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Book Review Essay

Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race

CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY.

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ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH. By Derrick
Bell.^{††††} New York: Bloomsbury, 2002. Pp. 183. \$13.95.

Reviewed by Richard Delgado*

I. Introduction

The nation stands today at the beginning of what many believe will be a protracted struggle against international terrorism,¹ and a similar one to strengthen the hand of the moderate, democratic wing of Islam *vis-à-vis* its more fundamentalist counterparts.²

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1. See, e.g., Eric Schmitt, *The Military, Pentagon Draws Up A 20-to-30 Year Antiterror Plan*, N.Y. TIMES, Dec. 17, 2003, at A10.

2. See, e.g., Dexter Filkins, *Now Playing in Turkey; Can Islamists Run a Democracy?*, N.Y. TIMES, Nov. 24, 2002, § 4, at 1 (describing the changing political philosophy of the Turkish leadership); Dexter Filkins, *Turks Look West; Will It Look Away?*, N.Y. TIMES, Dec. 13, 2002, at A16 (examining Turkey's application to join the European Union); Thomas L. Friedman, *An Islamic Reformation*, N.Y. TIMES, Dec. 4, 2002, at A31 (examining the work of Islamic revolutionary Hashem Aghajari to "rejuvenate Islam"); Thomas L. Friedman, *Bush, Iraq, and Sister Souljah*, N.Y. TIMES, Dec. 8, 2002, at A15 (urging the United States to take action to effectuate changes in the Muslim World); Thomas L. Friedman, *Death to Dictators*, N.Y. TIMES, Dec. 15, 2002, at A15 (noting faint signals indicating that such change is beginning to occur now); Ian Fisher, *How an Atheist Helps Protect Islamists in Turkey*, N.Y. TIMES, Nov. 26, 2002, at A3 (highlighting efforts of a Turkish atheist and Islamist to demonstrate that "opposites can put their ideas together without trying to kill each other or silence each other"); Carlotta Gall, *Threats and Responses: Taliban Backers; Islamists Take Office in Pakistan*, N.Y. TIMES, Nov. 26, 2002, at A16 (examining the views of Pakistan's new Islamic regime); Michael B. Gordon, *Turkey Saying No to Accepting GI's in Large Numbers*, N.Y. TIMES, Dec. 4, 2002, at A1 (investigating Turkey's motives in resisting United States military buildup in Turkey and the United States's motives in pushing for

What does this situation portend for the fortunes of *domestic* minorities? History shows that intergroup competition increases prejudice and distrust,³ while international conflict and wars have seen blacks and other minorities register great gains.⁴ Will the current situation offer the type of alignment of interests that prevailed during the Cold War years and that may have contributed to *Brown v. Board of Education*⁵ and the 1964 Civil Rights Act?⁶ Or will today's heightened patriotism, fear of outsiders, concerns over immigration, and retreat on civil liberties produce setbacks for blacks, Latinos, and other groups of color?⁷

In fact, questions of this type, which examine the material determinants of civil rights progress, are not even on the radar screen of the leftist movement—Critical Race Theory—that one would think would be most vitally interested in them.⁸ Why should this be so? My answer, developed in the course of this Essay, is that Critical Race Theory, after a promising beginning, began to focus almost exclusively on *discourse* at the expense of power, history, and similar material determinants of minority-group fortunes.

that buildup); Edward Rothstein, *Left Has Hard Time in Era of Terrorism*, N.Y. TIMES, Dec. 21, 2002, at B11 (noting the necessarily difficult process of evolving and gaining acceptance for liberal political positions in light of terrorist activity); Craig S. Smith, *A Movement in Saudi Arabia Pushes Toward an Islamist Ideal, and Frowns on the U.S.*, N.Y. TIMES, Dec. 9, 2002, at A13 (noting the growing influence of the "ultraconservative" movement in Saudi Arabia).

It is not only Western commentators who are anxious to affirm moderate Islam. Recently, the Senior Minister of Indonesia called "on America and other countries to cooperate more closely to support non-militant Muslims in a common fight against militants out to impose their version of the religion on the world." BBC WORLDWIDE MONITORING, June 30, 2003. The Minister went on to declare that "[t]o resolve the problem of terrorism, the U.S. and others must support the tolerant non-militant Muslims, so that they will prevail." *Id.* An Egyptian commentator, echoing this language, wrote that "the growing antagonism toward the United States threatens to undermine America's most important Mideast ally." Soraya Sarbaddi Nelson, *Sentiment Turning Against U.S. Within Egyptian Middle Class*, HOUS. CHRON., Sept. 15, 2002, at A27. On Europe's concerns, see Jonathan Stevenson, *The Qaeda Vipers in Europe's Bosom*, N.Y. TIMES, Feb. 1, 2003, at A19. On the need to aid modernizing Islam, see Avishai Margalit, *The Wrong War*, N.Y. REV. BOOKS, Mar. 13, 2003, at 4; Charlene Barshefsky, *The Middle East Belongs in the World Economy*, N.Y. TIMES, Feb. 22, 2003, at A17.

3. This is particularly true when groups compete for scarce resources, such as jobs or places at selective schools. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1380–83 (discussing the socioeconomic theory of racism and prejudice).

4. See generally PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999) (chronicling the events in American history that represented progress toward racial equality).

5. 347 U.S. 483 (1954).

6. On this "interest convergence" theory of civil rights progress, see Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

7. See, e.g., RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* (2002); LAWYERS COMMITTEE ON HUMAN RIGHTS, *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11* (2002) [hereinafter *YEAR OF LOSS*].

8. On this movement generally, see *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (presenting an anthology of leading works in the genre) [hereinafter *CUTTING EDGE*].

Are race and racism, at bottom, real, or are they social constructions? This seemingly simple question marks a deep, but largely unrecognized, divide within Critical Race Theory and modern progressive thought in general.⁹ That divide, in turn, explains the striking inattention to questions like the one posed above. An “idealist” school holds that race and discrimination are largely functions of attitude and social formation.¹⁰ For these thinkers, race is a social construction created out of words, symbols, stereotypes, and categories.¹¹ As such, we may purge discrimination by ridding ourselves of the texts, narratives, ideas, and meanings that give rise to it and that convey the message that people of other racial groups are unworthy, lazy, and dangerous.¹² These writers analyze hate speech, media images, census categories, and such issues as intersectionality and essentialism.¹³ They analyze unconscious or institutional racism and show how cognitive theory exposes a host of preconceptions, baselines, and mindsets that operate below the level of consciousness to render certain people consistently one-down.¹⁴

A second school holds that while text, attitude, and intention may play important roles in our system of racial hierarchy, material factors such as profits and the labor market are even more decisive in determining who falls where in that system.¹⁵ For these “realists,” racism is a means by which our

9. See Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2282–85 (2001) (illustrating the competing theories of “idealists” and “realists” in the debate over race); TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* 18–25, 134–35 (1996) (calling attention to a range of similar defects in postmodern scholarship).

10. That is, these thinkers hold that race and racism are products of ideas—ideal factors—and so may be combated by getting our thoughts and ideas in order through education, seminars, and direct, interpersonal experience with members of other groups. See Delgado, *supra* note 9, at 2282 (describing the “idealist” view and discussing the works of “idealist” scholars).

11. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (explaining that because race-oriented beliefs and attitudes are so pervasive in American life, “we are all racists”).

12. See, e.g., MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 96 (1993) (arguing that “a tort for racial slurs is a promising vehicle for the eradication of racism”).

13. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 7–9 (2001) (listing at length the variety of subjects discussed by critical race theorists); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462–63 (1993) (same).

14. See, e.g., Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1785–1806 (2000) (ascribing discrimination against Mexican Americans in California grand jury selection to unconscious, “institutional” racism); Lawrence, *supra* note 11, at 331–39 (exploring the nature of unconscious racism through the lenses of cognitive psychology and psychoanalytic theory); Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment*, 47 STAN. L. REV. 1161, 1186–1217 (1995) (analyzing unconscious group bias in terms of cognitive psychology); cf. Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017–25 (1988) (contending that the courts have failed “to attend to the impact of unconscious racism”).

15. See Delgado, *supra* note 9, at 2283–84 (surveying and summarizing the work of “racial realists”).

system allocates privilege, status, and wealth.¹⁶ They point out that the West did not demonize black or native populations until it determined to conquer and exploit them,¹⁷ and that media images in every period shift to accommodate the interests of the majority group, now for reassurance, now for vindication.¹⁸ Racial realists examine the role of international relations and competition, the interests of elite groups, and the changing demands of the labor market in hopes of understanding the twists and turns of racial fortunes, including the part the legal system plays in that history.¹⁹

In its early years, Critical Race Theory was dominated by the powerful writing of the racial realists. Derrick Bell wrote about interest convergence and how the self-interest of elite whites determined civil rights progress more than conscience or altruism did.²⁰ Girardeau Spann and Alan Freeman wrote about the Supreme Court's role in legitimizing racial discrimination.²¹ Spann urged that racial reformers forsake the search for judicial remedies and turn, instead, to ordinary politics—street marches, demonstrations, and voter registration campaigns.²²

In recent years, idealist approaches and discourse analysis have moved to the fore.²³ Perhaps inspired by Continental philosophers such as Jacques Derrida and Michel Foucault, and by trends in literary criticism and theory, many contemporary critical race theorists work almost entirely in the realm of discourse. Although the occasional realist work does make an appearance,²⁴ Critical Race Theory today is almost entirely dominated by the

16. See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 9 (4th ed. 2000) (positing that “race is an indeterminate social construct that is continually reinvented and manipulated to maintain domination and enhance white privilege”); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992) (asserting that racism serves the “political and economic ends” of “powerful whites”). The realist school emphasizes the material determinants of race and racism; hence I use the two terms interchangeably.

17. See, e.g., Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1267–69 (1992) (tracing the history of the increasingly negative racialized image of Native Americans from the sixteenth to the nineteenth century).

18. *Id.* at 1261–75.

19. See generally BELL, *RACE, RACISM, AND AMERICAN LAW*, *supra* note 16 (giving an impressive example of such analysis).

20. See Bell, *supra* note 6, at 524–25.

21. See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2000–08 (1990) (arguing that racial minority interests have achieved greater recognition in the legislative and executive branches than in the courts); Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

22. See Spann, *supra* note 21, at 1990–2000.

23. See discussion in Parts II & III, *infra*.

24. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (illustrating racial symbols in modern society and providing five rules for establishing racial standing); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999) (examining the criminal justice system and arguing that in order to level the playing field the white majority must become educated on the double standards in criminal cases); MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF*

analysis of text, discourse, and mindset. The study of “race” has supplanted the study of race.

A new collection illustrates this shift. *Crossroads, Directions, and a New Critical Race Theory*,²⁵ edited by three members of the new generation of critical theorists, brings the ascension of discourse analysis into bold relief. With essays on narrative, voice, the heroic, essentialism, anti-essentialism, and the black/white binary paradigm of race, *Crossroads*, which grew out of a recent Critical Race Theory conference at Yale Law School,²⁶ constitutes a major, implicit statement in favor of discourse analysis and against the materialist/realist approaches of the movement’s founding figures.

This Essay begins in Part II by outlining the history of Critical Race Theory and showing how a little recognized split between the two types of theories developed. Part III summarizes *Crossroads* and shows how it falls almost entirely on the side of discourse analysis. Part IV explains the limits of this approach and how it fails to even explain changes in the very racial consciousness it seeks to understand. Part V offers a materialist explanation for the recent turn. Part VI describes a radically different book written recently by Derrick Bell, one of the movement’s founding figures; and Part VII concludes by sketching some issues that the next major volume of critical race writing should address.

II. A Brief History of Critical Race Theory

Critical Race Theory sprang up in the late 1960s when a number of legal scholars and activists around the nation realized that the heady gains of the Civil Rights era had stalled and indeed were being rolled back.²⁷ New approaches and theories were needed to deal with the colorblind, subtle, or institutional forms of racism that were developing and an American public that seemed increasingly tired of hearing about race.²⁸ Early writing by Derrick Bell and others highlighted the deficiencies of traditional, incremental civil rights strategies. Bell wrote that interest convergence—the temporary alignment of the self-interest of elite whites and the interests of blacks—explained many of the twists and turns of blacks’ fortunes.²⁹ Alan

AMERICAN DEMOCRACY (2001) (explaining how the Cold War affected the civil rights movement); see also *infra* note 49 and accompanying text.

25. *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002) [hereinafter *CROSSROADS*].

26. *Id.* at xi.

27. *CUTTING EDGE*, *supra* note 8, at xvi; see *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xvi–xxvii (Kimberlé Crenshaw et al. eds., 1995) (both noting the origins of the movement in the early writing of Derrick Bell and Alan Freeman). See also DELGADO & STEFANCIC, *supra* note 13, at 7–9 (recounting the intellectual history of the movement).

28. See *CUTTING EDGE*, *supra* note 8, at xvi.

29. See Bell, *supra* note 6, at 518–28.

Freeman showed how the Supreme Court used civil rights doctrine to legitimize racial discrimination and limit redress to the acts of a few outright bigots.³⁰

Girardeau Spann showed how African Americans' greatest strides came about not through litigation but rather through ordinary politics, including street protests, lobbying, and local elections.³¹ I myself wrote about imperial scholarship and how a few prominent white scholars, otherwise friendly to blacks and other minorities, were dominating civil rights scholarship, shaping its direction, blunting its edges, and citing each other, but rarely, if ever, the new generation of civil rights scholars like Bell, Leon Higginbotham, and, a little later, Mari Matsuda and Kimberlé Crenshaw, who were beginning to frame new approaches to race and racism.³²

Then the movement underwent a subtle shift whose significance was not fully appreciated at the time. Beginning with an organizational conference held in Madison, Wisconsin—home to the Law and Society movement, which emphasizes law in action, not just law on the books—and, just earlier, a student-initiated course at Harvard Law School, the movement, which now had a name, absorbed a large number of new members, many of whom were young, trained in social science and literary theory, and deeply impressed with the insight that race is a social construction.³³ Moving away from its materialist roots, Critical Race Theory began examining the means of that construction. Scholars focused on how media images shaped the way Americans understood race.³⁴ They examined the role of multi-racialism,³⁵ census categories,³⁶ intersectionality,³⁷ and hate speech.³⁸ Words, categories, narratives, and mindsets—in a word, discourse—moved to the fore.

30. See Freeman, *supra* note 21, at 1052–57, 1073–76, 1102–19.

31. See Spann, *supra* note 21, at 1997–2000.

32. See Richard Delgado, *Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561–66 (1984).

33. On these formative events, see, for example, DELGADO & STEFANCIC, *supra* note 13; Kimberlé Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Doors,"* in CROSSROADS, at 1, 15–22. On the view that Berkeley, not Harvard, students were instrumental in the rise of Critical Race Theory, see, for example, Sumi Cho & Robert S. Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1379–81 (2000).

34. E.g., Margaret Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243, 244–47 (1991).

35. E.g., KEVIN JOHNSON, *HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN'S SEARCH FOR IDENTITY* (1999); *MIXED RACE AND THE LAW: A READER* (Kevin R. Johnson ed., 2003).

36. E.g., CLARA RODRIGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES* (2000); Luis Angel Toro, *A People Distinct from Others: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995).

37. E.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

A related nonmaterialist strand applied Freudian psychology to dominant-group behavior. A much-cited article by Charles Lawrence considered why the Supreme Court had replaced a test for discrimination that allowed plaintiffs to show that a policy produced differential effects—helping whites and burdening blacks—in favor of one that required intent, making it much harder for a civil rights plaintiff to prove his or her case, and easier for a white to escape liability.³⁹

But instead of criticizing this shift as contradicting the ostensible purpose of civil rights law, the author urged that we, instead, see white action in terms of the id, the ego, and equal protection.⁴⁰ He urged the civil rights community to use Freudian psychology to show that individuals sometimes perform acts, including racist ones, with an unconscious intent.⁴¹ And when they do, a civil rights attorney, presumably with Freudian reader at the ready, should be prepared to pounce.⁴² The lawyer would accept the new, tougher intent test, but would attempt to show that it was met because the white harbored an unconscious intent to disadvantage the black.⁴³

In short, the term race, and the language, terminology, and mindsets with which society frames racial issues replaced the study of race and racism in the real world. Ideas, words, categories, and symbols replaced nationalism, interest convergence, history, and similar tools that had served as Critical Race Theory's stock in trade until then. One of his protégés even read Bell as representing "a bold departure from the *discursive conventions* of legal scholarship."⁴⁴

If the main thing one is interested in is terms and categories, then what more interesting ones than those that apply to you and your group?⁴⁵ Thus, Critical Race Theory (CRT) splintered into a series of subgroups, with gays and lesbians charging that not enough attention was being paid to the interaction between race and sexual orientation.⁴⁶ Latinos formed their own group—Latino Critical scholarship (Lat/Crits)—and began hosting annual

38. E.g., MATSUDA ET AL., *supra* note 12; Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431.

39. See Lawrence, *supra* note 11, at 319.

40. *Id.* at 318–19, 324–30.

41. *Id.* at 323, 331, 334, 387–88.

42. See *id.* at 323.

43. *Id.* at 355–80.

44. Crenshaw, *supra* note 33, at 10–11 (emphasis added).

45. E.g., DELGADO & STEFANCIC, *supra* note 13, at 83, 120–21 (identifying categories that scholars of color have examined: sterilization of black, Latina and Indian women; depictions of Latino males as oversexed and Asian males as sexless or effeminate; Catholic marginalization of gay and lesbian Latinos/as).

46. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 199–201 (1995).

conferences separate from the CRT workshops.⁴⁷ Asians pointed out that their social construction differed in significant ways from that of the other groups, and created critical Asian scholarship with its own meetings and canonical texts.⁴⁸

In the meantime, American society is becoming more and more polarized, the gap between the rich and the poor is widening,⁴⁹ and the civil rights community, according to Cornel West, is divided and lacks direction.⁵⁰ Jennifer Hochschild recounts how she recently asked her favorite African-American student why he and some of his friends had staged a sit-in in the university president's office and was disappointed to hear his self-referential reply: "[T]o change the terms of discourse."⁵¹

A few straws in the wind suggest that the movement may be poised to return to its materialist roots. A book by Mary Dudziak revisits Bell's interest convergence thesis.⁵² Bell had hypothesized that the astonishing breakthroughs of the Civil Rights era, including *Brown v. Board of Education*,⁵³ materialized not because the American public underwent a moral epiphany. Rather, the need to preserve international appearances in the face of Cold War competition, as well as the threat of domestic disruption, prompted elite decisionmakers to arrange a few symbolic victories for blacks.⁵⁴ Unearthing hundreds of memos, press releases, and letters from the State Department and other sources, Dudziak proved what Bell, years earlier, had only suspected—that Congress and the judiciary decided to advance the cause of black civil rights, not so much because

47. See DELGADO & STEFANCIC, *supra* note 13, at 81; THE LATINO CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998).

48. Hsien Chin Hu, *The Chinese Concepts of "Face,"* in CONFLICT AND CULTURE: A READER 252 (Pat K. Chew ed., 2001). See generally Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, in CUTTING EDGE, *supra* note 8, at 354 (describing historical and current anti-Asian discrimination in America and debunking the myth of American Asians as the "model minority").

49. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 61–65 (1995) (showing that the top one percent of American households possess an increasingly greater percentage of the nation's wealth); KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH 127 (2001) ("By 2000, the increasing distance between the median family and America's top 1 percent elite . . . had been a point of national discussion for over a decade.").

50. CORNEL WEST, RACE MATTERS (1993) (deploring that a crisis of self-interest has fragmented black political and intellectual leadership).

51. Jennifer Hochschild, *Foreword*, in DELGADO, *supra* note 7, at xi.

52. DUDZIAK, *supra* note 24, at 258 n.26 (citing Bell's argument that the Cold War influenced the civil rights movement).

53. 347 U.S. 483 (1954).

54. See Bell, *supra* note 6, at 524–25 (explaining that *Brown* is an example of such an arranged symbolic victory).

morality required it, but to deprive the Soviet Union of political capital in the competition for Third World allies.⁵⁵

Building on Dudziak's insight, I recently showed how interest convergence can be extended to explain, as well, the *demise* of the Civil Rights era a decade or so later.⁵⁶ An implicit expectation in the establishment's delivery of breakthroughs for African Americans and other people of color was that they embrace anti-communism, fight in foreign wars, and purge themselves of radical elements.⁵⁷ Earlier, blacks had caught a glimpse of the iron fist in the velvet glove when official power descended on radicals like W.E.B. DuBois, Paul Robeson, and Josephine Baker who refused to endorse the official line—especially in speeches delivered abroad—that although America was not perfect, the racial situation was improving, and America was on balance the best country in the world.⁵⁸ The U.S. lifted their passports, broadcast against them, and schemed to have their speaking and performing engagements cancelled.⁵⁹ The black press went right along, editorializing against the three and urging their readers to embrace Americanism and official policy.⁶⁰ The NAACP even expelled DuBois, the country's leading black intellectual, from the organization he had founded decades earlier, for criticizing America too sharply.⁶¹

The events of the late sixties and early seventies traced a similar path when the civil rights movement, which until then had been prayerful, nonviolent, and mannerly, took a different turn. The Black Panthers began preaching self-reliance and armed self-defense and quoting Marx, Lenin, and Fanon.⁶² Malcolm X called whites "satanic" and America "the devil nation."⁶³ Black organizations like the Student Nonviolent Coordinating Committee (SNCC) began teaching black nationalism.⁶⁴ The establishment responded in two ways—with lethal force for the Panthers, and with grants,

55. DUDZIAK, *supra* note 24, at 87, 88–90, 104–07, 183, 185–87, 212 (citing Congressional leaders' arguments that Cold War considerations led to the passing of civil rights legislation and presenting evidence that the Supreme Court considered the Cold War implications of their decision in *Brown*).

56. See Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 376–85 (2002) (discussing governmental and corporate responses to increasing radicalism among minority leaders and organizations).

57. *Id.* at 376.

58. *Id.* at 377–80.

59. *Id.* at 378–79.

60. *Id.*; Mary L. Dudziak, *Josephine Baker, Radical Protest, and the Cold War*, 81 J. AM. HIST. 543, 564 (1994).

61. Delgado, *supra* note 56, at 379.

62. *Id.* at 381.

63. *Id.* at 377.

64. See CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 204–05, 299 (1981) (stating that some SNCC staff members "put forward explicit black separatist doctrines during 1966").

titles, and patronage jobs for once-militant leaders.⁶⁵ The federal Office of Economic Opportunity (OEO) program and Ford Foundation began pouring millions of dollars into minority communities.⁶⁶ The radical thrust of civil rights was soon blunted, replaced by community development, affirmative action, and similar programs more attuned to America's majority interests.⁶⁷ Indigenous radicalism was placed on hold, not to return until a milder form, Critical Race Theory, emerged a decade later.

Unlike its predecessors, the new movement met a relatively favorable response, at least in its early years. Academics and journalists praised its audacious scholarship.⁶⁸ Critical race theorists gained appointments at elite schools.⁶⁹ Then, after an early period of generally positive reviews, critics weighed in: Is the notion of a unique minority voice not essentialist?⁷⁰ Is the critique of merit anti-Semitic?⁷¹ Does narrative scholarship degrade constitutional discourse?⁷² The movement defended itself as best it could, but momentum slowed. The school splintered into factions,⁷³ the annual workshops came to an end, and the scholarship underwent a significant shift. Although the occasional article or book analyzing the material side of race does appear, it is as apt to be written by a nonadherent of Critical Race Theory as by an adherent.⁷⁴ The turn from materialism to idealism is nearly complete. Audacious, sweeping analyses of the relationship among race, racism, and American law have given way to works examining text and

65. Delgado, *supra* note 56, at 380–85.

66. *Id.* at 382–85.

67. *Id.* at 382–86.

68. *E.g.*, Stephanie B. Goldberg, *The Law, New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A23.

69. Derrick Bell teaches at N.Y.U. Law School (formerly at Harvard), Ass'n Am. Law Schools, AALS DIRECTORY OF LAW TEACHERS 2001-2002 279 (2001); Patricia Williams at Columbia, *id.* at 1098; Kimberlé Crenshaw at UCLA and Columbia, *id.* at 397; and Ian Haney Lopez and Angela Harris at UC-Berkeley (Boalt Hall), *id.* at 564, 568.

70. *E.g.*, Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1801 (1989); Richard A. Posner, *The Skin Trade*, NEW REPUB., October 13, 1997, at 40.

71. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?* 83 CAL. L. REV. 853, 856 (1995) (reiterating the argument that the radical attack on merit has anti-Semitic repercussions and contending that the logical implications of Critical Race Theory are anti-Semitic); DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 52 (1997).

72. See Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 251–52 (1992) (contemplating the relationship between narrative jurisprudence, judicial integrity, and constitutional discourse). See generally Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (suggesting that the use of narrative scholarship by outsider scholars may undermine their intellectual goals).

73. See *supra* notes 44–48 and accompanying text.

74. *E.g.*, OLIVER & SHAPIRO, *supra* note 49; WHITE REIGN: DEPLOYING WHITENESS IN AMERICA (Joy L. Kincheloe et al. eds., 1998); COLE, *supra* note 24, at 5–13. See also Dalton Conley, *The Cost of Slavery*, N.Y. TIMES, Feb. 15, 2003, at A25 (proposing a precise measure, based on family wealth, for making reparations for black slavery).

mindset. After a brief discussion of the latest critical race collection, I examine why this is so.

III. Crossroads

Edited by Francisco Valdes, Jerome Culp, and Angela Harris and produced by the same publishing house that released one of the early Critical Race Theory readers, *Crossroads, Directions, and a New Critical Race Theory*⁷⁵ offers a snapshot of what is on the minds of 25 critical race theorists, including a few of its founding figures. With sections on histories, race, narrativity, globalization, and critical method, the volume aims to expose what the editors see as the movement's impact "on the public discourse on race"⁷⁶ and its "reject[ion of] the basic premises of American legal liberalism."⁷⁷ The editors' introduction sets out the book's principal themes: the above-mentioned need to change discourse, an explicit focus on the meaning of racial identity, including its sexual, cultural, and class dimensions,⁷⁸ and an examination of the many practices "close to home"⁷⁹ that disempower people, like the authors, who labor in law school and in law practice. As they put it: "applied CRT oftentimes has amounted to hand-to-hand combat in and for the corridors of academic power in the United States."⁸⁰ This all amounts, the editors maintain, to a vigorous reassertion of a distinct "voice of color"⁸¹ and a reaffirmation of the promise of the movement's early years.⁸²

Does it? This reviewer confesses doubt.⁸³ An opening selection, by Charles Lawrence, introduces the trope of the heroic to describe critical race scholars,⁸⁴ but their bravery seems to consist not in acting forthrightly in the

75. Cited in full *supra* note 25. Both volumes are published by Temple University Press, whose editor Doris Braendel has championed many progressive causes and books.

76. Francisco Valdes, Jerome McCristal Culp & Angela Harris, *Battles Waged, Won, and Lost: Critical Theory at the Turn of the Millennium*, in CROSSROADS, at 1.

77. *Id.*

78. *See id.* at 1–2.

79. *Id.* at 4.

80. *Id.* *See also* Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, in CROSSROADS, at 32 (assessing the achievements and failings of efforts to raise race-consciousness through the student-led struggle for campus diversity and through Critical Race Theory's scholarly interventions).

81. Valdes, Culp & Harris, *supra* note 76, at 4.

82. *Id.* at 5 ("[T]his book helps to consolidate CRT's vigor and status in critical legal theory while providing a new teaching resource that allows faculty . . . to share these exciting developments . . .").

83. For a different set of doubts, see Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1763–65, 1787–89 (2003) (suggesting that CRT offers no new methodological tools and provides little in the way of economic or structural analysis of discrimination in the workplace).

84. *See* Charles R. Lawrence III, *Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times*, in CROSSROADS, at xi, xiv (describing the movement as engaged in a lonely

face of physical danger or risk, but in speaking out in law reviews, faculty lounges, and similar fora.⁸⁵ The following selection, by three authors, makes plain that the volume's principal achievement, like that of Critical Race Theory in general, is the development of a unique voice.⁸⁶ For these authors, at least, the volume is largely about the volume—its style, range of subjects, and unique perspective. Other selections deal with the history of Critical Race Theory and its role in contesting terms of discourse.⁸⁷ Other selections focus heavily on the idea of construction—construction of race,⁸⁸ disability,⁸⁹ and white privilege.⁹⁰ One pair of authors even write about the social construction of their adopted son!⁹¹

One author applies literary analysis to texts and words pertaining to blacks, especially black men,⁹² while another writes about the role of narratives in racial discourse.⁹³ One writes about a fictional dinner with an African king during which the two discuss racial experiences in cross-cultural perspective.⁹⁴ An article by a white scholar describes his trepidation at entering this arena at all,⁹⁵ while another, by a black scholar, points out that it is not just whites, but straights and males as well, who must struggle to disavow unearned privilege.⁹⁶ An Indian author writes about her tenure

struggle, in "perilous times," without friends or support); *id.* at xvii (arguing that scholars are engaged in "dangerous work").

85. *Id.* at xiv–xvi (urging various kinds of speaking); *id.* at xvii (urging a courageous definition of self).

86. Valdes, Culp & Harris, *supra* note 76, at 3 ("For a small band of scholars whose ideas are set out in multisyllabic words and who travel with armies of footnotes, CRT has had . . . an extraordinary impact on popular as well as on legal discourse."); *id.* at 4 (describing the achievement of a "voice of color").

87. *E.g.*, Crenshaw, *supra* note 33, at 19 (describing the group as engaged in making "a distinctive contribution to the discourse on race and the law").

88. *E.g.*, Robert S. Chang, *Critiquing "Race" and its Uses: Critical Race Theory's Uncompleted Argument*, in CROSSROADS, at 87 (surveying disagreements in the literature concerning the implications of viewing race as a social construct).

89. See Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender and Disability*, in CROSSROADS, at 161 (questioning why race is continually regarded by some to be a biological phenomenon when academicians and jurists have increasingly accepted a provisional, contextual, and constructed notion of "disability").

90. See Devon W. Carbado, *Straight Out of the Closet: Race, Gender, and Sexual Orientation*, in CROSSROADS, at 221, 221–22 (arguing that white privilege maintains racism and that men should assert a feminist political identity).

91. See Victoria Ortiz & Jennifer Elrod, *Construction Project: Color Me Queer + Color Me Family = Camilo's Story*, in CROSSROADS, at 258.

92. See Anthony Paul Farley, *The Poetics of Colorlined Space*, in CROSSROADS, at 97.

93. See Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in CROSSROADS, at 243.

94. See Henry J. Richardson III, *Dinner and Self-Determination*, in CROSSROADS, at 288.

95. See Thomas Ross, *The Unbearable Whiteness of Being*, in CROSSROADS, at 251 (describing the author's misgivings about attending Critical Race Theory conferences due to the status of the movement as one traditionally composed of scholars of color).

96. Carbado, *supra* note 90, at 238–40.

struggle,⁹⁷ while two others describe the efforts of students at an elite law school to persuade the faculty to hire more professors of color.⁹⁸

Rendered, for the most part, in serious tones and polysyllabic language with frequent citation to European philosophers,⁹⁹ the volume suggests that America's most pressing racial problems are either those facing the authors in their personal lives or else the challenge of determining the best way to talk about those and similar issues. Few of the authors grapple with real-world problems such as poverty, housing discrimination, or the fortunes of African Americans in the military. Intriguingly, the few exceptions appear in chapters on globalization and international human rights issues,¹⁰⁰ which feature discussions of specific practices such as genital surgery¹⁰¹ or capital investment in Third World countries;¹⁰² in a chapter by a Canadian author writing about national ID cards;¹⁰³ and in one by a leading immigration law scholar on the role of race in the immigration laws.¹⁰⁴

The last-mentioned article, while grappling with an issue of real-world importance, nevertheless exhibits traces of the solipsism that figures so prominently throughout the volume. The author, a distinguished young critical race scholar, reminds his readers not to ignore immigration law and theory, even though they fall outside the black/white binary paradigm of race that structures most discourse today.¹⁰⁵ He then goes on to show how, under that paradigm, American society has sometimes visited harsh treatment on one group of color at exactly the time when it was tolerating breakthroughs for a different one.¹⁰⁶ For example, Reconstruction ushered in great gains for blacks at precisely the same time that California and the federal government were enacting harsh anti-Chinese legislation¹⁰⁷—and, he might have mentioned, at the same time that the country was consolidating the gains

97. See Patricia Monture-Angus, *On Being Homeless: One Aboriginal Woman's "Conquest" of Canadian Universities, 1989–98*, in CROSSROADS, at 274.

98. Cho & Westley, *supra* note 80, at 40–48.

99. See Valdes, Culp & Harris, *supra* note 76, at 3–4 (acknowledging this very characteristic).

100. See Section C: Globalization, in CROSSROADS, at 303.

101. Isabelle R. Gunning, *Global Feminism at the Local Level: The Criminalization of Female Genital Surgeries*, in CROSSROADS, at 337.

102. Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, in CROSSROADS, at 310.

103. Sherene H. Razack, "Simple Logic": *Race, The Identity Documents Rule, and the Story of a Nation Besieged and Betrayed*, in CROSSROADS, at 199.

104. Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in CROSSROADS, at 187.

105. *Id.* at 187.

106. *Id.* at 188–89.

107. *Id.* at 189.

from an imperialist war against Mexico in which it seized nearly one-third of that nation's territory.¹⁰⁸

By the same token, *Brown v. Board of Education*¹⁰⁹ ended official school segregation for African-American children at precisely the time when Congress was ordering Operation Wetback, under which 1.3 million Mexicans and Mexican Americans, many of them lawful U.S. citizens, were deported.¹¹⁰ In 1913, California's Alien Land Law made it illegal for aliens ineligible for citizenship to lease land for more than three years, a measure that proved devastating for Japanese farmers.¹¹¹ A few years later, Congress eased immigration quotas for Mexican farmworkers.¹¹² Today, Indian tribes have been winning a series of breakthroughs, establishing the right to sponsor casino gambling and proving mismanagement in federal trust accounts, all at the very time California has been enacting a series of anti-Latino ballot measures.¹¹³ The checkerboard of racial history, with progress for one group coupled with retrenchment for another, features innumerable similar examples.

What does the author make of all this? It is a product, he says, of the psychological phenomena of *transference* and *displacement*, which occur when feelings toward one person are refocused on another, who is defenseless or more exploitable.¹¹⁴ He also invokes the idea of *scapegoating*,¹¹⁵ in which members of powerful groups discharge frustration on nonmembers who are not the cause of that frustration but who are safer to attack.

Inventing ghosts in the machine to explain white behavior, as this author does, follows in the footsteps of Charles Lawrence, an early critical race theorist who applied Freudian psychology to explain unconscious racism and expose the deficiencies of antidiscrimination law's requirement of proof of a conscious intent.¹¹⁶ But is this a useful way to proceed? A more thoroughgoing analysis of the Freudian turn must await a later section, which addresses the deficiencies of the new approaches.¹¹⁷ But for now, consider how the immigration scholar's recourse to Freudian theory ignores how

108. See Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 291 (2000).

109. 347 U.S. 483 (1954).

110. See, e.g., Delgado, *supra* note 108, at 289 (describing Operation Wetback); see also Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES at 197 (Juan Perea ed., 1997) (indicating that over 3.7 million people were deported as a result of Operation Wetback).

111. Delgado, *supra* note 108, at 289.

112. *Id.*

113. See *id.* at 293 (describing measures that hurt Latino interests, such as Proposition 187 and restrictions on bilingual education).

114. Johnson, *supra* note 104, at 188.

115. *Id.* at 188–89.

116. See *supra* notes 39–41 and accompanying text.

117. See *infra* Part IV.

majority society affirmatively pits minority groups against each other in every era and how the shifting tides of white desire, now for labor, now for land, now for cannon fodder, now for political loyalty and Americanism, underlie most major shifts in minority fortunes.¹¹⁸ For example, shortly after the Civil War, the United States recruited Buffalo Soldiers, elite black forces of the U.S. Army, to help put down Indian rebellions in the West.¹¹⁹ The Indians, who might have expected solidarity, got trained killers instead. One could, of course, reach for a strained psychological explanation and posit that American society, which could no longer officially oppress blacks, offered them jobs in the U.S. Army, then discharged frustration at this turn of events on the hapless Indians. A more likely explanation is that U.S. elites simply coveted Indian lands and used the blacks as fodder against these brave warriors.

IV. Deficiencies in Discourse Analysis

In earlier scholarship, I pointed out how the discourse school cannot easily explain how minority fortunes shift over time, nor how white elite groups play one minority group against the other.¹²⁰ I showed how the depiction of racial groups changes from era to era according to the shifting needs of the majority group,¹²¹ and how analysis in material terms better explains changes in the country's attitudes toward welfare, affirmative action, hate crimes, hate speech, and the demise of the civil rights movement.¹²² I showed how discourse analysis can easily be turned against blacks and other minorities¹²³ and how the search for a culpable actor/thinker reinforces a perpetrator perspective that sees racism as a series of isolated acts rather than as an interlocking system that elevates some at the expense of others.¹²⁴ It also postpones reckoning with racism's counterpart, white privilege.¹²⁵ Earlier parts of this Essay showed how traces of discourse analysis marred an analysis of immigration law by a prominent CRT scholar,¹²⁶ and confined an entire volume of CRT scholarship to the analysis of text, voice, and the personal career problems of some of its contributors.¹²⁷

118. See Delgado, *supra* note 108, at 291–95 (discussing, as one example of these practices, the use by plantation owners of “house slaves” to spy and inform on dissident “field slaves”).

119. *Id.* at 294.

120. Delgado, *supra* note 9, at 2280, 2284–85.

121. *Id.* at 2285–86.

122. *Id.* at 2288–94.

123. *Id.* at 2295.

124. *Id.* at 2294–95.

125. *Id.* at 2292–93.

126. See *supra* notes 103–19 and accompanying text.

127. See the discussion of examples of this type of scholarship from CROSSROADS in Part III, *supra*.

Now, I would like to add to my critique of discourse scholarship by giving further illustrations of how materialist and idealist explanations interact. As the reader will see, discourse analysis alone does not deliver what a critical (much less radical) movement needs. In particular, it does not enable one to (a) understand his or her racial circumstances and condition; (b) seize opportunities when they appear; and (c) appreciate when discourse analysis is, in fact, genuinely valuable.

A. Two Ways to Think About Race

In general, there are two ways to think about race. One, which focuses more on “race” (the word), rather than race (the real-world phenomenon), is the stock in trade of a discourse school, currently in the ascendancy in Critical Race Theory, that concerns itself with text, narrative, and mindset.¹²⁸ Another view, corresponding to the work of some of the movement’s founding figures and much recent writing by scholars not aligned with CRT, examines the way race functions as an ordering principle in a world of power, resources, and privilege.¹²⁹

Often, the two sub-schools, without realizing it, come to the same conclusions. For example, both condemn hate speech, although for slightly different reasons.¹³⁰ But understanding and redressing other racial problems will require analysis in both idealist and materialist terms; either alone will be incomplete.

1. *Examples from Today’s Headlines.*—Recently, two empowered actors, Trent Lott, the majority leader of the United States Senate,¹³¹ and the Catholic Church,¹³² were accused of wrongdoing—Lott, with implying at a birthday celebration for Strom Thurmond that he approved of his colleague’s 1948 presidential platform endorsing segregation and Jim Crow laws,¹³³ the Catholic Church, with tolerating pedophilia by priests.¹³⁴

In Lott’s case, the controversy immediately centered on whether his successive apologies were heartfelt enough.¹³⁵ Much of the controversy surrounding the Church took the same form—did this cardinal or that admit

128. See the discussion of the discourse turn in Critical Race Scholarship, *supra* notes 11–12, 33–44 and accompanying text.

129. See the discussion of racial realism and materialism, *supra* notes 14–19, 52–67 and accompanying text.

130. Compare MATSUDA, *supra* note 12, at 44 (criticizing campus hate speech in largely idealist terms), with Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 387 (1991) (pointing out the material, interest-serving aspect of campus hate speech).

131. Bill Keller, *Who’s Sorry Now?*, N.Y. TIMES, Dec. 28, 2002, at A19.

132. Lauri Goodstein, *Trail of Pain in Church Crisis Leads to Nearly Every Diocese*, N.Y. TIMES, Jan. 12, 2003, at A1.

133. Keller, *supra* note 131.

134. Goodstein, *supra* note 132.

135. Keller, *supra* note 131.

fault, how quickly, and with how much resistance?¹³⁶ Lost in the uproar was any consideration of what happened to blacks in the South or altar boys in Catholic churches. Instead, attention focused on the perpetrator and what he or she said. Without constant effort, discourse analysis can be ahistorical and perpetrator-centered. In fact, conservatives can easily turn things around, so that the word “racism” becomes the most terrible accusation of all. Being accused of racism becomes an evil as monstrous as racism itself.

2. *Seeing and Seizing Opportunities: Cold War Interest Convergence.*—The opening paragraphs of this Essay asked how critical race theorists would see the current situation facing this country in its struggle against terrorism and for the loyalties of democratic, modernizing elements in the Muslim world.¹³⁷ To this point, no Critical Race Theorist has posed this question, although some of the movement’s founding scholarship employs interest convergence to explain the advent of the Civil Rights era of the 1960s.¹³⁸ In a landmark article, Derrick Bell hypothesized that the remarkable breakthroughs of that period stemmed not so much from a moral or spiritual conversion on the part of whites as from concern over international appearances and the threat of domestic disruption.¹³⁹ In the years leading up to *Brown*,¹⁴⁰ the country had just completed a titanic struggle against Germany and its allies, during which hundreds of thousands of servicemen and women of color had risked their lives fighting for freedom and democracy. These veterans of color were unlikely to return meekly to civilian lives of racial servility; for the first time in decades, racial unrest loomed.¹⁴¹

At the same time, the United States was entering into a Cold War against the forces of atheistic, monolithic Communism, competing for the hearts and minds of the Third World, much of which was black, brown, or Asian.¹⁴² It ill served this country for the world press to splash stories across their front pages of lynching, cross-burning, Southern sheriffs with cattleprods, or returning black servicemen and women unable to buy a meal at a lunch counter. Accordingly, Bell posited, America’s elite class prevailed on the justice system to afford blacks a number of symbolic, and short-lived, breakthroughs.¹⁴³

136. Goodstein, *supra* note 132.

137. See *supra* notes 1–2 and accompanying text.

138. See, e.g., Bell, *supra* note 6, at 523–25 (explaining the *Brown* decision as a product of the convergence of the interests of blacks and whites).

139. *Id.* at 524–25.

140. 347 U.S. 483 (1954).

141. See Bell, *supra* note 6, at 519–34.

142. *Id.*

143. *Id.*

Although Bell's proposal was greeted with cries of outrage, further scholarship confirmed its broad outlines,¹⁴⁴ while a recent essay by this author showed that interest convergence also explained the *demise* of the Civil Rights era beginning about a decade later.¹⁴⁵

The role of interest convergence in determining the course of minority fortunes is thus a well-known tool of critical analysis, useful both in explaining the course of history and in determining when the time may be right to strike for change. Yet, no Critical Race Theorist has analyzed the possibility that interest convergence may offer opportunities today, when society is confronting the threat of terrorism and re-evaluating its approach to Islam. The little attention progressive writers have devoted to today's situation has consisted of examining the predictable issues of rhetoric, mindset, and image: Who is a terrorist? Might not my terrorist be your freedom fighter?¹⁴⁶ What are the dangers of ethnic profiling of Middle-Eastern-looking travelers?¹⁴⁷ Are immigration authorities guilty of essentialism when they heighten scrutiny of all immigrants, including ones from Mexico and Latin America?¹⁴⁸

Those are surely legitimate issues. But they do not exhaust, by any means, all those a radical theory of race ought to consider. For example, the United States will need an army to wage any ground war in the Middle East. Will black and Latino soldiers fight enthusiastically in such a conflict, given that the enemy is apt to be brown and that many African-American leaders side with Palestine in its struggle with Israel?¹⁴⁹ If so, will U.S. Jews, many

144. See DUDZIAK, *supra* note 24.

145. See Delgado, *supra* note 56, at 376–77.

146. See *Discussing Inevitability*, CHRISTIAN SCI. MON., May 30, 2002, at 11 (discussing the public's changing definition of terrorism in the face of the heightened threat of attacks).

147. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 299–300, 346, 351–55 (2002) (examining the potential negative effects of post-September 11 racial profiling of people of Middle-Eastern descent, including validating the use of racial profiling in general in all areas of law enforcement).

148. See *id.*; Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September Eleven*, 34 COLUM. HUM. RTS. L. REV. 1, 39 (2002) (noting that Latinos have come in for suspicion originally aimed at Arabs and Middle Easterners); see also Nick Madigan, *U.S. Expands List of Nations Whose Visitors Must Register*, N.Y. TIMES, Jan. 17, 2003, at A11 (reporting that the visitor registration program has been criticized for “unfairly [singling] out men . . . of specific nationalities”); Suzanne Gamboa, *Seven Million Illegal Immigrants Living in U.S., According to INS: Count Taken Before 2001 Attacks, but Calls for Tighter Borders Expected*, BOULDER (CO) DAILY CAMERA, Feb. 1, 2003, at A1 (reporting that since the September 11, 2001, terror attacks, U.S. immigration laws and enforcement have been under heightened scrutiny).

149. See Andrew Gumbel, *Pentagon Targets Latinos and Mexicans to Man the Front Lines in War on Terror*, THE INDEPENDENT (LONDON), Sept. 10, 2003, at 11 (criticizing the U.S. military's focus on recruiting Hispanics); see also CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE* 29–33 (1996) (discussing strained race relations during the Vietnam War based on black leaders' denouncing the war). On Martin Luther King, Jr.'s opposition to the war in Vietnam,

of whom marched hand in hand with Martin Luther King in the 1960s, respond coolly to black causes, such as affirmative action?¹⁵⁰

To present a positive face to its European allies, not to mention moderate Islamic regimes, the United States will need to hold itself out as a moderate, secular, democratic regime.¹⁵¹ Can it do so persuasively if its elections deny African Americans the right to vote,¹⁵² its federal government is enthusiastically endorsing faith-based initiatives,¹⁵³ and its Attorney General holds prayer sessions for his highest level of lawyers?¹⁵⁴ The U.S. deplores fundamentalist Muslim schools that preach theocracy and hatred of the West.¹⁵⁵ But can we condemn them at the same time U.S. state legislatures require schoolchildren to recite the Pledge of Allegiance, require

see Editorial, *A King of Peace: Nonviolence as Key as His Civil Rights Work*, BOULDER (CO) DAILY CAMERA, Jan. 20, 2003, at A7 (observing that the U.S. "stands on the verge of unleashing war on a small nation full of dark-skinned people" and positing that King would have opposed it). On Jesse Jackson's pro-Palestine position, see, for example, *Palestinian Leader Receives Jesse Jackson on Peace Mission*, BBC WORLDWIDE MONITORING, July 31, 2002, available at 2002 WL 24807291.

150. See, e.g., Editorial, *The Middle East Meets the South*, ECONOMIST, Aug. 17, 2002, at 30 (noting that Middle-Eastern tensions have strained relations between these historic allies).

151. See Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 295 (2002) (asserting that the U.S. "must promote democracy and human rights worldwide"); BBC WORLDWIDE MONITORING, *supra* note 2 (quoting Indonesian Senior Minister Lee Kuan Yew in his call for America to "support non-militant Muslims in a common fight against militants"); Nelson, *supra* note 2 (pointing out that many in that part of the world believe "that the United States actually cares little about democracy and human rights in their country"); see also *id.* ("The current Bush administration has a credibility problem . . . Show us that the United States still adheres to the principles of human rights when it detains Egyptians (in America) without trial."); Brittany T. Kauffman, *Race and the Death Penalty* (2002) (unpublished manuscript, on file with author) (arguing that international perceptions favor ending the U.S. death penalty).

152. See Katharine Q. Seelye, *Divided Civil Rights Panel Approves Election Report*, N.Y. TIMES, June 9, 2001, at A8 (reporting the disenfranchisement of African-American voters in Florida); see also Harold Meyerson, *Dems in the Dumps: Demystifying their Defeat; Charting their Comeback*, AM. PROSPECT, Dec. 16, 2002, at 23 (discussing the whitening of the electorate in the 2002 electoral cycle). On the struggle to achieve effective electoral representation, see, for example, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1432-58 (1991).

153. See Editorial, *Using Tax Dollars for Churches*, N.Y. TIMES, Dec. 30, 2002, at A16 (criticizing the Bush Administration's faith-based initiatives); Curt Anderson, *Ashcroft Speaks for Faith Funding: Critics Say Attorney General Should Stay Out of Debate*, BOULDER (CO) DAILY CAMERA, Jan. 14, 2003, at B3 (discussing Ashcroft's endorsement of federal funding for faith-based charitable organizations); Editorial, *The War at Home*, N.Y. TIMES, Apr. 20, 2003, § 4, at 8 (questioning federal government plans to earmark public funds for building churches, as long as part of the building is used to provide social services). See also Craig S. Smith, *Threats and Responses: Two Worldviews; Joking Aside, a Serious Antipathy to Things American Rises in Europe*, N.Y. TIMES, Feb. 14, 2003, at A11 (noting that Europeans see U.S. leadership as "rooted in a kind of religious certainty").

154. See Laurie Goodstein, *Ashcroft's Life and Judgments are Steeped in Faith*, N.Y. TIMES, Jan. 14, 2001, § 1, at 22.

155. See Allan Gerson & Ron Motley, Editorial, *Is Saudi Arabia Tough Enough on Terrorism?*, N.Y. TIMES, Dec. 30, 2002, at A17 (criticizing fundamentalist Muslim schools in Saudi Arabia for just this reason).

schools to post the phrase, "in God we trust,"¹⁵⁶ and allow schools to post the Ten Commandments prominently in the front of classrooms?¹⁵⁷

Similarly, the United States condemns Muslim states that control the press and issue *fatwahs* against writers like Salman Rushdie, who write critically of certain aspects of Islam.¹⁵⁸ Yet, in our own country, right-wing websites post the names of professors who have not condemned terrorism staunchly enough or praised our various wars emphatically enough.¹⁵⁹ When a television comedian criticized our campaign in Afghanistan, an Administration official warned him to be careful of what he said.¹⁶⁰

And what of the role of women? Can the United States condemn nations like Saudi Arabia for denying women's rights when it is endorsing the traditional family,¹⁶¹ curtailing women's procreative liberties,¹⁶² narrowing sex education in schools and elsewhere,¹⁶³ and reducing aid to single mothers?¹⁶⁴ Can a country that condemns the cruel punishments of the *sharia* continue to execute blacks who kill whites many times more often

156. See Jon Sarche, *Bill Would Require Motto: Schools, Public Buildings Would Have to Display 'In God We Trust,'* BOULDER (CO) DAILY CAMERA, Jan. 19, 2003, at B3 (discussing proposed Colorado legislation that would require posting of the national motto in classrooms); William Raspberry, *The Danger of Ashcroft,* BOULDER (CO) DAILY CAMERA, Dec. 1, 2002, at F2 (expressing concerns about the actions of religiously-motivated politicians).

157. See *National Briefing South: Virginia: Allowing Ten Commandments in Schools*, N.Y. TIMES, Feb. 9, 2002, at A13. See also Jeffrey Gettleman, *Judge's Biblical Monument is Ruled Unconstitutional*, N.Y. TIMES, Nov. 9, 2002, at A1 (discussing the battle over a judge's placement of the Ten Commandments in a courthouse).

158. See, e.g., Salman Rushdie, *Editorial, No More Fanaticism as Usual*, N.Y. TIMES, Nov. 27, 2002, at A23 (criticizing moderate Muslims' reactions to acts of Muslim extremism).

159. See Emily Eakin, *On the Lookout for Patriotic Incorrectness*, N.Y. TIMES, Nov. 24, 2001, at A15 (referring to a list compiled by the American Council of Trustees and Alumni, a conservative nonprofit group devoted to curbing liberal tendencies in academia).

160. DELGADO, *supra* note 7, at 65; Frank Rich, *On 'Fixed Ideas' Since Sept. 11*, N.Y. REV. BOOKS, Mar. 13, 2003, at 20.

161. See Editorial, *The War against Women*, N.Y. TIMES, Jan. 12, 2003, at A14 (discussing the Bush Administration's attempts to restrict women's choice to have an abortion); Christopher Marquis, *Saudi Tries to Calm U.S. Opinion*, N.Y. TIMES, Dec. 3, 2002, at A18 (referring to Saudi Arabia's denial of the basic rights of women); Robert Scheer, *Politics and Population*, BOULDER (CO) DAILY CAMERA, Nov. 7, 2002, at A4 (detailing the Bush Administration's objection to a United Nations pact signed by 179 other nations that requires abortions to be made a medically safe procedure).

162. See Peggy Loonan, *Don't Compromise on Abortion*, N.Y. TIMES, Jan. 15, 2003, at A23 (discussing increasing restrictions on abortion rights).

163. See Adam Clymer, *U.S. Revises Sex Information, and a Fight Goes On*, N.Y. TIMES, Dec. 27, 2002, at A14 (noting that government web pages have deleted information concerning condoms, abortion, and breast cancer); Nicholas D. Kristoff, *The Secret War on Condoms*, N.Y. TIMES, Jan. 10, 2003, at A25 (criticizing the Bush Administration's lack of support for condom use).

164. See Drake Bennett, *The Fly-by-Night 107th*, AM. PROSPECT, Nov. 18, 2002, at 14, 16 (reporting that President Bush plans to increase working hours for welfare mothers and freeze funding for the welfare reform program); *Then There Are the Poor*, N.Y. TIMES, Jan. 22, 2003, at A2 (discussing Congress's proposal to cut block grants to certain states).

than whites who kill blacks,¹⁶⁵ or maintain a prison system that is more than one-half black and brown?¹⁶⁶ Can the United States portray itself as the example of open democracy at the same time that it is passing laws making it easier to spy on its citizens and detain those it suspects of disloyal attitudes?¹⁶⁷

To the Arab street or a wavering regime like Pakistan, can the United States portray itself as the voice of reason while it insists that its own teachers teach Creationism,¹⁶⁸ that its courts emphasize original intent and the meaning of 225-year-old texts,¹⁶⁹ and while the Administration encourages local school boards to experiment with voucher systems that channel government funds to religious schools?¹⁷⁰ Can it condemn the warlord ethic of the *mujahedin* at the same time that it resists gun control and registration, and an increasing proportion of its citizens own guns?¹⁷¹

Can it make a credible case that it wishes to befriend any Muslim country whose population is black or brown at the same time that it is

165. See Randall Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420–22 (1988) (discussing the disparity in capital sentences between blacks and whites); DAVID BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY* 254–67 (1990) (concluding that race is still a significant factor in death penalty sentencing); *The Court Tunes Out*, L.A. TIMES, Apr. 23, 1987, § 2, at 4 (criticizing the Court for “shut[ting] its eyes to blatant systematic racial discrimination . . . in the way murderers are sentenced to death”).

166. See MARC MAUER, *THE SENTENCING PROJECT, RACE TO INCARCERATE* 163 (1999) (explaining that while African Americans made up only 13% of the population, 44% of those arrested for violent offenses in 1995 were African American); JENNI GAINSBOROUGH & MARC MAUER, *DIMINISHING RETURNS* 23 (2000) (noting that 49% of black inmates surveyed in 1996 had an incarcerated family member and that one in fourteen black children has a parent in prison).

167. See DELGADO, *supra* note 7, at 58; YEAR OF LOSS, *supra* note 7, at 1–24 (both describing new measures permitting the government to use wiretaps; scrutinize citizens’ e-mail, medical records, credit card bills, and library records; and search homes, businesses, and houses of worship); Laura Wides, *Muslim Leaders Call Patriot Act Threat to Democracy*, BOULDER (CO) DAILY CAMERA, Dec. 22, 2002, at A17 (highlighting the federal government’s powers under the Patriot Act to obtain personal information on U.S. citizens and to detain aliens); see also Editorial, *Sun Setting in East*, BOULDER (CO) DAILY CAMERA, Dec. 30, 2002, at A6 (detailing how Chinese nationalists have used the U.S. retreat on civil liberties to justify new, restrictive laws for Hong Kong); YEAR OF LOSS, *supra* note 7, at iv, 43 (noting that repressive regimes abroad are beginning to cite U.S. rollbacks on civil liberties as precedent for their own authoritarian actions).

168. See Raspberry, *supra* note 156 (reasoning that those in government who subscribe to Creationism will work to make their belief become the dominant view by assuring that school children hear more than a perfunctory mention of Creationism).

169. See SAMUEL A. MARCOSEN, *ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES* 2–4 (2001) (examining the principles of “Originalism” as used in constitutional interpretation); LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDE-STEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* 262 (2001) (describing the Supreme Court’s selective use of historical analysis to avoid difficult constitutional questions).

170. See Elisabeth Bumiller, *Bush Calls Ruling About Vouchers a ‘Historic’ Move*, N.Y. TIMES, July 2, 2002, at A1 (reporting that President Bush called the decision allowing the use of public money for religious schools “a great victory to parents and students”).

171. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* 36 (2d ed. 2000) (reporting that gun ownership rose from 26% to 39% of the general population between 1988 and 1996).

restricting affirmative action through statewide initiatives,¹⁷² and easing desegregation decrees that formerly required school districts to place white and nonwhite children in the same schools?¹⁷³ Its officer ranks in all arms of the military,¹⁷⁴ as well as CEOs of most Fortune 500 companies,¹⁷⁵ are virtually all white. Can it insist with any credibility that the Muslim monarchies share power and authority with their own citizenry—that these same monarchs share their unimaginable oil wealth with their subjects if the United States is daily enacting tax measures that can only further enrich its top one percent¹⁷⁶ and reducing welfare, Head Start, and financing for public education for those in the bottom tier of average income?¹⁷⁷

In short, the fundamentalist, terrorist-harboring, West-hating faction of Islam can point out, with a degree of plausibility, to wavering moderates that

172. Consider, for example, California's Proposition 209, prohibiting the use of race in college and university admissions and other state programs. CAL. CONST. art. I, § 31 (added by initiative measure (Prop. 209, approved Nov. 5, 1996)). See also Adam Liptak, *Racial Math: Affirmative Action by Any Other Name*, N.Y. TIMES, Jan. 19, 2003, § 4, at 1 (citing the Bush Administration's legal briefs that opposed the race-conscious admissions policies of the University of Michigan, and instead extolled the use of "percentage plans" to guarantee university admission to students who graduate near the top of their high school class).

173. Greg Winter, *Schools Resegregate, Study Finds: Authors Cite Demographics and Lifting of Many Court Orders*, N.Y. TIMES, Jan. 21, 2003, at A14 (reporting on a study by the Harvard Civil Rights Project showing that lifting desegregation decrees sharply accelerated resegregation of public schools nationwide). See also Kevin Brown, *Recent Developments in the Termination of School Desegregation Decrees*, 26 IND. L. REV. 867, 879 (1993) (warning of that possibility).

174. See CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION IN THE ARMY 47–51 (1996) (demonstrating that despite the growth in the number of blacks in the U.S. Army officer corps, only 1 in every 9 officers today is black).

175. See, e.g., Alison M. Jaggar, *Sexual Equality as Parity of Effective Voice*, 9 J. CONTEMP. LEGAL ISSUES 179, 186 n.8 (1998) (stating that "95 percent of Fortune 500 CEOs" are white men); Kellye Y. Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025, 1036, 1036 n.22 (2000) (citing a 1998 Korn/Ferry International Annual Board of Directors Study for the proposition that CEOs remain mostly white).

176. See, e.g., Kevin Phillips, *A Tax-Cut Plan Rooted in the Bush Pedigree*, BOULDER (CO) DAILY CAMERA, Jan. 19, 2003, at E6; David Leonhardt, *Defining the Rich in the World's Wealthiest Nation*, N.Y. TIMES, Jan. 12, 2003, at 1; Molly Ivins, Editorial, *Connect the Dots, Folks: Bush Tax Cuts for the Rich*, BOULDER (CO) DAILY CAMERA, Jan. 15, 2003, at A5; E.J. Dionne, Editorial, *Rich Owe Government*, BOULDER (CO) DAILY CAMERA, Jan. 20, 2003, at A7 (all pointing out that the repeal of both estate and dividend taxes will disproportionately benefit the wealthy). See also Diana Jean Schemo, *Head Start Plan Worries Supporters*, N.Y. TIMES, Feb. 12, 2003, at B8 (reporting criticism over the Bush administration's proposal to shift control of funding for the Head Start program, which helps poor preschool children, from the federal government to "cash-strapped" state governments); Maureen Dowd, *The Class President*, N.Y. TIMES, Jan. 22, 2003 at A21 (criticizing the current President Bush for "pandering to an unspoken racial elitism," especially in his support for tax cuts that "favor the wealthy").

177. See RICHARD DELGADO & JEAN STEFANCIC, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 90–95 (1996) (examining the potential effects of welfare reform proposals supported by conservative political groups); Scott Lindlaw, *Bush Renews Call to Stiffen Welfare-Work Laws*, BOULDER (CO) DAILY CAMERA, Jan. 15, 2003, at A8 (noting that payments to welfare recipients have dropped by \$2 million since the 1996 welfare reform bill); Schemo, *supra* note 176.

the West is hedonistic, corrupt, theocratic, and antiwoman.¹⁷⁸ Although these are, of course, only partial truths, we need not give the other side these openings. We may need to tend our own garden first.

Nothing is wrong with approaching a situation, like today's, in terms of text, trope, rhetoric, and narrative. The closure of the U.S. border is, in some respects, symbolic—like one narrative killing another. On some level, most Americans probably fear the combined force of the Arab world—its immense size and exotic foreignness evoke unconscious fears of engulfment.¹⁷⁹ But analyzing the current situation solely in terms of its symbolic and Freudian features surely is to overlook key aspects that we need to attend to. Detention and internment accompany practically every one of our foreign wars.¹⁸⁰ But you would not know that if you attended purely to the textual dimension of this one. True, we can think only in words. But when we think only about words, we often end up thinking about nothing at all. And we can easily lose sight of opportunities, like the ones listed above, to press for women's and minorities' issues, and freedom of the press, here at home. Times of war and conflict provide opportunities for self-reflection—after all, what are we fighting for? But they also provide moments of interest-convergence which, once pointed out, can end up benefiting previously excluded groups.¹⁸¹

Nothing is wrong with working to improve racial attitudes, conscious or subconscious. Yet, we should not be overly sanguine about the possibilities

178. See Chris Hedges, Book Review, *Global Village Idiots*, N.Y. TIMES, Dec. 15, 2002, § 7, at 25 (reporting that much of the world forms images of America based on movies and television—images that are often “erotic,” “opulent,” “glitzy,” and “violent”); Adam Clymer, *World Survey Says Negative Views of U.S. Are Rising*, N.Y. TIMES, Dec. 5, 2002, at A11 (detailing the results of a Pew Research Center survey of foreign nations that showed widespread unfavorable views of the United States, especially in countries with Muslim majorities); Smith, *supra* note 2 (describing a conservative form of Islam in Saudi Arabia called Wahhabism and its growing militancy toward the West based on what many there believe is a holy war being waged against Islam, a war that began when the United States stationed troops on Saudi soil).

179. See, e.g., EDWARD W. SAID, *ORIENTALISM* 286–87 (1979) (describing characterizations of the Arab as “bloodthirsty” and relating depictions of Arabs as a massed group, the result of which was (or is) a fear among Americans that Muslims (or Arabs) will take over the world).

180. E.g., DELGADO, *supra* note 7, ch. 4 (discussing World War II internment and similar events); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224 (1998) (engaging in a historical analysis of the exceptional powers that presidents wield during wartime and stating that “[i]t is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime”).

181. That is, domestic groups like blacks, Latinos, Asian Americans, and Indians. This, of course, begs the question whether rapprochement with the West is, in fact, in the interest of the uncommitted Islamic world. See collection of articles, *supra* note 2 (all pointing out that Western elites very much want to strengthen the hand of moderate Islam *vis-à-vis* its fundamentalist factions). I do not assume that the answer to this question is yes. The best course may be for uncommitted Muslim societies to throw off their autocratic leaders, then pursue their own, independent courses free of Western influence. My point simply is that *competition* for the loyalties of these regimes may be healthy—and may offer opportunities for domestic minorities to advance. See *supra* notes 6, 19, 52–67 and accompanying text.

for change through this avenue alone. Racial attitudes in the United States have been improving continually in recent years,¹⁸² yet the black-white gap in income, family wealth, educational attainment, and health and longevity is as great as ever.¹⁸³ Much more than text, narrative, and mindset governs the course of race relations.

3. *The Legitimate Role of Discourse Analysis.*—Racial analysis that proceeds exclusively at the level of discourse will thus miss a great deal. Still, discourse analysis is not entirely useless. Consider hate speech and media depictions of minorities, for example. Although discourse analysts have had a field day with both issues, recent scholarship has shown that hate speech has a material, privilege-reinforcing dimension.¹⁸⁴ The history of media depiction of minorities does, as well. In one period, the stereotype of the happy Sambo reassures American society that blacks are happy with their lot and pleased to serve whites.¹⁸⁵ A few years later, conditions change. The happy, singing darkie of slave years gives way to the bestial, out-of-control black, with designs on white women—images that justify brutal repression.¹⁸⁶ In one era, film and literature depict Asians as devious and tricky; in another, as hapless, pidgin-talking Charlie Chan figures.¹⁸⁷ During expansionist periods, we depict Indians as warlike and bloodthirsty; later, they are noble lovers of nature.¹⁸⁸

Can all this be explained in terms of shifts in literary fashion or unconscious forces, such as displacement? No, for the contents of our subconscious minds would change often and suddenly. Moreover, how would one explain the many shifts in the various minority groups' fortunes, with society welcoming one group (for example, the Chinese) at exactly the same time it is treating another (for example, the Japanese or Mexicans) with scorn and derision?¹⁸⁹ If racism were an unconscious force like sibling

182. See Kevin Sack, with Janet Elder, *Poll Finds Optimistic Outlook but Enduring Racial Division*, N.Y. TIMES, July 11, 2000, at A1 (reporting a poll in which 74% of those surveyed, including 58% of blacks surveyed, believed that America had made real progress in reducing racial discrimination—an increase of 25% since 1992).

183. See OLIVER & SHAPIRO, *supra* note 49, at 89 (noting that the increasing disparity between the wealth of whites and of that blacks affects “access to educational, career, health, cultural, and social opportunities”); PHILLIPS, *supra* note 49, at 135–36 (noting that the wealth gap between blacks and whites has widened despite increases in nonwhite income levels over the past 20 years).

184. See Delgado, *supra* note 56, at 385–86 (noting that racist speech gives credibility to the dominant group and works to degrade the effectiveness of minority rebuttal speech by creating a stigma that is difficult to overcome).

185. See Delgado & Stefancic, *supra* note 17, at 1259, 1260, 1263 (mentioning recent museum exhibitions and a documentary chronicling things like minstrel shows from the 1890s that depicted blacks as dimwitted, happy to serve, and incompetent).

186. *Id.* at 1259, 1264.

187. *Id.* at 1270–72.

188. *Id.* at 1267–70.

189. See discussion, *supra* notes 105–13 and accompanying text.

rivalry, why would it change frequently from era to era and by minority group, now singling out one, now the other?

Racist ideology and social structures frequently do work together, so that combating the first is not entirely useless. But the connection between material conditions and discourse is often complex; frequently, changes in material conditions and social needs will precede and usher in changes of consciousness, rather than the reverse.¹⁹⁰ Society needs something that minority groups have—labor, land, votes, exoneration. It takes what it wants. Attitudes and images then change to justify the result. At that point, groups with little to gain from racial hierarchy—blue-collar workers, labor unions, white women—catch the attitude and join in mindlessly, without receiving any real benefit in return.¹⁹¹ At this point, discourse analysis becomes genuinely helpful in explaining how dominant groups are able to persuade those with little at stake to underwrite a system of racial oppression.

V. A Materialist Explanation for the Idealist Turn

What might have brought about the turn to discursive scholarship that I have described? Earlier, I suggested an idealist explanation—a large number of young people joined CRT having learned in their undergraduate and graduate studies that people in other departments talked that way.¹⁹² They simply carried into the study of race habits of speech and analysis that they had learned elsewhere and that placed texts, narratives, scripts, stereotypes, and Freudian entities at the center of analysis.¹⁹³

But I believe more is at work than that. Around the time that Critical Race Theory took the turn I mentioned, it was also gaining a degree of legitimacy in academic circles.¹⁹⁴ Deans were bankrolling workshops and conferences and subsidizing new specialized law reviews to publish their proceedings.¹⁹⁵ The annual Lat/Crit conferences, for example, have generated no fewer than five symposium issues of various reviews, some running over 1200 pages and replete with articles addressing the mainstay issues of the discourse school.¹⁹⁶ Even a symposium on Lat/Crit theory in a

190. See DELGADO, *supra* note 9, at 2284–88 (citing examples of changing social needs and material conditions leading to quickly shifting racial stereotypes designed to serve the majority in some material way).

191. *Id.* at 2287.

192. See *supra* notes 31–38 and accompanying text.

193. *Id.*

194. See *supra* note 69 and accompanying text.

195. See discussion *supra* notes 47–48 and accompanying text; Elizabeth M. Iglesias & Francesco Valdes, *Afterword: Lat/Crit at Five: Institutionalizing a Post-Subordination Future*, 78 DENV. U.L. REV. 1249, 1251 n.2 (2001) (explaining that the Fifth Annual Lat/Crit Conference received “generous support” from at least four major universities).

196. See, e.g., *Lat/Crit V Symposium—Class in Lat/Crit: Theory and Practice in a World of Inequality*, 78 DENV. U. L. REV. 467 (2001) (containing thirty articles and running over 850 pages).

world of economic inequality was no exception, featuring articles on such topics as communicative praxis, the appropriation of Latino pop music, the social construction of Latino gangs, and crime thrillers in Chicano cinema.¹⁹⁷

Might it be the lure of easy publication, not to mention that of attending an annual conference where one might meet one's friends and relax in spa-like splendor, that accounts for the proliferation of discourse scholarship during the period in question? And, from the dean's perspective, is it not safer to fund scholarship that examines literary tropes than that which has the effrontery to propose that America's proudest moment—*Brown v. Board of Education*¹⁹⁸—came about because white folks decided to do themselves a favor?

From the perspective of the young scholar seeking tenure, it is certainly safer to attack a word or media image than law school hiring, the Supreme Court, or the Pioneer Fund. A media image cannot fight back or send a letter to one's dean. Similarly, how much safer to criticize immigration authorities for profiling Arab travelers than to confront the possibility that the military designs of the U.S. might be in the service of Big Oil?

Tellingly, the terms courage, commitment, and confrontation are almost entirely missing from *Crossroads*—but not from the writing of Derrick Bell.

VI. Ethical Ambition and a Lawyer's Life

In *Ethical Ambition: Living a Life of Meaning and Worth*,¹⁹⁹ Derrick Bell, Critical Race Theory's founding figure, reflects on his own life and career. Pensive and ruminative, even spiritual, the book covers some of the same ground Bell covered in his earlier *Confronting Authority: Reflections of an Ardent Protestor*.²⁰⁰ Although the two books' subject matter is the same—moments in Bell's career that tested his convictions—their emphasis is slightly different. *Confronting Authority*, the earlier book, is descriptive and autobiographical. Its aim is to tell the story of Bell and his place in American public life over a period of several decades. *Ethical Ambition* is more inward-looking. It describes Bell's struggle to reconcile a number of competing forces and demands—family life and professional ambition,²⁰¹ courage and prudence,²⁰² reformist zeal and personal humility.²⁰³ The most

[hereinafter *Lat/Crit V*]. For a listing of the predecessor conferences, see Iglesias & Valdes, *supra* note 195, at 1261 n.26.

197. See *Lat/Crit V*, at 467, 719, 795, 1049.

198. 347 U.S. 483 (1954).

199. DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002) [hereinafter *ETHICAL AMBITION*].

200. See generally DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR* (1994).

201. *ETHICAL AMBITION*, *supra* note 199, at 1–5, 14, 133.

202. *Id.* at 54–58, 61.

203. *Id.* at 156–64.

riveting sections of both books describe moments when Bell placed his job on the line²⁰⁴—sometimes on behalf of the very Race-Crits who went on to embrace a form of scholarship radically different from his own.

In *Ethical Ambition*, Bell addresses a series of recurring dilemmas facing civil rights lawyers and students considering careers in the public interest. Can one reconcile the search for professional success and the preservation of personal integrity?²⁰⁵ Is it possible to do good and do well at the same time?²⁰⁶ What should one do if one's job seems to require the sacrifice of one's deepest principles and commitments? Resign? What if one has no ready means of support?²⁰⁷

Six short chapters on passion, courage, faith, relationships, inspiration, and humility set out how these components play out in the life of a lawyer. Set in the context of specific challenges—the colleague who is an unrecognized racist,²⁰⁸ the dean who is an unfeeling bureaucrat,²⁰⁹ the law office that wants to pursue one strategy while the client community wants another²¹⁰—Bell offers advice tempered with humor, practical realism, and a gentle insistence on the importance of following the dictates of conscience. Doing so, Bell points out, will often lead practitioners to discover sources of energy, even elation, that they did not suspect they could call on.²¹¹ Helping those in need “without expecting reward or public recognition . . . is a difficult task, but no other endeavor better conveys the certainty that this is what life is about, this is why we are here.”²¹²

What about the need to make a living? Even the resource-strapped public interest lawyer who pursues what his or her conscience dictates, Bell writes, may find the situation ultimately less confining than he or she first thought. Ethical work on behalf of others is “often difficult, unpopular, and unappreciated, but it can be self-sustaining.”²¹³ It can be “scary and exhilarating to commit my energies in support of my beliefs . . . while keeping faith that my needs will be taken care of.”²¹⁴ What about students who graduate with \$150,000 or more of educational debts?²¹⁵ Even when

204. *Id.* at 2–3, 95–127 (recounting how Bell resigned, out of principle, from positions at the U.S. Department of Justice and at the Harvard and Oregon law schools (the latter a deanship)).

205. *Id.* at 1–5, 10–11, 13, 36, 54–55, 61.

206. *Id.* at 1–5, 73.

207. *Id.* at 10, 133.

208. *Id.* at 9, 102–05 (recounting Bell's difficulties at Harvard in gaining tenure and in persuading his colleagues to hire a woman of color).

209. *Id.* at 52–57, 59–65 (recounting examples of friends or public figures who stood up to editors, professors, deans, or landlords in acts of courage).

210. *Id.* at 156–57, 160–61, 167.

211. *Id.* at 10, 16, 58.

212. *Id.* at 16.

213. *Id.* at 13.

214. *Id.* at 10.

215. *Id.* at 5–10.

trapped in a conventional, deadening job, one will have opportunities to “stand up in some small way to a practice or policy or environment that you see as demeaning.”²¹⁶ Sometimes the lawyer who leaves a job that requires him or her to sacrifice integrity will unexpectedly find a better one. One is often less trapped than one thinks by one’s role, physical needs, or the expectations of others.

Echoing Aristotelian precepts, Bell observes that “[l]iving ethically is . . . a habit that must be refreshed frequently.”²¹⁷ But cultivating that habit is not a dreary form of unending discipline. It enables passion (the topic of his second chapter), the human faculty that thrives on “a job well done, giving credit to others, standing up for what you believe in, voluntarily returning lost valuables.”²¹⁸ Passion means that an outsider, even one without resources, media access, or influence will persevere, enjoying a kind of energy from “reaching out to others, trying to make things better.”²¹⁹ He cites the quiet joy of the teacher, like himself, “having students tell me on graduation day that my course was the most meaningful they had in their three years of law school.”²²⁰ Or the passion of the writer: beginning with his years as a litigator, “the fervor of my feelings about justice has motivated my entry into activities where my passion could take the form of writing.”²²¹

Chapters on courage, which Bell describes as overcoming fear and finding the will to act for others and what you believe is right,²²² and on spirituality,²²³ follow. Although Bell’s own life contains ample examples of courage, in typical fashion he lists cases of others he finds inspirational: the Israeli reservists who refused to serve in the Gaza Strip or West Bank,²²⁴ whistle blowers who lost their jobs when they reported the tobacco industry’s complicity in marketing a known dangerous, addictive product,²²⁵ and early civil rights heroes like Medgar Evers,²²⁶ Thurgood Marshall,²²⁷ and Constance Baker Mottley²²⁸ who advocated on behalf of black plaintiffs in front of unsympathetic judges and juries. Even though Bell himself is not a pacifist, he mentions Cassius Clay’s courageous refusal to perform military

216. *Id.* at 12.

217. *Id.* at 36.

218. *Id.* at 34.

219. *Id.* at 25.

220. *Id.* at 26.

221. *Id.* at 21.

222. *Id.* at 41–43.

223. *Id.* at 75–95.

224. *Id.* at 43–49.

225. *Id.* at 149–52.

226. *Id.* at 138.

227. *Id.* at 29–32, 170–71.

228. *Id.* at 170–71.

service in Vietnam as an illustration of personal courage and the willingness to sacrifice career ambitions for a cause one considers just.²²⁹

The lawyer or other person who acts courageously often finds that the action brings unexpected rewards. Taking an unpopular stand has often given Bell "a unique sense of peace."²³⁰ Years later, he found that a stand he took inspired others, who took similar action.²³¹ "I'll let you in on a little secret . . .," he writes. "Choosing the good and doing good feels good."²³² The individual who acts courageously finds unexpected sources of energy, even an adrenaline rush.²³³ The student protests of the 1960s were highly ethical,²³⁴ Bell writes, urging today's students to challenge insensitive professors who utter racist or sexist remarks in classes or on exams.²³⁵

Courage is not always rewarded, however. Sometimes one stands up for principle, but in vain.²³⁶ An institution does not change; a judge renders an unjust verdict. But part of the meaning of struggle comes from the act itself.²³⁷ Especially in these situations, Bell writes, one's religion or marriage can provide invaluable support and sustenance.²³⁸ Religion enables one to draw on spiritual sources; in a good marriage two partners reinforce and validate each other's ethical intuitions and actions.²³⁹ Citing the case of his first wife, Jewel, who advised him to stand firm when Harvard Law School suggested that the young professor take an extra year to build his tenure file, Bell urges his readers to form such supportive relationships and invest in them.²⁴⁰ In one of the more painfully candid passages in the book, Bell describes how he at times was guilty of devoting excessive attention to his career at the expense of his three children.²⁴¹

The final two chapters, on inspiration and humility,²⁴² describe further inspirational cases, such as that of Paul Robeson, who resisted anti-communist fervor and lost everything,²⁴³ and Professor Bensib Meyers, the University of Tennessee football tutor who brought to public attention

229. *Id.* at 140–41. Clay later changed his name to Muhammed Ali.

230. *Id.* at 74.

231. *Id.* at 50.

232. *Id.* at 58.

233. *Id.* at 25, 58.

234. *Id.* at 56.

235. *Id.* at 64–65.

236. *Id.* at 54–55 (giving, as an example, a generic organization which is unresponsive and even hostile to responses from below).

237. *Id.* at 73, 166.

238. *Id.* at 75–126.

239. *Id.* at 101–04.

240. *Id.* at 104.

241. *Id.* at 112–15.

242. *Id.* at 127–68.

243. *Id.* at 145–48.

academic abuses in major football programs around the nation.²⁴⁴ But Bell also points out how courage must be coupled with humility, or else it can prove dangerous and misguided.²⁴⁵ A black or minority professional can hold a job as a token, believing that an impressive title renders him or her important, when it brings little actual power but merely serves to legitimate an unjust institution.²⁴⁶ He also cites the case of the Boston lawyers for black plaintiffs who insisted on pursuing busing and school integration remedies that exposed minority schoolchildren to virulent racism and physical danger.²⁴⁷ Good intentions can render the reformer rigid, self-important, and doctrinaire; legal victories can induce inertia and unjustified self-satisfaction.²⁴⁸ The lawyer or organization who successfully pursues a law-reform strategy must not rest content with a seeming victory, but remain ever-vigilant for the inevitable backlash.²⁴⁹ The lawyer must make certain that the breakthrough edict leads to structural change, or else it will be worth little.²⁵⁰

VII. Two Approaches to Critical Thought

The two books, one by the founder of Critical Race Theory, the other by three of his followers, could not be more different, in language, tone, and content. Bell's language is earnest and straightforward. He seeks to reach the ordinary reader, the everyday lawyer, the average law student. *Crossroads*, by contrast, is jargon-laden and full of obscure language. Bell's examples, stories, and analysis aim to ennoble and inspire the reader to find internal resources that he or she did not suspect were there. *Crossroads* aims at encouraging readers to consider the content of a national conversation about race, but with very few practical suggestions on how one should, as a result, lead life differently. Bell uses terms like courage, commitment, and sacrifice that are almost entirely absent from the vocabulary of the younger generation of critical race theorists. He cites examples from the history of racial struggles and heroes who laid their lives and careers on the line. The authors of the articles in *Crossroads* are, in that respect, almost completely ahistorical. Struggle enters the book only insofar as it concerns the efforts of authors, like themselves, to gain tenure and recognition, or else to hire others very much like themselves to their faculties. Struggle on behalf of others is almost entirely absent.

244. *Id.* at 152–53.

245. *Id.* at 160–61.

246. *Id.* at 133–34.

247. *Id.* at 156–59.

248. *Id.* at 160–61.

249. *Id.* at 163–64.

250. *Id.* at 169.

At a Crossroad

The next volume of Critical Race Theory should consider that race is not merely a matter for abstract analysis, but for struggle. It should expressly address the personal dimensions of that struggle and what they mean for intellectuals, like the authors. What do courage and commitment mean in academic settings? What sacrifices, in careerism and personal security, are reasonable to expect from each other? And what kinds of support can we give?

It should also address the material components of race, and the way these shape the country's agenda. What does the war on terrorism mean for racial equality in this country?²⁵¹ How should we see the extraordinary growth of the Latino population?²⁵² Is immigration the new civil rights issue of the century?²⁵³ What about racial minorities and the two-party system of U.S. politics?²⁵⁴ One party considers itself the friend of people of color, but does relatively little for them; the other party has few minority members, but says it is anxious to recruit more. Would some lively competition be in order, and what are the implications of setting that competition in motion?²⁵⁵

Critical race theorists should also examine the relationship between class and race more carefully than they have done.²⁵⁶ Is the significance of race really declining,²⁵⁷ and, if so, are poverty and the income gap the new civil rights issues of the millennium?²⁵⁸ They should examine issues like environmental justice that span race, class, and the profit motive.²⁵⁹ The movement needs to examine high-stakes testing,²⁶⁰ school accountability and

251. See discussion *supra* notes 1, 2, 146–77 and accompanying text.

252. See Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in THE LATINO/A CONDITION: A CRITICAL READER 77–81 (Richard Delgado & Jean Stefancic eds., 1998) (chronicling the growth of the Latino population in the United States and its relationship to American labor shortages).

253. See, e.g., Johnson, *supra* note 104, at 187 (calling for such an analysis).

254. See Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1932 (1990) (advocating the re-evaluation of political affiliation by poor nonwhites).

255. See *id.* at 33–48 (suggesting that poor nonwhites may obtain greater political success by severing their traditional relationship with the left and opening a dialogue with the right).

256. See Delgado, *supra* note 9, at 2296 (advocating materialist interpretation as the proper framework for synthesizing race and class analysis).

257. See WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS 2–3 (1978) (introducing an argument that barriers to wealth and power are no longer targeted at the black population as a whole, only the black underclass).

258. See Delgado, *supra* note 9, at 2296 (suggesting that economic issues and global workers' rights will be prominent issues in the near future).

259. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 54 (2001) (citing studies that show environmental hazards, such as waste dumps, are placed disproportionately often in or near minority neighborhoods).

260. See Richard Delgado, *Official Elitism or Institutional Self-Interest?*, 34 U.C. DAVIS L. REV. 593, 601 (2001) (urging schools and professional organizations to abandon standardized tests).

exams, and voucher and charter school alternatives.²⁶¹ Do these offer traps or benefits for communities of color? Gun control,²⁶² cigarette and fast-food marketing,²⁶³ and Eurocentric standards of beauty²⁶⁴—none of these are currently on the agenda of Critical Race Theory, but they all should be. Organized medicine overlooks minority ills and relegates black and brown consumers—even those who can afford standard medical care—to second-class treatment.²⁶⁵ Why, and what can be done about it?²⁶⁶

All of these issues have a discourse dimension, of course. But how we talk about, conceptualize, and narrate these issues is only part—perhaps a minor part—of the story.

because of the poor correlation between standardized test scores and intelligence or potential academic performance, and the high correlation between such scores and socioeconomic status).

261. See John Merrow, *Speaking in Tongues*, N.Y. TIMES, Jan. 12, 2003, § 4A, at 7 (discussing school accountability programs and the danger of seeking to close the achievement gap by referring to race rather than socioeconomic factors).

262. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 361 (1991) (contending that gun control restrictions are unlikely to successfully reduce violence in a society with a dismal record for protecting individual safety and in which self-defense is a civil right).

263. See Alix M. Freedman, *Deadly Diet: Amid Ghetto Hunger, Many More Suffer Eating Wrong Foods*, WALL ST. J., Dec. 18, 1990, at A1 (noting that corporations have a history of most aggressively marketing their most hazardous and unhealthy products in poor areas).

264. See John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 312–14 (1997) (discussing the objectification of the physical appearances of white women); Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2051 (1987) (arguing that a significant aspect of prejudice against blacks has to do with a negative reaction to their appearance).

265. See, e.g., Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Broad Disparities in Health Care*, 90 CAL. L. REV. 2047, 2055–60 (2002) (giving examples of racial disparities in medical treatment that disadvantage blacks and benefit whites).

266. See *id.* at 2092–2100 (recommending ways to remedy such racial disparities in medical treatment).