers involved, the subsequent civil disturbance, and the Reginald Denny trial. To those Los Angelenos anxious to put those unfortunate events behind them, framing the defense around a racial conspiracy seemed the embodiment of irresponsibility."[347] This stance rejected the truth of the matter, she suggested, that the prosecution's chief witness, Detective Mark Furman, had serious credibility problems, and the police investigation might not have been conducted according to standard rules of criminal procedure. These factors might have led a jury to discount the

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340. *Id*. at 103.
341. *Id*.
342. *Id*. at 105.
343. *Id*. at 104.
344. *Id*.
345. *Id*. at 118.
346. *Id*. at 119.
347. *Id*.

prosecution's evidence: "it seems to be taken for granted that on the one hand, there are elaborate rules constraining police prerogatives, and that on the other, such rules often appear to be disregarded."[348]

Crenshaw perceived the investigating police officers' actions and testimony as containing inaccuracies, irregularities, and implausible stories. All of these were examples of "testilying." For example, "Fuhrman was simply a skillful liar, and at worst, a rogue cop, clearly not the kind of witness upon whom to rest a high-profile case."[349] Yet, he was permitted to testify, even though he was not the best of witnesses. The prosecution defended his integrity. This could happen, in Crenshaw's view, because in modern policing, "support for police reform was always tempered by the fear that such constraints might compromise the effectiveness of police in containing crime," pointing once again to the racial divide.[350] Elite whites were not often the targets of police investigation; as a result, "race figures prominently in this equation by investing police with a formal credibility that trumps the testimony of many African Americans and others who are most likely to be familiar with the realities of an unpoliced police force."[351]

Thus, what for many in the mainstream press was an obvious case of guilt, became, in the hands of the jury, an irrational decision not to convict, one for which the black community ought to be punished. Crenshaw saw it differently: "the proof of Simpson's guilt beyond a reasonable doubt was, as the experts acknowledged, not as open and shut as laypersons might have believed."[352] There were reasonable doubts that many could see, including the three non-black members of the jury. In her view, the majority black jury was better than any all-white jury. The jury members should "be credited for imposing higher standards on police and prosecutorial conduct."[353]

Crenshaw found that the verdict pitted feminist discourse against African American civil rights. The Simpson case was all about gender, in the view of many white feminists. A wife batterer killed his ex-wife, and the black female jurors just did not understand the gender dynamics. In Crenshaw's view, the jurors could not be fully to blame, when "even those closest to the prosecution's case did not, initially, understand this case to be about domestic violence,"[354] and they "saw little that would have significantly altered any predisposition to see the domestic violence incident from 1989 as marginal to the case."[355]

But the argument that white feminists had with black female supporters of Simpson, Crenshaw suggested, was too simplistic: "In the absence of discourses that center specifically on black women, an important and unresolved question is whether the oppression of black women is more closely linked to the policing of black men within the public sphere or the

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348. *Id*. at 121.
349. *Id*. at 120.
350. *Id*. at 123.
351. *Id*. at 124.
352. *Id*. at 133.
353. *Id*. at 137.
354. *Id*. at 147.
355. *Id*. at 148.

marginalization of white women in the private sphere."[356] Black women might not have felt any connection to Nicole Simpson, because the case was not particularly about critical race feminism. For that reason, it might very well be, Crenshaw proposed, that black women were forced to choose, and they ought not be criticized for siding with Simpson. But most importantly, white feminists were indulging in colorblind rhetoric, forgetting the "historic and social factors that tell much more about why many black women identified primarily with Simpson."[357]

She admitted that when issues of intraracial gendered oppression were raised, African American women were forced to come to terms with both gender and racial loyalties. More often than not, they subsumed their gender claims to their racial loyalties, particularly when the issues involved "the context of a highly charged trial that featur[ed] virtually all of the symbols of a racial injustice that have shaped antiracist resistance discourses for generations."[358] But if there was heightened racial scrutiny upon Simpson for Nicole Simpson's murder, then feminists should question the verdict for other reasons, suggested Crenshaw.

Cases of intraracial violence fell through the cracks and did not garner as much attention from the media; they thus "have every reason to question the terms of the postverdict debate and to demand greater accountability on the part of police departments, as well as communities, employers, families, and the like,"[359] to conduct fair investigations and not privilege some cases over others. This approach would link the feminist agenda to the African American civil rights agenda, by focusing efforts on the ultimate goal, what Crenshaw saw as "intersectional politics that merges feminist and antiracist critiques of institutional racism and sexism."[360]

Crenshaw was articulating a critique of what formalism had come to mean in American society and civil rights discourse, but with respect to popular perceptions of a criminal case. The popular formalist view stated that in the post civil rights era, affirmative action led to unacceptable race consciousness. In the eyes of the critical race theorists, formalism led some to excuse police brutality against African Americans as not being a racial issue; but, in the critical race theory view, race always did matter. There could be no color blindness, as long as whites failed to consider the overwhelming significance race has had in regulating white-black relations and in determining the status of African Americans in social and legal institutions.

When conservatives demonized the critical race theorists, liberals and other progressives celebrated them. Book reviews written by liberals presented the critical race theorists in a different light. Although they might have had problems with the unorthodox style adopted by the critical race theorists in storytelling, they were sympathetic to the message. The critical race theorists were waging the civil rights struggle and articulating important truths. Wendy Kaminer liked Patricia Williams's discussion of

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356. *Id*. at 152.
357. *Id*. at 154.
358. *Id*. at 155.
359. *Id*. at 157.
360. *Id*. at 158.

privatization and concepts of property, even though she perceived that her writing style resulted in "an alternately engaging and tedious book with valuable insights, weighed down by the baroque, encoded language of post-structural legal thought and literary theory."[361] Like Williams, she wondered about "the effects of such dispossession in a society that defines and values people—and imbues them with rights—according to their capacity to acquire."[362] Saul B. Shapiro found Williams to be a "thoughtful social critic from the left."[363] She was not doctrinaire.[364]

The editors of the *Voice Literary Supplement* identified the critical race theorists as "public intellectuals," academics who wrote about societal concerns for the general public. Williams's interest in cultural criticism and in the effects of law upon culture gave her that status. Nonetheless, Williams questioned the status accorded her; she found that intellectuals were becoming increasingly limited in their opportunity to interact with the general public, due to the popularization of the "public-intellectual realm that had become overwhelmingly dominated by visual media and television."[365] Since she used words when the popular trends supported the visual media, she was at a disadvantage; however, when she spoke in public and used the language of her academic community, she found that her intellectualism was too high-caliber for a lay audience. Nonetheless, she felt compelled to speak out to the general public and gain support for her ideas; the legal academy was too isolating for her. She used the print media and became a cultural critic.[366]

But although Williams felt isolated within academia, liberal commentators outside of it offered support to critical race theory. Vincent Harding described Bell as "one of our own generation's important strivers and framers,"[367] and Linda Greenhouse found that Bell's stories "challenge[d] old assumptions and then linger[ed] in the mind in a way that a more conventionally scholarly treatment of the same themes would be unlikely to do."[368] Jeremy Waldron recognized the long-standing faith African Americans have had that their struggle for civil rights has been a just one. Although Bell proposed that racism is a permanent force in American society, that "does not mean an end to the fight against discrimination and inequality; on the contrary, it means clear and dignified struggle against these things on the simple ground that they are wrong and unjust . . . ."[369]

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361. Wendy Kaminer, *Citizens of the Supermarket State*, N.Y. Times Book Rev., May 26, 1991, at 10. This was a review of *Alchemy of Race and Rights*.
362. *Id*.
363. Saul B. Shapiro, *The Rooster's Egg*, N.Y. Times Book Rev., Oct. 29, 1995, at 43.
364. *Id*.
365. Joe Wood, *Who's the Boss*, Voice Literary Supplement, Oct. 1992, at 13.
366. *Id*. at 14.
367. Vincent Harding, *Equality is Not Enough*, N.Y. Times Book Rev., Oct. 11, 1987, at 7. This was a review of *And We Are Not Saved*.
368. Linda Greenhouse, *The End of Racism, and Other Fables*, N.Y. Times Book Rev., Sept. 20, 1992, at 7. This was a review of *Faces at the Bottom of the Well*.
369. Jeremy Waldron, *The Dream, Deferred: Derrick Bell Uses Music and Parable to Talk About Race Relations*, N.Y. Times Book Rev., July 21, 1996, at 22. This was a review of *Gospel Choirs*.

But within the African American popular press, the critical race theorists were lionized as latter-day civil rights activists protesting discrimination. The editors of *Jet*, a general news magazine, documented in their education column Bell's 1987 sit-in protest denying tenure to two white professors. They noted his protest leave in 1990 and informed their readership when he filed a complaint that Harvard Law "disproportionately excludes minorities from its faculty."[370] When Harvard deemed him resigned for failing to return from his leave, the magazine's readers were informed of that fact, and of the student protests: "Some law students have filed a lawsuit against the school alleging discriminatory hiring practices. Students also have held demonstrations demanding the hiring of a more diverse faculty."[371] The editors of *Essence*, a magazine with a middle-class African American female readership, presented Bell's protest leave as the action of "a deeply compassionate man who learned early in life to stand up for what he believes in." He arrived at Harvard as a result of student protest and struggle for racial representation; he felt he could not adequately serve as a role model for "[b]lack women and other women of color at Harvard Law."[372] Four years later, the editors presented a dialogue between him and Lani Guinier after the failure of her nomination to be assistant attorney general for civil rights.

Each was presented as a profile in courage that readers could emulate on the job and in their professions, when one might hesitate to challenge power, refraining "from speaking up when they should, taking a public position that may not be popular or going to the mat with a power figure."[373] Guinier's protest in response to the withdrawal of her nomination and Bell's leave from Harvard symbolized "a new style and generation of protesting."[374] This new approach "changed shape and style since the militant days of the Civil Rights Movement when we marched in the streets for our rights. Scholars like Guinier and Bell now make up a growing cadre of intellectual leaders who carry on the struggle from within the system." The editors of *Crisis*, the NAACP magazine, made a connection between Bell's protest and Harvard Law's decision to hire Guinier as a tenured professor on its staff. He was a trailblazer who made it possible, and his mentorship was valuable. Patricia Williams explained: "Derrick was the most important mentor in legal education for years because he was the only black man, for one thing. He took everyone seriously, especially black women, which was rare."[375]

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370. Editors, *Black Harvard Law Prof Files Hiring Bias Charge*, Jet, Mar. 23, 1992, at 21. *See also Black Harvard Professor Protests Tenure Policy*, June 29, 1987, at 28; *Harvard Prof Quits Until School Picks Black Woman*, May 14, 1987, at 25.
371. Editors, *Prof. Derrick Bell Leaves Harvard Amid Controversy*, Jet, July 20, 1992, at 22.
372. Benilde Little, *Derrick Bell: Harvard's Conscience*, Essence, Nov. 21, 1990, at 44.
373. Editors, *A Dialogue Between Lani Guinier and Derrick Bell: Challenging Power*, Essence, Oct. 1994, at 75.
374. *Id*.
375. *See*, Richard Pyatt, *Derrick Bell: A Career of Confrontation Opens Doors for Others*, Crisis, Sept./Oct. 1998, at 21. *See also HLS Diversity: A Celebration of the Movement*, Oct. 30, 1998, Washington D.C., a program held in honor of Guinier upon her joining the faculty at Harvard. Bell made remarks, as did Professor Charles Ogletree and Professor Christopher Edley, Jr.

VIII. Conclusion

The debate over critical race theory in the academy and in the public realm pointed to the salience of civil rights issues in American society as formalists on the civil rights question battled with those on the left over the future of civil rights policy, and the future of legal education. The debate became a public one, because support for policy would have to come from Americans capable of listening to and understanding the issues which raged during the 1980s and 1990s, as civil rights policy was fought in the Supreme Court, by way of the Oval Office. This was a new venue for the critical race theorists who were struggling with traditionalism in the law school and with formalism in the courts. They went to the public for support, because they realized that it was where their strength lay. Their rivals were forced to confront them on a ground where the critical race theorists had long found a sympathetic audience that was primed to accept their arguments as a result of long exposure to storytelling.

One commentator saw popular support for critical race theory as a tragedy; its success signified a greater struggle for the soul of legal education. The critical race theory outsiders in the legal academy who were leading the attack against formalism and traditionalism in scholarship imperiled its future. He perceived that the rise of storytelling in education and scholarship meant that students were no longer learning law and how to be lawyers. They were taught instead to hate the law and its role in society, to believe that that the law was in the province of a white elite bent upon subordinating people of color. The law was thus a useless tool for gaining civil rights. The critical race theorists were nihilists bent upon tearing apart the legal foundations of society.[376]

The popular appeal of critical race theory and the role of critical race theorists as public intellectuals meant that future law students were being trained in critical race theory ideology as undergraduates:

> The work of Bell and Williams has currency in undergraduate race and gender classes. The importance of the multicultural ethos cannot be underestimated: its agents provide support for race and gender exclusivity and separateness on the lecture circuit and in journals . . . . In addition, the prevailing mood of hate-speech censorship tends to dampen the vigor and scope of criticism from the dominant group.[377]

This view was certainly supported by the publication of two edited volumes on critical race theory that marked its greater accessibility to those outside the legal academy in ways that it had not been before.[378] The

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376. Arthur Austin, The Empire Strikes Back: Outsiders and the Struggle over Legal Education (1998).

377. *Id*. at 192.

378. Critical Race Theory: The Key Writings that Formed the Movement (Crenshaw, Gotanda, Peller & Thomas eds., New York: The New Press, 1995); Critical Race Theory: The Cutting Edge (Delgado ed., 1995). A volume on critical race feminism appeared afterwards; Bell wrote the foreword: Adrien Katherine Wing, Critical Race Feminism: A Reader (1997). Richard Delgado and Jean Stefancic co-edited a second edition of the first critical race theory volume, republished by Temple in 2000. They have also co-edited Critical White Studies: Looking Behind the

articles were edited, presenting major works in the field, but shorn of the scholarly style found in law review articles. Each was geared towards the reader just becoming introduced to critical race theory, providing a road map of the major issues in the development of its discourse. The books could be used in undergraduate or graduate classes in the humanities or arts and sciences.

Has this new direction for critical race theory meant that the civil rights movement is to be found in education? That is arguably the case. Critical race theory developed as a protest literature in legal scholarship, and the critical race theorists fueled activism in the law school environment. Students exposed to critical race theory can accept or reject it in formulating their own views of civil rights. Those who accept the critical race theory position may find that their perceptions of race and the law are politicized as a result. Nonetheless, some might argue that critical race theory was ineffective in changing legal education. But the critical race theory mission did not necessitate a complete overhaul of the law school environment. Instead, the critical race theorists hoped to use their scholarship in engaging theory with practice. In the classroom, they aimed to sensitize students to civil rights.

Critical race theory is still developing, insofar as the first generation of critical race theorists are still teaching and writing. Younger scholars find in critical race theory a language for framing legal issues, because its foundation lay in critique of legal discourse, combined with a dedication to understanding how people of color experience the law. Those who are interested in practice can use it in developing legal theories and policy proposals that address the unique needs of people of color. But the movement in education has not been limited to the classroom. The critical race theorists of the first generation continue to occupy their role as public intellectuals, well-known experts in their fields. They will undoubtedly continue to occupy that role and address legal issues in the public realm as they arise in political and legal discourse.

It is hard to predict what the next critical race theory themes will be. But it is certainly possible that as the nation becomes ever more vigilant of the threat of terrorism in the wake of the September 11, 2001 attacks, the critical race theorists will continue in their traditional role. They will analyze the law and question policy measures that threaten the civil liberties of all Americans, of whatever racial and ethnic background. Nonetheless, they will call attention to policies that endanger people of color, those who are particularly vulnerable due to their status as "outsiders."

Because political conservatism has continued to thrive, and it has supported an ongoing formalism on the Supreme Court, one might wonder whether the critical race theorists have been effective public intellectuals. Across the country, affirmative action is under continued attack, and courts, both state and federal, have supported its demise. Cases pending before the lower state and federal courts continue the trend. Cali-

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Mirror (1997). Adrien Katherine Wing later edited Global Critical Race Feminism: An International Reader (2000). Temple University Press is scheduled to release a new volume on critical race theory in 2002: Francisco Valdes, Jerome McCristal Culp and Angela P. Harris, Crossroads, Directions, and a New Critical Race Theory.

fornians rejected by referendum the policy of affirmative action in higher education. These phenomena might lead to the conclusion that the critical race theorists have failed in their ultimate mission, that critical race theory is no longer significant. But as long as civil rights issues remain significant, critical race theory will have an appeal.

When de jure segregation made discrimination the law of the land, activists of yesteryear fought to overturn precedents and practices that placed African Americans in a subordinate position. That phase of the movement was effective. But today, legal discourse determines the nature of the civil rights debate, and those who are most effective at reaching the public and formulating the language of discourse find that their policy measures gain support, whether conservative or liberal. Legal and political thinkers are the ones who mobilize others on civil rights. The critical race theorists are interpreters. That is their strength, and it is one they will undoubtedly continue to cultivate.

Critical race theory has retained a stronghold within the academy, and not just within the law schools. Critical race theory adherents continue to publish scholarly works and edited anthologies. Scholars in other fields as disparate as education, political science and sociology use critical race theory in their scholarship. On law faculty throughout the country, there are scholars interested in civil rights. Even if they are not critical race theorists, critical race theory gives them a common language. They all consider the influence of law upon the status of people of color in society. They question cases decided by the Supreme Court, and they consider how legal doctrine and jurisprudence hinders or promotes civil rights.

The lasting influence of critical race theory is in its ability to develop and institute an ongoing discussion of race and law in American society. By addressing the ostensible failures of legal liberalism and color-blindness, the critical race theorists have encouraged American intellectuals to consider the effectiveness of the civil rights movement vision, whether its methods were sound, whether the civil rights dream is one capable of being brought into reality. Has America become a society free of racism and prejudice? Can people of color experience full equality? Are the courts effective arbiters of civil rights? The critical race theorists have contributed to discussion of these questions, and the debate continues to rage.