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# Liberal McCarthyism and the Origins of Critical Race Theory

*Richard Delgado\**

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## I. INTRODUCTION

Anniversary occasions like this one invite us to look backward, at origins, as well as to reflect on our current situation and prospects for the future. Written to commemorate critical race theory's twentieth year, this article, a *pièce d'occasion*, focuses on the organization's early period and is primarily retrospective in character. Yet, an examination of our beginnings and the stories we tell about them may yield insight into our current condition as well as the forces that may shape us in the years ahead.

Stories of origin are essential components of almost every group's self-understanding.<sup>1</sup> Native American cosmology, for example, offers an account of how the earth and its creatures came into being.<sup>2</sup> For Latinos, the mythical land of Aztlán serves a similar constitutive function.<sup>3</sup> And, of course, Americans of every description learn the story of their country's revolutionary origins, including their colonial forebears' righteous grievances against the Crown and their subsequent westward march in pursuit of Manifest Destiny—a story that, naturally, differs dramatically from that of the Native Americans.<sup>4</sup>

Like the abovementioned stories, critical race theory's accounts of its own beginnings are multiple and contested but perform many of the same functions—designating an official ideology, selecting a set of heroes, and avoiding the appearance of contingency and luck in explaining how the group came into existence.<sup>5</sup>

One suspicion that emerges when one encounters competing stories of origin is the possibility that an unarticulated, broader version might better explain events than any of the others alone. Moreover, it may turn out that no one account holds an exclusive claim to the truth, but that a hitherto unidentified material force may be at work as well.<sup>6</sup>

In 1980, Derrick Bell startled the legal world when he posited, in an article entitled *Brown v. Board of Education and the Interest Convergence*

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1. Concerning stories of origin and their role in maintaining a group's identity and sense of mission, see Milner Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296–2318 (1998).

2. See generally *id.* (describing many such stories and some of their common themes).

3. On the role of this mythical homeland, corresponding roughly with present-day northern Mexico and the U.S. Southwest, see, e.g., THE LATINO/A CONDITION: A CRITICAL READER 34, 69, 335, 628–29 (Richard Delgado & Jean Stefancic eds., 1998).

4. For more on Manifest Destiny—the conviction that the North-American continent deserves to belong to Euro-Americans, rather than the original inhabitants—see *id.* at 167–69.

5. See *infra* Part I (discussing different accounts of critical race theory's origin). For a definition of critical race theory and discussion of its history, tenets, and major figures, see, e.g., RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 2–10 (2001).

6. See *infra* Parts II–III (describing material and political conditions that set the stage for advent of the critical-race-theory movement).

*Dilemma*,<sup>7</sup> that this groundbreaking decision arrived when it did, not because of a belated spasm of conscience on the part of the Supreme Court, but because of a fortuitous combination of material and sociopolitical circumstances.<sup>8</sup> The NAACP Legal Defense and Education Fund, Bell pointed out, had been litigating school desegregation cases throughout the South for decades and achieving, at most, narrow victories.<sup>9</sup> Yet the skies opened in 1954 when the Supreme Court, in a unanimous decision, appeared to grant the organization everything it wanted.<sup>10</sup>

Why just then? Based on fragmentary evidence coupled with some highly astute intuition, Bell posited that America's need to burnish its image in the eyes of the international community set the stage for the breakthrough decision.<sup>11</sup> At the time, the United States was competing with its Soviet adversaries for the loyalties of the uncommitted Third World, much of which was black, brown, or Asian.<sup>12</sup> Every time the world press featured front-page stories and photographs of lynchings and Jim Crow treatment in the South, our Cold War rivals made capital at our expense.<sup>13</sup>

Thus, it behooved America's establishment to arrange a spectacular victory for African Americans as a way to improve our competitive position *vis-à-vis* the Soviet bloc. In addition, the country was then absorbing back into its civilian population tens of thousands of black servicemen and women who had served in World War II and Korea.<sup>14</sup> Having for the first time experienced an environment where a person of color might advance more readily than in civilian life and having risked their lives in the defense of democracy, these men and women were unlikely to return meekly to lives of menial labor and deference to whites. For the first time in years, domestic unrest loomed.<sup>15</sup> A breakthrough demonstrating that America had blacks' best interests at heart would go far to quell any incipient uprising.

When newly discovered evidence from governmental files confirmed Bell's hypothesis, "interest convergence" took its place as a powerful tool of critical analysis.<sup>16</sup> Bell later expanded his material-determinist approach to

7. Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

8. *Id.* at 524–26 (setting out Bell's interest-convergence thesis).

9. *Id.* at 520, 524–26.

10. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that pupil assignment rules that sent white and black children to separate schools violated the Equal Protection Clause).

11. Bell, *supra* note 7, at 524–26.

12. *Id.*

13. *Id.*

14. *Id.* at 524.

15. *Id.*

16. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (discussing evidence from governmental files showing how Cold War imperatives contributed to the breakthrough decision).

the full sweep of American history in his monumental casebook, *Race, Racism, and American Law*,<sup>17</sup> while other scholars employed the tool to understand such areas as labor history<sup>18</sup> and Latino legal fortunes.<sup>19</sup>

What might interest convergence tell us about the origins of critical race theory? Can a concept which has helped historians understand the twists and turns of black fortunes help explain how critical race theory itself arose and then saw its fortunes wax and wane? My thesis is that it can and does. Part I of this Article briefly reviews competing stories of critical race theory's origin, in particular the Harvard story, the Berkeley story, and the Los Angeles story.<sup>20</sup> These narratives generally place the origin of the movement in the organizational or intellectual skills of individual actors.

Part II then examines broader currents in American society during and just before this period.<sup>21</sup> Like Bell, I begin with *Brown v. Board of Education*,<sup>22</sup> but I examine that case for the light it sheds on future events, in particular for its influence on the thought and conduct of educational visionaries such as Kingman Brewster at Yale, Clark Kerr at the University of California, and Albert Bowker at University of California, Berkeley.<sup>23</sup> I will focus particularly on a little-known purge of radical Marxist and socialist professors, most of them young, talented, and white, that began around 1969 or 1970 and continued for a decade afterward, in which the abovementioned figures and others of their elite class played parts.<sup>24</sup>

I posit that this wave of what I call liberal McCarthyism occurred because America's guardians foresaw the arrival of growing numbers of black and Latino applicants knocking at the doors of America's leading colleges and universities.<sup>25</sup> This early generation of undergraduates of color, who would have entered the nation's newly desegregated grade schools beginning in the mid and late 1950s, their ranks now swollen by affirmative

17. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 200).

18. For the view that the needs of the U.S. economy, especially the agricultural sector, dictate immigration policy and the fortunes of Latino immigrants, see 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 190-200* (Juan F. Perea ed., 1997), reprinted in RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW* 430-40 (2008); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2050-55 (2008).

19. See, e.g., RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988); Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006) (discussing the ebb and flow of legal protection for Latinos).

20. See *infra* Part I (explaining and comparing each of the three stories).

21. See *infra* Part II.

22. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

23. See *infra* Part II.A (discussing these figures and a fourth, James Conant, president of Harvard University).

24. See *infra* Part II.B (discussing the careers of a number of white leftist professors at elite universities).

25. See *infra* Part II.A.

action, seemed poised to become the nation's first large generation of black and brown schoolteachers, social workers, mayors, college professors, lawyers, executives, and doctors.

Establishment figures were not at all eager for these future leaders to learn social analysis from far-left professors of law, history, criminology, and political science.<sup>26</sup> Having just lived through the turbulent sixties, these visionary figures preferred the new cohort of minorities moderate, responsible, and above all, not angry. Accordingly, the establishment removed the white radical professors in a series of tenure denials that spread across the country during this period. I describe a number of these removals in Part II.<sup>27</sup> Culling from newspaper reports, personal interviews, and archival material, I show how two prominent law professors, a professor of history, and one of criminology were forced out of their jobs at elite universities.

In Part III, I connect four of the most prominent removals with the rise of critical legal studies and critical race theory.<sup>28</sup> Specifically, I show how these leftists used their periods of unemployment (in one case) or underemployment (in three others) to nurture radicalism in the hinterlands in ways that contributed to the rise of these two schools of radical thought.

A short, final Section draws lessons from the foregoing.<sup>29</sup> One message, hopeful in nature, is, simply, that it is hard to kill an idea.<sup>30</sup> A related insight holds that, as much as the establishment might wish to confine education to that which it finds useful, it cannot, in the end, do so. A "theory of surplus education"—a correlate of Marx's famous proposition<sup>31</sup>—holds that if you teach a worker enough mathematics to use a machine or operate a cash register, he will use that knowledge to figure out that you are raking off a great deal of profit and ask for a raise.<sup>32</sup> If you teach Chicano children to read well enough that they can follow the directions on a bag of fertilizer or pesticide, they may also read the rest of the label, including the health warnings, and may one day get a lawyer and file a class action against you for personal injury. If you teach grade-school students the revolutionary ideals that led to the Boston Tea Party, you may find them using that same rhetoric

26. I explain this thesis further in Part II.A, *infra*.

27. See *infra* Part II.B (discussing this little-known wave of liberal McCarthyism).

28. See *infra* Part III.

29. See *infra* Part IV.

30. I mean, of course, radicalism and the movements—such as critical legal studies and critical race theory—associated with it.

31. Marx's theory of surplus value holds that in a capitalist system the value of goods produced exceeds the value of wages paid to laborers. As laborers realize the true value of their labor, this knowledge can potentially destabilize capitalism and, ultimately, countries. See 1 KARL MARX, CAPITAL 270–80 (Ben Fowkes trans., Vintage Books 1st ed. 1977) (1867).

32. My correlate holds that state-sponsored education, even where it sets out to be purely practical or instrumental—i.e., aimed at fitting students for roles in the ongoing order—ends up acting as a destabilizing force.

against you if you have been tyrannizing them in the classroom. Like capitalism, education inevitably generates its own contradictions and pressures for reform.<sup>33</sup>

I hasten to add that nothing I say here should diminish the brilliance or courage of the founding figures of the critical-race-theory movement. Rather, I seek to explain why we may have been successful when we were; who among our intellectual predecessors paid a price for our rise; how political power and the educational establishment work to both promote and inhibit change; and the likely fate of groups like ours in the years ahead.

One lesson that emerges is that placing excessive reliance on the liberal establishment can sometimes be a serious error.<sup>34</sup> That establishment primarily looks after its own interests, not yours and mine. Indeed, mainstream liberals may be nearly as great a threat to progressive movements and intellectual freedom as the cigar-chomping conservatives who drove Hollywood screenwriters, State Department career officers, and academic leftists out of town in the 1940s and 1950s merely because as idealistic youths, those screenwriters, officers, and academics had attended a socialist or communist meeting or two.<sup>35</sup>

Insurgent scholars like those taking part in this symposium may easily be the next victims of the homeostatic instincts of today's liberals; indeed, some of your careers may have suffered at their hands, whether you know it or not. If I am right, the cycle will probably repeat itself, with a new generation of students building on our work and achieving new degrees of freedom, sometimes without realizing the price their predecessors paid for the liberty they now enjoy.

## II. CRITICAL RACE THEORY: THREE STORIES OF ORIGIN

Critical race theory developed as an academic field in the mid and late 1970s when a host of lawyers and legal scholars across the country realized that the impressive gains of the 1960s civil-rights era had halted and were, in many cases, being rolled back.<sup>36</sup> New, more nuanced approaches were required to combat the types of subtle, unconscious, or institutional racism

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33. Another way of putting this is that learning makes a student inquisitive. He or she invariably ends up wanting to know how things work.

34. See *infra* Part III (discussing the lives of four professors following rejection by elite schools).

35. On this earlier wave of purges, see generally ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM* (2004) [hereinafter SCHRECKER, *THE AGE OF MCCARTHYISM*] (detailing anticommunist inquisitions in general); ELLEN SCHRECKER, *NO IVORY TOWER* (1986) [hereinafter SCHRECKER, *NO IVORY TOWER*] (describing exclusion of communist teachers during this period). Schrecker also notes that “[t]he failure of leading liberals and the organizations associated with them to offer more than rhetorical opposition was particularly damaging.” SCHRECKER, *THE AGE OF MCCARTHYISM*, *supra*, at 98.

36. See DELGADO & STEFANCIC, *supra* note 5, at 3–4 (2001) (describing the origin of critical race theory).

that were developing and that were more deeply entrenched and difficult to combat than the former overt variety.<sup>37</sup>

Beginning with the early work of Derrick Bell and Alan Freeman, scholars put forward the idea that racism is normal, not aberrant, in American society and over time becomes natural to those living in it.<sup>38</sup> As a result, formal equality and legal rules requiring equal treatment of blacks and whites are capable of redressing only the most dramatic forms of injustice, not the more routine forms that target persons of color on a daily basis.<sup>39</sup> Early writing experimented with new modes of scholarship, including legal storytelling.<sup>40</sup> Building on the American civil-rights tradition, including the work of such figures as Martin Luther King, Jr., W.E.B. Du Bois, and César Chávez, as well as Continental and postcolonial writers, the new movement slowly but surely altered our understanding of race and civil rights.<sup>41</sup>

Organizationally, the movement gained impetus when, in 1989, a workshop outside Madison, Wisconsin gave it a name and a formal structure.<sup>42</sup> Convened by former University of Wisconsin Hastie Fellow Kimberlé Crenshaw, who had become a law professor at UCLA, the conference was the first of several annual workshops that explored intersectionality, the black–white binary of race, essentialism, and a number of other critical themes.<sup>43</sup>

What enabled critical race theory to progress from a small, nameless collection of scholars to a legal movement with conferences, anthologies, and law-review articles in the space of a few short years? Three stories of origin overlap, each emphasizing the role of a different small group.

#### A. THE HARVARD STORY

One story centers on the role of a non-credit, student-initiated class at Harvard Law School.<sup>44</sup> This story goes roughly as follows. When Derrick Bell

37. *Id.* at 4.

38. *Id.* at xvi–xvii.

39. *Id.* at xvi.

40. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 5–6 (1987); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 5–8 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411–16 (1989) (explaining how legal storytelling differs from conventional, linear analysis and modes of discourse, and lends itself to transformative ideas and legal approaches).

41. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (covering developments in various areas of this body of scholarship); DELGADO & STEFANCIC, *supra* note 5, at 4–5.

42. DELGADO & STEFANCIC, *supra* note 5, at 4.

43. *Id.* (listing and explaining these and other topics in the critical-race literature).

44. See, e.g., Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, at xxi (Kimberlé Crenshaw et al. eds., 1995) (explaining the contribution of a student-initiated course at Harvard Law School to the critical-



resigned to become the dean at University of Oregon Law School in 1981, Harvard appointed a prominent white civil-rights scholar, Jack Greenberg, to co-teach his class on race law the following year.<sup>45</sup> Black students questioned his selection, pointing out that Harvard surely could have found a black professor somewhere in the United States capable of teaching Bell's course.<sup>46</sup> When Harvard stood its ground, the black students boycotted the course, which turned out to have a virtually all-white enrollment.<sup>47</sup>

The students then secured permission to create an alternative course that met on Saturdays under the sponsorship of Harvard law professor Charles Ogletree.<sup>48</sup> Featuring a series of professors of color who flew in to give single talks, the course satisfied student demands for an academic experience that offered a sustained, critical examination of race.<sup>49</sup> Many of the professors who addressed the group, as well as some of the student organizers, went on to become key figures in the critical-race-theory movement, and many of their talks turned into articles that became movement classics.<sup>50</sup>

According to the Harvard story, the weekend series marked the beginning of the critical-race-theory movement. Other stories, however, emphasize a slightly different set of actors and events.

race-theory movement); KIMBERLÉ WILLIAMS CRENSHAW, *THE FIRST DECADE: CRITICAL REFLECTIONS, OR "A FOOT IN THE CLOSING DOOR,"* reprinted in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 9, 12–15 (Francisco Valdes et al. eds., 2002) [hereinafter CRENSHAW, *THE FIRST DECADE*] (same); Athena D. Mutua, *The Rise, Development and Future Direction of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 345–47 (2006) (same).

45. See Mutua, *supra* note 44, at 345–46 (describing the controversy over Greenberg's appointment); *Minority Students at Harvard Protest Boycott*, *N.Y. TIMES*, Aug. 9, 1982, at A9 [hereinafter *Protest Boycott*] (same); *Students Picket Law Course in Rights Protest at Harvard*, *N.Y. TIMES*, Jan. 6, 1983, at A16 (same). Greenberg's co-teacher would have been Julius Chambers, a distinguished black lawyer. *Students Picket*, *supra*.

46. CRENSHAW, *THE FIRST DECADE*, *supra* note 44, at 12–15; see Mutua, *supra* note 44, at 345–47 (describing the controversy over Greenberg's appointment); *Protest Boycott*, *supra* note 44 (same).

47. CRENSHAW, *THE FIRST DECADE*, *supra* note 44, at 12–15; *Protest Boycott*, *supra* note 44; *Students Picket*, *supra* note 44.

48. See CRENSHAW, *THE FIRST DECADE*, *supra* note 44, at 13–14; Mutua, *supra* note 44, at 345–47 (describing the student-run alternative course at Harvard Law).

49. See Mutua, *supra* note 44, at 345–46 (listing visiting speakers who took part in the course).

50. E.g., Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 *U. PA. L. REV.* 561 (1984). Other speakers were Linda Green (now a professor of law at the University of Wisconsin-Madison), Neil Gotanda (now a professor of law at Western State University), and Charles Lawrence (now a professor of law at Georgetown University). At the time, these speakers were working on such landmark articles as Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 *STAN. L. REV.* 1 (1991); Charles R. Lawrence, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987).

## B. THE BERKELEY STORY

A short time after the aforementioned events unfolded on the East Coast, a group of law students at the University of California, Berkeley formed the Boalt Hall Coalition for a Diverse Faculty.<sup>51</sup> Disappointed with Boalt's slow pace in hiring faculty of color, gays, and women, the students rallied, spoke out, and invited professors of color—including some of the very same ones who spoke at Harvard—to give talks about the need for diversity and to deliver papers that they hoped would persuade the school's professors to hire more minorities.<sup>52</sup> When the Berkeley faculty was slow in responding to their requests, the students led a national strike for diversity that spread to a number of schools.<sup>53</sup> Andrea Guerrero, one of the organizers of the coalition, subsequently wrote a book about the upsurge in student activism at her school, which lasted for a number of years and continues, albeit in changed form, today.<sup>54</sup>

## C. THE LOS ANGELES STORY

While the two student movements were winding down, the Conference of Critical Legal Studies ("cls"), an organization of left-leaning law professors at elite schools, was preparing to hold a national conference at an old hotel in downtown Los Angeles.<sup>55</sup> On learning that the event's theme would be race, a small group of law professors of color requested an opportunity to address the gathering.<sup>56</sup> The organization readily agreed, and the resulting panel turned out to include a number of young scholars who would go on to play important roles in the critical-race-theory movement.<sup>57</sup>

The presentation gained additional significance when the panelists reached an agreement with the editors of the *Harvard Civil Rights-Civil*

51. See ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* 35–49 (2002) (describing the Berkeley Coalition); Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Movements that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377 *passim* (2000) (same).

52. Cho & Westley, *supra* note 51, at 1395. Charles Lawrence and I were among the speakers.

53. GUERRERO, *supra* note 51, at 53; Cho & Westley, *supra* note 51, at 1395–96 (describing the events leading up to the national strike).

54. See generally GUERRERO, *supra* note 51 (describing this period at U.C. Berkeley School of Law, its immediate aftermath, and the continuation of student activism at U.C. Berkeley today).

55. See CRENSHAW, *THE FIRST DECADE*, *supra* note 44, at 17–18 (describing the conference). Critical Legal Studies is often abbreviated "cls" by the group's insiders. I follow this convention.

56. The group included Jose Bracamonte, Kimberlé Crenshaw, Patricia Williams, and me.

57. The speakers included Harlon Dalton, Mari Matsuda, Patricia Williams, and me. Jose Bracamonte introduced the panel. Jose Bracamonte, *Foreword: Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297, 297 nn.a–aa (1987).

*Liberties Law Review* to publish some of their papers.<sup>58</sup> The subsequent articles became key documents in the critical-race-theory corpus, laying the foundation for the initial conference in Madison, Wisconsin a few years later.<sup>59</sup>

#### D. WHO FOUNDED CRITICAL RACE THEORY?

Which story, the Harvard story, the Berkeley story, or the Los Angeles story, best explains how critical race theory began? The Harvard alternative course possesses a certain dramatic appeal, with its collection of plucky students rescuing radical thought from an unresponsive administration. Moreover, it occurred earliest in time. But the group left little in the way of a legacy. The course apparently did not continue in future years, nor did it yield written scholarship other than that which the guest speakers succeeded in publishing on their own.

As mentioned, the Berkeley students did inspire similar efforts across the nation, generating consequences extending beyond their immediate sphere of action. Still, few of the law schools targeted by the strike hired diverse faculty in the years immediately following. The coalition's efforts did, however, produce one book and a number of law-review articles, and several of its members went on to become law professors and critical race theorists in their own right.

The Los Angeles group left a tangible legacy in the form of a collection of foundational articles in a top law review. In addition, at least one of the professors of color published his paper in an outside journal. Though the steering committee responded tolerantly and affirmatively to the minorities' request to address the group, and the audience listened respectfully to their criticisms of its account of race, cls made few, if any, organizational changes as a result. Indeed, it ceased operating in a formal sense soon afterward and survives mainly through occasional law-review articles by its founding members, often of a retrospective or ruminative nature.<sup>60</sup>

None of these efforts proceeded in coordination with the others, although each may have responded to common needs and forces. Each contributed different things—one, scholarship;<sup>61</sup> another, cachet;<sup>62</sup> yet

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58. To read more about the tenth National Critical Legal Studies Conference, see *id.* at 297–99.

59. See *supra* text accompanying notes 42–43 (describing the Madison workshop). By “initial,” I mean the first such conference. Was the conference official in nature? No, because the organization did not exist at the time. Instead, the gathering was a founding conference, somewhat like the Constitutional Convention that ratified the U. S. Constitution.

60. On the demise of critical legal studies as an organized movement, see DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 215–22 (rev. ed., N.Y.U. Press 2004).

61. See *supra* Part I.C (discussing the Los Angeles event).

62. See *supra* Part I.A (discussing the Harvard story).

another, new blood in the form of large numbers of students across the country who would provide the audience, readership, law-review editors, and future scholars necessary to sustain a movement.<sup>63</sup>

Moreover, no one story seems to explain fully why critical race theory arose just then or assumed the particular form that it did. A thorough explanation requires a closer look at currents roiling American society during the 1970s and 1980s and, in particular, the influence of a generation of post-*Brown* youth of color on the thought of elite educators. It also entails an examination of a series of career-altering academic personnel decisions that took place around this time that I term “liberal McCarthyism.”<sup>64</sup>

### III. LIBERAL MCCARTHYISM AND THE FATES OF FOUR PROFESSORS

To understand how events set the stage for the rise of critical race theory, we will need to consider the role of two groups—prominent educational leaders such as Kingman Brewster, James Conant, Clark Kerr, and Albert Bowker, and insurgent scholars such as David Trubek, Staughton Lynd, Richard Abel, and Anthony Platt. We will also need to take note of the role of a post-*Brown* generation of color, several hundred thousand strong, who marched up the K–12 ladder and, by the period in question (the late 1960s and early 1970s), was beginning to knock on the doors of America’s colleges and universities.

#### A. A FELLOWSHIP OF VISIONARIES: KINGMAN BREWSTER, JAMES CONANT, CLARK KERR, AND ALBERT BOWKER

A key qualification of an elite university president is the ability to spot a trend—to grasp large social currents, appreciate their relevance for the university’s mission, and act accordingly.<sup>65</sup> By the early and mid-1960s, leading educational writers could foresee the arrival of substantial numbers of post-*Brown* students of color who began to flood the nation’s campuses about a dozen years after that famous decision.<sup>66</sup> Of course, the nation

63. See *supra* Part I.B (discussing the University of California, Berkeley student group).

64. “McCarthyism” refers to Senator Joseph McCarthy and his congressional investigation of alleged communist influences in the entertainment industry, government, and academia during the early 1950s. See, e.g., SCHRECKER, *AGE OF MCCARTHYISM*, *supra* note 35, at 37–97 (discussing this era); SCHRECKER, *NO IVORY TOWER*, *supra* note 35, at 3–11 (same).

65. For example, will long-term enrollments increase or decrease? Will the legislature favor or disfavor public spending or seek a balanced budget? Will chemistry, physics, or engineering be the key to important scientific breakthroughs? Will students prefer to live on-campus or off-campus? Will wealthy alums donate generously, or keep their checkbooks hidden? Will federal money favor crime control? Aerospace? Multicultural education? Will the adjunct faculty unionize? The custodians? The clerical staff?

66. The Court decided *Brown* in 1954. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Although not every school district immediately desegregated, some did. These initial participants in desegregation resulted in the first large wave of post-*Brown* students of color who began reaching universities around twelve years later.

already had its share of talented black and brown youth, but many of them attended historically black colleges like Morehouse or Howard; the few who attended predominantly white colleges and universities did so in such small numbers that their impact was relatively slight.

By the period in question, however, those numbers were rising and showed every sign of continuing to do so. Beginning in the late 1960s, predominantly white schools accelerated this trend by adopting affirmative-action policies that gave promising youths of color increased opportunities to gain admission and, once admitted, to succeed in their studies.<sup>67</sup>

What would the new cohort of black and brown students be like? Would they be as clamorous as the largely white student protesters who had roiled Berkeley, Michigan, and Yale just a few years earlier?<sup>68</sup> Would they endorse violence and spout Mao, Marx, and Guevara, as the Black Panthers and Brown Berets had done during the turbulent sixties?<sup>69</sup> Or would they be studious, latter-day versions of Booker T. Washington, leading their communities responsibly and peacefully into an era of harmony with whites?

The speeches, personal writings, oral interviews, and memoirs of four prominent university officials show that these questions were very much on their minds during this period.<sup>70</sup> These officials spoke about the shape and orientation of the new wave of minority students and hoped that they would integrate peacefully into the campus scene, devote themselves to their

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67. On affirmative action in higher education and other spheres, see generally TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* (2004) (providing an overview of the history of affirmative action); WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998) (exploring affirmative action); GIRARDEAU SPANN, *THE LAW OF AFFIRMATIVE ACTION* (2000) (examining the U.S. Supreme Court's decisions on race); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) (following the experiences of Rodrigo Crenshaw, the author's fictional alter ego). On practices—such as theme dorms and ethnic studies departments—that universities adopted to ease the transition for the new generation of students of color, see, for example, Gerald L. Early, *The End of Race as We Know It*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 10, 2008, available at <http://chronicle.com/weekly/v55/i07/07b01101.htm>.

68. See generally *THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE SIXTIES* (Robert Cohen & Reginald E. Zelnick eds., 2002) (discussing the early protest movements at this large, elite university); LAURA KALMAN, *YALE LAW SCHOOL IN THE SIXTIES: REVOLT AND REVERBERATIONS* (2005) [hereinafter KALMAN, *REVOLT AND REVERBERATIONS*] (describing this turbulent period at Yale Law School); JUAN F. PEREA ET AL., *RACE AND RACES, CASES AND RESOURCES FOR A DIVERSE AMERICA* 168–71, 816–39, 1203–11 (2d ed. 2007) (discussing the U.S. civil-rights movement in general); *EYES ON THE PRIZE* (Juan Williams & Julian Bond eds., 1987) (exploring America's civil-rights years).

69. On the Panthers and their employment of Marxist–Maoist ideology, see generally *THE BLACK PANTHERS SPEAK* (Philip S. Foner ed., 2002); 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, 381–83 (2002). Was this concern warranted? On the flirtation of some of the early generation of black students in Ivy League colleges with Mao, Marx, and other radical philosophies, see Early, *supra* note 67.

70. See *infra* Part II.A.1–4 (discussing four university administrators who held office during this period).

studies, mix with white students, and move easily into leadership positions while serving as role models for the next generation of black and brown youth.<sup>71</sup> And they were especially wary of the role that young, white, radical professors might play in socializing them.<sup>72</sup>

A few provisos are in order. I do not seek to prove that each of these towering figures consciously and openly aimed to rid their campuses of leftist professors to avoid corrupting minority youth, much less that they conspired with each other in a smoke-filled room.<sup>73</sup> Much of their participation was indirect. But these leading figures set an example and tone and communicated, directly or indirectly, to their underlings the kind of campuses they wanted, leaving it to the department heads, deans, and chancellors who ran the campus on a day-to-day basis and supervised personnel decisions emanating from below to act accordingly.<sup>74</sup>

And the kind of campus those top leaders wanted was peaceful, with students of all types working together to create the kind of society that high-level technocrats love—everything operating smoothly like a well-oiled machine.<sup>75</sup> This meant that these figures, praised for their educational vision, readily sacrificed actual intellectual diversity for the outward appearance of it, in the form of students of color.<sup>76</sup> Hardcore Marxists have long written that race divides the working class.<sup>77</sup> Whether that is true or not, a generation of promising left-wing professors lost their jobs, their security, and their opportunity to participate in elite academic marketplaces so that America's decision-makers might buy a short-lived racial peace.<sup>78</sup>

Even if America's educational elite welcomed the labor and talents of the thousands of black, Latino, Asian, and female students who were beginning to arrive at their campuses, it did not relish the thought of their exposure to radical social ideas. It needed them to remain loyal to

71. *Id.*

72. *Id.*

73. By way of comparison, recall the three small groups who figured in the founding of critical race theory in the early and mid 1980s. *See supra* Part II. Operating without conscious coordination, they contributed to the founding of a movement. *Id.* Zeitgeist (the spirit of the times) and common forces and influences can often produce the appearance of coordination when none, or very little, exists.

74. A typical tenure or mid-tenure review will begin with a departmental vote, then a review by a campus committee followed by review by the chancellor, provost, or other top officer. With public universities, the regents or board of governors often perform final review, although this is generally pro forma.

75. *See* Part III.A (describing the perspectives of four top university administrators).

76. *Id.* (highlighting how prominent educators endorsed affirmative action, ethnic-studies departments, and increased minority enrollments, but at the same time discouraged radical thought and teaching).

77. *See, e.g.,* Rhonda M. Williams, *Race in Political Economy: Major Contemporary Themes*, in 2 ENCYCLOPEDIA OF POLITICAL ECONOMY 948–51 (Phillip Anthony O'Hara ed., 1999).

78. *See* Part III.B, *infra*, discussing the fates of four left-wing professors and others.

mainstream American values, including those of liberal capitalism. And, as will be seen, it took measures to ensure this end.<sup>79</sup>

### 1. Kingman Brewster, President of Yale University

Born to a prominent New England family, Kingman Brewster served as president of Yale University from 1963 to 1977.<sup>80</sup> Prior to that time, he taught at Harvard Law School and served as provost at Yale.<sup>81</sup> The possessor of an Ivy League education, he is the subject of at least two books discussing his years in the Yale hot seat<sup>82</sup> and is thought to be the inspiration of a character (“King”) in the popular cartoon series *Doonisbury*. A well-connected member of the Eastern establishment, after leaving Yale, Brewster served as U.S. ambassador to the United Kingdom and, later, as master of University College, Oxford.<sup>83</sup>

As the president of Yale, Brewster was by all accounts a skilled negotiator who succeeded in keeping the lid on during tempestuous times, primarily by co-opting dissent and enlisting his adversaries to a version of his position.<sup>84</sup> During his tenure, Yale saw a series of increasingly sharp student protests on behalf of minority admissions and against the Vietnam War.<sup>85</sup>

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79. See *id.* (discussing academic personnel decisions during this period in fields such as law, history, and sociology in the United States and Canada). Does it seem implausible that *liberals*, like those discussed here and their underlings, would purge their campuses of radicals who, after all, are in the same region of the political spectrum as they are, except further out? The skeptical reader may want to consider how a very similar group of liberals cooperated readily and enthusiastically with *conservative* forces a mere ten years earlier when McCarthyism swept the land. See SCHRECKER, NO IVORY TOWER, *supra* note 35, at 3–9 (discussing dozens of university faculty who lost their jobs after being summoned before congressional investigators). Nothing required that their campuses fire them. *Id.* McCarthy merely identified them, leaving it to the colleges to find pretexts for getting rid of them. *Id.* In this earlier, much-larger purge, many campus liberals sided with McCarthy against the radicals. *Id.* The academic community fired dozens of the latter, on flimsy charges, after punctilious hearings, all the while loudly proclaiming that they were defending intellectual freedom and the right to dissent. *Id.* at 10.

80. For background on Brewster's life and thought, see generally GEOFFREY KABASERVICE, THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT (2004); KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68 (describing Kingman Brewster's role as Yale president during a turbulent period that included protests at the law school).

81. KABASERVICE, *supra* note 80, at 117–18; Eric Pace, *Kingman Brewster Jr., 69, Ex-Yale President and U.S. Envoy, Dies*, N.Y. TIMES, Nov. 9, 1988, at D29.

82. See KABASERVICE, *supra* note 80; KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68 (discussing Brewster's handling of a host of issues, including leftist faculty, clamorous students, Black Panthers, Vietnam War protests, and demands for more minority students and professors).

83. Pace, *supra* note 81; KABASERVICE, *supra* note 80, at 445, 456.

84. For an illustration of his skill as a conciliator and how he was able to cater to many constituencies simultaneously but ultimately work for moderation, see, e.g., KABASERVICE, *supra* note 80, at 329–31, 403–16; KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 59, 204–05.

85. E.g., KABASERVICE, *supra* note 80, at 224–25 (describing student protests after denial of tenure to Richard Bernstein); *id.* at 314 (describing the riots of 1967); *id.* at 388 (describing

Students also demanded a role in university governance and shaping such policies as grades.<sup>86</sup> When the university was slow in responding, they would often up the ante with sit-ins, teach-ins, disruption of alumni weekends, and even threats to shut down the university.<sup>87</sup> The protests reached their height in 1967–1968, some of them centering in the law school.<sup>88</sup> Under Dean Louis Pollak, the school was a bastion of New Deal liberalism and the cradle of the legal-realist school of scholarship, which rejected formalism in favor of policy analysis and an open-ended, pragmatic role for judges.<sup>89</sup>

Many of the Yale faculty members were liberal, especially at the law school, where a large portion of the senior and mid-level faculty had been active supporters of the civil-rights movement and high-level public servants during Democratic administrations.<sup>90</sup> They thought of their role as training future leaders and were surprised when some of their students, from families much like their own, rejected their values and called them apologists for a failed social order.<sup>91</sup> When a small group of young faculty sided with the students, their senior colleagues were taken aback, considering them traitors to their class.<sup>92</sup>

The Yale faculty drew a distinction between black protesters, such as the Black Panthers who threatened to burn down the university if the town of New Haven convicted a few of their members for an earlier incident, and the white students who demanded change.<sup>93</sup> The black students' demands struck them as both more legitimate and more frightening than those of the discontented white students from wealthy families.<sup>94</sup>

During this period, Brewster was walking a tightrope. He saw reform as essential to avoid revolution,<sup>95</sup> yet he believed strongly in Yale's traditional

how faculty allowed students to participate in budgeting, admissions, and faculty hiring without informing the administration); *id.* at 417 (describing the alumni protest of the admission of black and female students); KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 4, 137–38, 146, 165–66.

86. See KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 1, 6–7, 98–139 (providing examples of student activism).

87. See KABASERVICE, *supra* note 80, at 388, 403, 408–09, 411, 420–21; KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 1–2, 107–08, 111–13, 146–56, 203–12 (citing examples of situations where students employed aggressive methods of protest).

88. See KABASERVICE, *supra* note 80, at 327–418; see generally KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68 (describing Yale Law School during this tumultuous period).

89. KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 6, 18–24, 32; LAURA KALMAN, THE STRANGE CAREER OF LEGAL REALISM 82 (1996) [hereinafter KALMAN, STRANGE CAREER] (describing this school of legal thought, which originated and developed at Yale Law School).

90. KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 32–46, 50.

91. *Id.* at 4–7, 32, 98–139 (“Student Power”), 237–39.

92. *Id.* at 7, 234–39.

93. *Id.* at 111–18, 138.

94. *Id.*

95. KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 59. See *Inky's Years: Policy Shift, Alumni Ire*, YALE DAILY NEWS, Jan. 21, 1970, at 1, available at <http://images.library.yale.edu>:



mission of educating students for leadership roles in a liberal society.<sup>96</sup> When some of the young faculty, including three professors discussed below, sided with the students, the “psychodrama,” as one writer put it, in which they had participated “may have played a role” in the turnover that followed.<sup>97</sup> The same writer noted: “I know of no other sequence of such concentrated firings.”<sup>98</sup>

What were Brewster’s thoughts about radicalism and its influence on the new generation of black and brown students? His writing exhibits considerable concern. In a speech at Yale University, he identified disruptive protests and “false idolization of student popularity” as serious threats to the values of the university.<sup>99</sup> Sounding an ominous note, he warned that the threat might “require reappraisal of the scope and limits . . . of faculty action.”<sup>100</sup>

In a second speech—this one at the annual convention of the American Association for the Advancement of Science—Brewster noted that the largest threat to the university comes “not from the silent majority without, but from the raucous minority within the house of intellect.”<sup>101</sup> A university cannot be a completely egalitarian community, he added, for “a community of shamans and gurus would not be a university.”<sup>102</sup> Both speeches show that Brewster drew a sharp distinction between the responsible centrists and liberals on his faculty and the far left.

With black protesters, Brewster’s signature tactic, of which he was proud, was co-optation, offering them a piece of the action. If the blacks toned down their militancy and agreed to make only reasonable demands, he would grant them concessions and guarantee them a place at the table. This tactic was very much in accord with his general approach to minority

2007/cdm4/document.php?CISOROOT=/yale-ydn&CISOPTR=10999&REC=1 (noting that some alumni were unhappy at the rapid pace at which Yale was diversifying its student body, but that Brewster and his admissions director “Inky” (R. Inslee Clark, Jr.) nevertheless believed that the goal was worthwhile).

96. See generally PAUL BASS & DOUGLAS W. RAE, MURDER IN THE MODEL CITY 122 (2006) (noting that “Brewster’s Yale trained the capitalists, the war planners, the liberal defenders of the status quo”); KABASERVICE, *supra* note 80 (documenting this attitude in Brewster and his peers).

97. KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 228.

98. *Id.* at 237 (quoting a second scholar).

99. See KABASERVICE, *supra* note 80, at 408–09; *Brewster: Universities Threatened, Brewster Talk*, YALE DAILY NEWS, May 8, 1967, at 1, available at <http://images.library.yale.edu:2007/cdm4/document.php?CISOROOT=/yale-ydn&CISOPTR=9183&REC=1> [hereinafter *Brewster Talk*]. On his attitude toward hiring communists, see KABASERVICE, *supra* note 80, at 138–39.

100. *Brewster Talk*, *supra* note 99.

101. Richard Fuchs, *Brewster Blasts Extremes*, YALE DAILY NEWS, Jan. 7, 1970, at 1, available at <http://images.library.yale.edu:2007/cdm4/document.php?CISOROOT=/yale-ydn&CISOPTR=10973&REC=4>; see also KABASERVICE, *supra* note 80, at 406–15 (describing Brewster’s antipathy toward campus radicalism).

102. Fuchs, *supra* note 101.

issues. According to the authors of a book about the New Haven Black Panther murder trial, Brewster had a “vision of a vanguard of [black] leaders who would diversify America’s ruling class”—meaning that they would assimilate and fit in.<sup>103</sup> A second biographer notes Brewster’s use of co-optation and describes black undergraduates such as William Farley, Ray Nunn, and Kurt Schmoke, the later mayor of Baltimore, as grudgingly admiring him for his ability to negotiate flexibly and offer concessions that slowly and almost insensibly drew them to his side.<sup>104</sup> The author also notes that Brewster had long been concerned with the role negroes would play in the post-*Brown* order. When, at the height of student protests, moderate black student leaders like Henry Louis Gates, William Farley, and Kurt Schmoke sided with Yale against the Black Panthers and pressed other blacks to endorse nonviolence and peaceful change, Brewster’s policy received vindication.<sup>105</sup> In turn, Yale rewarded these better-behaved blacks, whose behavior Brewster had singled out and reinforced, with Rhodes Scholarships and other honors.<sup>106</sup>

Brewster’s treatment of African Americans was friendly, but instrumental. For example, he readily agreed to approve an Afro-American studies major at Yale, believing it could quell racial tensions between blacks and whites and offer an opportunity for black students to immerse themselves in the systematic study of a body of literature and history, thus providing an outlet for energy that might otherwise go toward disruption.<sup>107</sup> When he supported co-education at Yale a short time later, his decision also was more a product of strategic calculation than a sincere change in perception about female equality.<sup>108</sup>

Brewster was so pleased at the success of his program of rewarding black moderation that he subsequently wrote a letter to McGeorge Bundy, his

103. BASS & RAE, *supra* note 96, at 128; *see also* KABASERVICE, *supra* note 80, at 234–35, 260, 264–65, 286–88 (noting that Yale wanted blacks for establishment reasons); KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 117 (same); JEROME KARABEL, THE CHOSEN 383 (2005) (same).

104. KABASERVICE, *supra* note 80, at 330–31, 406–07, 417–18.

105. *Id.* at 330 (“Brewster was absolutely a master at co-opting . . . . There is no other way of putting it.”); *id.* at 334 (noting Brewster’s use of charm to bring adversaries to his position); *id.* at 406–07, 412 (noting that it was Brewster’s skill that kept Yale from going up in flames and prevented liberals from turning into radicals); *id.* at 417–18; *see also id.* at 388, 402–03 (describing the Panthers’ role vis-à-vis Yale University); *id.* at 412 (describing activism at Yale during this period).

106. *Id.* at 417–18; *see also id.* at 295–96 (listing gentlemen’s clubs and stag dinners as some of these honors).

107. *See id.* at 331–32 (noting Brewster’s comparison of the tensions between Irish-Americans and Yankees in the 1950s with the tensions between the black students and Yale’s administration); *see also id.* at 261–65 (noting that the new administrative policy focused on inner-city blacks and other minorities from low socioeconomic backgrounds).

108. *Id.* at 366–68; JANET LEVER & PEPPER SCHWARTZ, WOMEN AT YALE: LIBERATING A COLLEGE CAMPUS 57, 217–19 (1971).

former Yale lieutenant and colleague who was then directing the Ford Foundation. In it, he asked Bundy to provide financial support for black students at top universities<sup>109</sup> and reiterated his belief in a “tradition of moderate, independent public service.”<sup>110</sup> “Negroes,” he wrote, had “reached the moat and were pushing on” toward full admission.<sup>111</sup> His “moderate, incremental approach” could enable this to happen without too much disruption to America and its class system.<sup>112</sup> Bundy’s Ford Foundation subsequently adopted an express policy of offering minority leaders in a dozen cities, even former Panthers and Brown Berets, federal Office of Equal Opportunity (“O.E.O.”) grants that would shift them from street militancy to a policy of urban development (i.e., capitalism).<sup>113</sup>

## 2. Clark Kerr, President of the University of California

Clark Kerr served as president of the University of California (“U.C.”) from 1958 to 1967.<sup>114</sup> His term of service thus overlapped with that of Kingman Brewster at Yale. Because he took office before the turbulent 1960s but well after *Brown v. Board of Education* in 1954, Kerr’s career serves as a useful vehicle for exploring the early attitudes of leading university administrators toward the impending surge in minority enrollment and their plans for accommodating it.

A graduate of Swarthmore College, Stanford University, and University of California, Berkeley, Kerr was an economist who specialized in industrial relations.<sup>115</sup> Before becoming president of U.C., he served as the Berkeley campus’s first chancellor, presiding over that institution during the

109. KABASERVICE, *supra* note 80, at 432; *see also id.* at 277, 310–11 (describing the role of Brewster’s friend McGeorge Bundy).

110. KABASERVICE, *supra* note 80, at 465 (describing Brewster’s position and that of his class).

111. *Id.* (paraphrasing his position).

112. *Id.* at 469; *see id.* at 277, 289, 317, 465–66, 469 (describing how Brewster tapped into the antipathy toward elitism that was prevalent in the era).

113. *See, e.g.*, KABASERVICE, *supra* note 80, at 277, 310–11, 331, 412, 432; Delgado, *supra* note 69, at 382–85.

114. RAY COLVIC, *TURNING POINTS AND IRONIES: ISSUES AND EVENTS—BERKELEY, 1959–67* 4 (2004). On Kerr’s life and career, *see generally* 1 CLARK KERR, *THE GOLD AND THE BLUE: A PERSONAL MEMOIR OF THE UNIVERSITY OF CALIFORNIA 1949–1967* (2001) [hereinafter 1 KERR, *MEMOIR*] (recording recollections of his life and career); UNIV. OF CAL. DEP’T OF THE HISTORY OF HEALTH SCIENCES, *INTERVIEWS WITH CLARK KERR PH.D. AND MORTON MEYER M.D.: EYEWITNESSES TO UC CAMPUS TURMOIL IN THE MID-1960S* (1996) [hereinafter *Rockefeller Interview*] (describing his life and thought). On Kerr’s perspective, *see generally* CLARK KERR, *THE USES OF THE UNIVERSITY* (1963) [hereinafter *USES OF THE UNIVERSITY*] (describing the social forces that shape the function of the American university).

115. *See* 1 KERR, *MEMOIR*, *supra* note 114, at 6–7, 12–13 (describing how he came to enter this field); *id.* at 8–9, 129–42 (describing the loyalty-oath controversy); *id.* at 8, 130–32, 134, 165–66 (describing McCarthyism and the university). For an account of his early schooling, *see* Grace Hechinger, *Clark Kerr, Leading Public Educator and Former Head of California’s Universities*, *Dies* at 92, N.Y. TIMES, Dec. 2, 2003, at B7.

McCarthy years (the late 1940s to early 1950s) and the controversy over the loyalty-oath requirement for faculty in 1949.<sup>116</sup> He was thus well acquainted with how national currents could easily encroach on the life of the university.

As his academic background might suggest, Kerr was an inveterate planner who left little to chance. In fact, his best known legacy was a massive tripartite scheme for California higher education, reminiscent of Plato's divisions for the citizens of Athens, known as the Master Plan (1960).<sup>117</sup> This blueprint, which won prompt approval from the state legislature, divides California higher education into three tiers: the University of California system, which serves the top one-eighth of the state's high-school graduates; the state universities, which serve the top third; and the community colleges, which serve the rest.<sup>118</sup> With minor variations, Kerr's Master Plan is still in effect today.

As one might expect, Kerr took a lively interest in communism, the Cold War, developing nations, and other issues of his day. He believed most of the world's problems would yield to careful planning, attention to economic development, and sound educational systems.<sup>119</sup> He also supported U.S. aid to developing nations, which he believed could make those nations pro-Western and less inclined to turn communist.<sup>120</sup> His general approach to most social problems was to cultivate moderation through good management practices and foresight.<sup>121</sup>

Kerr's approach toward educational policy in the United States demonstrated a similar penchant for planning and a dislike of anything that

116. 1 KERR, MEMOIR, *supra* note 114, at 8–9, 129–42 (describing the loyalty-oath controversy); *id.* at 8, 130–32, 134, 165–66 (describing McCarthyism and the university).

117. 1 KERR, MEMOIR, *supra* note 114, at 172–90 (describing Kerr's "Master Plan for Higher Education"); *id.* at 268 (noting that Kerr also aimed the plan to increase enrollment of lower-income students and minorities); Rockafellar Interview, *supra* note 114, at 4–5 (describing how Kerr aimed the plan at accommodating "the tidal wave" of students needing a college education).

118. 1 KERR, MEMOIR, *supra* note 114, at 172–89 (explaining the adoption of the Master Plan and its principal provisions).

119. *E.g.*, HAL DRAPER, THE MIND OF CLARK KERR (1964) (noting Kerr's conviction that most educational problems would yield to efficient management and administration); 1 KERR, MEMOIR, *supra* note 114, at xxiii–xxiv (discussing Kerr's personal qualities and his "big picture" vision); *see also* 1 KERR, MEMOIR, *supra* note 114, at 111–29, 153–72, 219–34 (noting his faith in planning and strategic approaches); USES OF THE UNIVERSITY, *supra* note 114, at 106–08 (same); Janet Gayle Elsea, The Rhetoric of an Academic President: Clark Kerr, 1958–1964, at 58–62 (Jan. 1972) (unpublished Ph.D. dissertation, The University of Iowa).

120. Elsea, *supra* note 119, at 58, 62. *See also Comparative Effectiveness of Systems, in* 12 SYSTEMS OF HIGHER EDUCATION: 6 DECISIVE ISSUES (1978) (viewing public education as a democratic force and bulwark against communism).

121. *E.g.*, DRAPER, *supra* note 119 (describing his style as technocratic and aimed at little more than efficiency); 1 KERR, MEMOIR, *supra* note 114, at 111–252 (noting that stability is necessary for a university's functioning through his description of an uprising at U.C. Berkeley in 1964); USES OF THE UNIVERSITY, *supra* note 114, at 95 (same).

might upset the smooth operation of the university. He noted during one interview that he had long been concerned with trends in enrollment and, in fact, devised the Master Plan in 1960 because he thought the universities “were facing the tidal wave.”<sup>122</sup> In a short essay entitled *Should Everyone Be Able to Go to College?*, he reiterated his concern over the massive numbers of students who would be arriving, specifically mentioning blacks and noting that it was time to address the unequal educational opportunities that impeded their chances.<sup>123</sup> He saw “ghettos” with high black concentrations as likely sources of “social dissent”<sup>124</sup>—something that he returned to throughout his writing and memoirs.<sup>125</sup> Those memoirs specifically mentioned his desire to admit blacks who would “reach[]the top.”<sup>126</sup> He felt the same way about the disadvantaged, urging his fellow university administrators to take steps to help them advance.<sup>127</sup>

When unrest broke out at Berkeley and other U.C. campuses over free speech, civil rights, and the Vietnam War, Kerr saw how black frustrations could ally with student anger. When Martin Luther King, Jr., wired Kerr expressing solidarity with the (largely white) students’ cause,<sup>128</sup> and civil-rights leader James Farmer spoke at the corner of Telegraph Avenue and Bancroft Way, linking the students’ cause with that of inner-city blacks in the phrase “student as Nigger,”<sup>129</sup> Kerr must have regarded the prospect of such a union as deeply worrisome. His own profound realization that blacks had

122. See 1 KERR, MEMOIR, *supra* note 114, at 71–89 (describing waves of youth uprisings); USES OF THE UNIVERSITY, *supra* note 114, at 86, 108–09, 126; Clark Kerr, *Toward the More Perfect University*, in THE UNIVERSITY IN AMERICA 9–16 (1967); Rockafellar Interview, *supra* note 113, at 4–5 (emphasizing form, structure, and careful planning in higher-education administration).

123. Clark Kerr, *Should Everyone Be Able to Go to College?*, in HIGHER EDUCATION FOR ALL 36, at 38–43 (1970) [hereinafter Kerr, *Go to College*].

124. *Id.* at 42.

125. *E.g.*, 1 KERR, MEMOIR, *supra* note 114, at 378; Kerr, *Go to College*, *supra* note 123, at 38–43; CARNEGIE COUNCIL ON POL’Y STUD. IN HIGHER EDUC., THREE THOUSAND FUTURES: THE NEXT TWENTY YEARS FOR HIGHER EDUCATION 12 (1980) (drafted in part by Clark Kerr) [hereinafter THREE THOUSAND FUTURES]. His influence in this regard proved long-lasting. See THREE THOUSAND FUTURES, *supra*, at 42–43, 159–65, 179, 188–96, 234–35, 249–50, 265–67 (devoting even more attention to this issue than previous reports did).

126. 1 KERR, MEMOIR, *supra* note 114, at 379; see also *id.* at 356 (expressing concern over the Board of Regent’s decision to forbid affirmative-action policies).

127. See COORDINATING COUNCIL FOR HIGHER EDUC., CALIFORNIA HIGHER EDUCATION AND THE DISADVANTAGED: A STATUS REPORT (1968), available at [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/34/fb/d9.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/34/fb/d9.pdf) (authored in part by Clark Kerr) (describing “what California higher education as a whole is attempting to do in respect to providing higher educational opportunities to the disadvantaged”).

128. This was, of course, simultaneously sent to the media. COLVIC, *supra* note 114, at 137.

129. See COLVIC, *supra* note 114, at 135, 137–38 (noting that Farmer evoked this comparison). Although others also evoked this comparison, see *id.* at 135–36 (describing James Forman’s similar comparison), the idea may have originated with Jerry Farber. See generally JERRY FARBER, THE STUDENT AS NIGGER: ESSAYS AND STORIES (1969) (reflecting the comparison in the title).

legitimate grievances and had been denied equal opportunities in American life must have compounded his concern.<sup>130</sup>

Despite his sympathy for the black cause, Kerr saw campus activism as a threat to core educational values. His 1963 book *Uses of the University*, written early in the activist era, declared his belief that “moderates need to be in control.”<sup>131</sup> Full employment and a thriving economy were the overall goal.<sup>132</sup> A sound educational system requires stability and security.<sup>133</sup> Extremists were a serious danger to stability and security,<sup>134</sup> as were faculty (the “walking wounded”) who joined ranks with the student protesters.<sup>135</sup> Communism and Marxism elicited little sympathy from him; he thought they were failed philosophies and threats to a peaceful social order.<sup>136</sup>

Kerr found the small cadre of his own faculty who sided with the students deeply misguided and likely to give bad advice.<sup>137</sup> They reminded him of the evils of politicization of the university that he had witnessed during visits to Latin America.<sup>138</sup> When the University of California drew public criticism for being too tolerant of radicals and dissidents, he praised centrist faculty leadership and emphasized to his critics that they were more typical than the long-haired radicals.<sup>139</sup> By the end of that turbulent decade, he wrote, “[t]he center had held.”<sup>140</sup>

130. COLVIG, *supra* note 114, at 140 (“Kerr . . . took care to speak with more appreciation of the importance of the civil rights work and of the dedication of some students.”); 1 KERR, MEMOIR, *supra* note 114, at 13 (describing Kerr’s personal engagement in peace activist causes in his college years); CLARK KERR, THE USES OF THE UNIVERSITY 133–34 (rev. ed. 1972) [hereinafter KERR, POSTSCRIPT] (reflecting on the rise of student activism on college campuses from 1963 to 1972); Rockafellar Interview, *supra* note 114, at 50–51 (describing and expressing sympathy for student activism on behalf of black and other causes).

131. USES OF THE UNIVERSITY, *supra* note 114, at 39, 130; *see also* COLVIG, *supra* note 114, at 77 (“Kerr frankly dislikes the new policy” of allowing advocacy of political ideas on campus.) (quoting James Benét, *Behind the Sorrow at University Hall*, S.F. CHRON., Nov. 23, 1964).

132. USES OF THE UNIVERSITY, *supra* note 114, at 76.

133. *Id.* at 95.

134. COLVIG, *supra* note 114, at 117–39 (describing campus activism and issuance of the “Kerr directives”); *see* 2 KERR, MEMOIR, *supra* note 114, at 57 (describing the removal of extremists from the educational system).

135. 2 KERR, MEMOIR, *supra* note 114, at 57 (recalling the firing of three communist instructors); *id.* at 69 (discussing his opposition to hiring instructors with communist leanings); *id.* at 100, 333 (discussing anti-red attitude); *see also* KERR, POSTSCRIPT, *supra* note 129, at 124–25 (noting the intellectual limitations of communism).

136. COLVIG, *supra* note 113, at 70–72; USES OF THE UNIVERSITY, *supra* note 113, at 124–26.

137. 2 KERR, MEMOIR, *supra* note 114, at 100–01, 268–69.

138. 2 *id.* at 23, 107–08; *see also* CLARK KERR, HIGHER EDUCATION CANNOT ESCAPE HISTORY 141–42 (1994) (deploring politicization of higher education and teachers who “propagate their own political beliefs and preferences”); USES OF THE UNIVERSITY, *supra* note 114, at 78 (same).

139. COLVIG, *supra* note 113, at 7–8; 2 KERR, MEMOIR, *supra* note 114, at 227–28, 253, 279.

140. 2 KERR, MEMOIR, *supra* note 114, at 279.

### 3. James Conant, President of Harvard University

James Conant served as president of Harvard University in the period just preceding *Brown v. Board of Education*. His tenure at the university—from 1933 to 1953—thus predates that of the two figures discussed above. During his period in office, the NAACP began litigating the line of school-desegregation cases that eventually culminated in *Brown*. But black rights were not in the nation's consciousness in the same way they were after that breakthrough decision. Still, white elites—including some on the Supreme Court—who made it their business to anticipate national trends understood what was coming and, in many cases, welcomed it.<sup>141</sup> Years later, Clark Kerr and Kingman Brewster clearly did.<sup>142</sup> To his credit, James Conant, twenty years earlier, did as well.

Born in New England, Conant attended Harvard, where he studied and taught chemistry before accepting an appointment as president in 1933.<sup>143</sup> Like Brewster, he was a planner with a special knack for thinking about large projects and bringing them to fruition. Between 1940 and 1946, he served as chairman of the Chemistry Section of the National Defense Research Committee, helping direct the Manhattan Project that developed the first atomic bomb during World War II.<sup>144</sup> Later, as president of Harvard, he continued to hold high positions in the nation's scientific establishment.<sup>145</sup> After stepping down from university office, he served as U.S. Ambassador to the Federal Republic of Germany for four years.<sup>146</sup>

During his long-running presidency, Conant transformed Harvard into a diverse, world-class university. Believing that the East Coast system of private, elite colleges was too ingrown, he pioneered entrance exams in a movement that would lead to the SAT.<sup>147</sup> Conant believed that a system of

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141. See generally DUDZIAK, *supra* note 16, at 79–117, 250 (documenting elites' reactions to black demands for equality).

142. See *supra* Part III.A.1–2 (describing the careers of Brewster and Kerr).

143. See generally JAMES CONANT, *MY SEVERAL LIVES* 3–97 (1961) [hereinafter *SEVERAL LIVES*] (discussing his early career and thought).

144. See Charles D. Biebel, *Styles of Educational Leadership: James B. Conant and the Making of an Educational Statesman* 11 (Occasional Paper No. 2, 1971); Audio tape: Educational Issues, The Conant Philosophy: A Conversation with Outspoken Educator James B. Conant (1969) (on file with Indiana University East Campus Library) [hereinafter *Conversation*].

145. Biebel, *supra* note 144, at 15–18; *Conversation*, *supra* note 144.

146. *Conversation*, *supra* note 144.

147. See, e.g., Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?, 57 VAND. L. REV. 1043, 1095 (2004); see also JAMES B. CONANT & FRANCIS T. SPAULDING, *EDUCATION FOR A CLASSLESS SOCIETY: THREE ESSAYS ON THE PURPOSES AND PROBLEMS OF AMERICAN EDUCATION* 40–42 (1940) (urging admissions by merit and examination rather than by social connections and family wealth).

merit-based admissions should replace the prevailing one that favored sons and daughters of upper-class white families with social connections.<sup>148</sup>

Although much of Conant's educational career was concerned with science policy and strengthening Harvard's research component, he devoted considerable thought to broader social currents, including the rise of communism, McCarthyism and the university, and the fate of blacks.<sup>149</sup> He had little use for radical or communist thought, believing them to be un-American and tyrannical.<sup>150</sup> His memoirs make plain that he did not reject McCarthyism entirely and that he was unsympathetic to university teachers who sought to disseminate communist propaganda, especially if it took a form inconsistent with the principles of freedom on which he believed American education depended.<sup>151</sup> According to Conant, a professor who surrendered his thinking to a mode of thought (such as communism) that required him or her to forfeit intellectual integrity was thereupon rendered unfit for the job.<sup>152</sup> He railed against "latent Bolsheviks" as early as 1940<sup>153</sup> and expressed sympathy for a plan to remove communist books from public-school libraries.<sup>154</sup>

He warned of the "flood of college students" as early as 1956<sup>155</sup> and, only a few years later, of the "social dynamite" of slums, Negro unemployment, and the risk that blacks might be attracted to communism and radical philosophies.<sup>156</sup> In a book written a short time after leaving office, *Slums and Suburbs: A Commentary on Schools in Metropolitan Areas*, Conant noted the increased militancy of Negro leaders and warned of their

148. See JAMES B. CONANT, *THE CITADEL OF LEARNING* 42–45 (1956) [hereinafter *CITADEL*] (favoring meritocratic university admissions); Biebel, *supra* note 144, at 3–7; Conversation, *supra* note 144.

149. See JAMES B. CONANT, *EDUCATION IN A DIVIDED WORLD* 66–68 (1948) [hereinafter *DIVIDED WORLD*] (advocating the provision of greater educational opportunities to minorities); *SEVERAL LIVES*, *supra* note 143, at 670–81; JAMES B. CONANT, *SHAPING EDUCATIONAL POLICY* 6–8, 26, 38–47 (1968) [hereinafter *SHAPING EDUCATIONAL POLICY*] (discussing the problems with public-school policy); JAMES B. CONANT, *SLUMS AND SUBURBS: A COMMENTARY ON SCHOOLS IN METROPOLITAN AREAS* 7–53 (1961) [hereinafter *SLUMS AND SUBURBS*] (addressing the problems with "big city slum schools"); Biebel, *supra* note 144, at 6–7.

150. *CITADEL*, *supra* note 148, at 1–11 (deploring the Soviet approach to education); *DIVIDED WORLD*, *supra* note 149, at 2, 17–19, 22–29, 66, 103, 218–19 (discussing America's need to compete with the Soviet Union); *SEVERAL LIVES*, *supra* note 143, at 454–57.

151. See *SEVERAL LIVES*, *supra* note 143, at 450, 566–75 (expressing doubts about whether communists should be employed as teachers and whether books advocating that philosophy should be in public libraries); sources cited *supra* note 149.

152. *SEVERAL LIVES*, *supra* note 143, at 454–58; see *DIVIDED WORLD*, *supra* note 149, at 2–3, 17–29, 66, 103 (expressing reservations over the Soviet approach and suggesting ways that America must counter it).

153. CONANT & SPAULDING, *supra* note 146, at 12.

154. *SEVERAL LIVES*, *supra* note 143, at 566–69.

155. *CITADEL*, *supra* note 148, at 71–79.

156. *SEVERAL LIVES*, *supra* note 143, at 622; see also *id.* at 670–81 (providing the text of the keynote address on "Social Dynamite in Our Large Cities").



new lack of interest in racial integration.<sup>157</sup> His memoirs also show that he deplored school systems in predominantly black neighborhoods where the curriculum and teaching “reflect the concern of the citizens expressed in racial terms.”<sup>158</sup> He also notes studies in large cities that showed a high percentage of unemployed black youths roaming the streets and others who had dropped out of high school.<sup>159</sup>

“To my mind,” he wrote, “there is no question that a healthy body politic necessitates a sound economy and high employment. The history of communism shows that it feeds upon discontented, frustrated, unemployed people.”<sup>160</sup> As an antidote, a chapter dealing with the suburban school discusses his desire for programs identifying talented minority youth and channeling them to the university.<sup>161</sup> He also notes that the country contained “few shining examples of Negroes in positions of intellectual leadership.”<sup>162</sup>

That dearth, he hastened to add, was “not due to any policy of discrimination on the part of the Northern universities.”<sup>163</sup> Instead, he believed it was the product of larger social forces that required a sustained national effort.<sup>164</sup> It was, however, an inexcusable waste of resources. The country forfeited a great deal of black talent, while the “Negro problem” hurt the United States in competition against Soviet philosophies.<sup>165</sup>

Even after Conant retired, foundations sponsored those books and projects.<sup>166</sup> His books and projects were, after all, quite consistent with the ideals of America’s elites and their plans for a meritocratic, smooth-running society.<sup>167</sup> Conant foresaw trends and used patterns of demography and economic growth to anticipate the country’s needs, especially in the area of higher education.<sup>168</sup> He and his class deplored social hardening and lack of

157. SLUMS AND SUBURBS, *supra* note 149, at 27–31, 33–44; *see also* DIVIDED WORLD, *supra* note 149, at 6–11, 181–210 (discussing barriers to economic mobility); SEVERAL LIVES, *supra* note 143, at 645–46 (describing his earlier admonition and noting the need to update it to reflect increasing black militancy); *id.* at 671 (noting how social neglect could attract blacks to communism).

158. SEVERAL LIVES, *supra* note 143, at 646; SHAPING EDUCATIONAL POLICY, *supra* note 149, at 6–8, 26, 38–47 (deploring segregation and a society that turns its back on “the Negro”). *See generally* SLUMS AND SUBURBS, *supra* note 149.

159. SLUMS AND SUBURBS, *supra* note 149, at 33–37, 147.

160. SEVERAL LIVES, *supra* note 143, at 671.

161. SLUMS AND SUBURBS, *supra* note 149, at 43–44.

162. *Id.* at 43.

163. *Id.*

164. *Id.*; *see also* CONANT & SPAULDING, *supra* note 147, at 9–13 (deploring social stratification and lack of upward mobility in general); SHAPING EDUCATIONAL POLICY, *supra* note 149, at 6–8 (same).

165. DIVIDED WORLD, *supra* note 149, at 66, 68.

166. Biebel, *supra* note 143, at 2–3.

167. *Id.* at 2–5.

168. *Id.* at 6–7.

upward mobility; they saw racial discrimination as wasteful and undemocratic. Radicalism and social unrest produced the same ill effects, and Conant's concern merely heightened as the Cold War intensified.<sup>169</sup>

#### 4. Albert Bowker, Chancellor of University of California, Berkeley

A final figure is Albert Bowker, who served as chancellor of the Berkeley campus of the University of California from 1971 to 1980. His term of service thus came in the immediate wake of Clark Kerr, whose career as president of the U.C. system I discussed above.<sup>170</sup> Like Conant and Kerr, Bowker received an undergraduate education in a technical subject (mathematics), receiving his B.S. at Massachusetts Institute of Technology in 1941 and a Ph.D. at Columbia University a few years later.<sup>171</sup> He taught as a professor at Stanford University and chaired that university's statistics department before assuming the chancellorship of City University of New York ("CUNY") from 1963 to 1971.<sup>172</sup>

At CUNY, Bowker's term was notable for adopting an open admissions policy that greatly increased minority enrollment.<sup>173</sup> A recent *New York Times* article noted that Bowker's embrace of minority enrollment might not have come about so much from a sincere championing of their cause; instead, it may have been a product of his background in mathematics—as an exact scientist, he realized that if the city colleges continued their near all-white path and did not open their doors to women, minorities, and the economically disadvantaged, they would come under intense criticism.<sup>174</sup> His memoirs and oral interviews show that he was proud of this policy and believed it to be far-sighted.<sup>175</sup> He also believed that this was true not just of

169. *Id.* at 18.

170. See *supra* Part III.A.2 (describing Clark Kerr's presidency at U.C.).

171. Glenn Collins, *Albert Bowker, 88, Dies; Ex-CUNY Head*, N.Y. TIMES, Jan. 23, 2008, at D8. See also Karen W. Arenson, *A CUNY Revolutionary Looks Back*, N.Y. TIMES, Mar. 20, 2002, at B9 (describing how Bowker's background in mathematics and science influenced his administrative style).

172. Collins, *supra* note 171.

173. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 6, 1991), in ALBERT H. BOWKER, SIXTH CHANCELLOR, UNIVERSITY OF CALIFORNIA, BERKELEY, 1971–1980; STATISTICIAN, AND NATIONAL LEADER IN THE POLITICS OF HIGHER EDUCATION 166, 175–77 (Harriet Nathan ed., 1995) [hereinafter BOWKER], available at <http://content.cdlib.org/ark:/13030/hb1p3001qq/?&query=bowker%20harriet&brand=oac>.

174. Arenson, *supra* note 171; see Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 5, 1991), in BOWKER, *supra* note 173, at 102, 151 (noting the desire to expand minority enrollment); see also *infra* note 176 and accompanying text.

175. See Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 5, 1991), in BOWKER, *supra* note 173, at 102, 151 ("The expansion of the university was, in a way, my biggest achievement.").

CUNY, but of the nation as a whole, and that increasing enrollment of formerly excluded groups would be good for society.<sup>176</sup>

At University of California, Berkeley, Bowker presided during a turbulent period (1971–1980) that began during Clark Kerr’s presidency but continued long afterward. Although his reign at CUNY had seen the establishment of pro-minority policies, Bowker’s term at U.C. Berkeley took a more cautious turn when he realized that in California, unlike New York, the winds were blowing in the opposite direction. Ronald Reagan and the conservatives were in power, and the state’s citizens were impatient with the university’s ten-year history of student rebellion, drugs, free speech, filthy speech, and campus attitudes that appeared to cater to left-of-center thinking.<sup>177</sup> Thus, much of Bowker’s term in office aimed to placate the public and eliminate any appearance of campus radicalism.<sup>178</sup> At the same time, he was intensely wary of the growing representation of minority students on campus and made efforts to ensure that it did not disrupt the university’s functioning or its public image as an elite training ground for California’s future leaders.<sup>179</sup>

For example, Bowker, who had championed black causes during his term in New York, displayed uncharacteristic ambivalence toward U.C. Berkeley’s ethnic-studies department, which he regarded as a source of impatient radical demands.<sup>180</sup> He told his oral historian that groups of black students demonstrated outside his office until he heard them. When he finally met with them, they presented a list of nine non-negotiable demands. He said “no” to each, after which “they went out chanting, ‘Bowker says no.’”<sup>181</sup> When he effectively fired a number of Black Studies professors by overruling the powerful faculty budget committee which had recommended

176. See JEROME KARABEL ET AL., *THE POLITICS OF STRUCTURAL CHANGE IN AMERICAN HIGHER EDUCATION: THE CASE OF OPEN ADMISSIONS AT THE CITY UNIVERSITY OF NEW YORK* 8–10 (1981); Ingram Olkin, *A Conversation with Albert H. Bowker*, 2 *STAT. SCI.* 472, 481 (1987).

177. E.g., COLVIC, *supra* note 114, at 194–206 (describing Ronald Reagan’s disapproval of University of California’s tradition of tolerating student radicalism); Olkin, *supra* note 176, at 482 (noting U.C. Berkeley’s historical “reputation for violence and protest”).

178. See Olkin, *supra* note 176, at 482; see also Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 13–15, 17–19 (discussing various hot-button issues during Bowker’s term, including firing teachers in the School of Black Studies and abolishing the Criminology School).

179. See Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 13–15 (discussing ethnic-studies hires, professors’ qualifications, and U.C. Berkeley’s public image); cf. Olkin, *supra* note 176, at 482 (discussing the change in U.C. Berkeley’s reputation).

180. See Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 10 (discussing Bowker’s refusal to negotiate with student groups).

181. *Id.*

tenuring them, he said that he did so because they were unqualified and were “tyrannizing” the campus.<sup>182</sup>

If Bowker regarded black students with trepidation and thought them likely to engage in violence, arson, and bombing, he saw white radicals, both in the student body and the faculty ranks, as even greater sources of threat.<sup>183</sup> Indeed, he saw the latter as prone to use black causes for their own ends and to whip up black anger to advance their own purposes: “Minority students have never been, for the most part, particularly active in pushing; it’s been the white rads,” he said.<sup>184</sup> “The white radical students have always used Berkeley’s insensitivity to minorities as one of their big points.”<sup>185</sup>

While in New York, Bowker invested heavily in minorities willing to toe the line and supported doctoral programs for blacks.<sup>186</sup> He was proud of a large minority program called Search for Education, Elevation, and Knowledge (“SEEK”), which he believed had won blacks over to his side. “The blacks supported me. I had gone out of my way to cultivate the black community. . . . I had the blacks.”<sup>187</sup>

At U.C. Berkeley, Bowker displayed a similar attitude when a black sociology professor came up for tenure. The professor had the solid support of every black member of the faculty, each of whom wrote in support his appointment.<sup>188</sup> Bowker approved the professor’s tenure and later wrote that “he had been a useful role model for the black athletes,” who prior to this time had been “hustling at the bookstore” and running up big bills with charge cards.<sup>189</sup> The professor had taken them in hand, so, Bowker wrote: “I felt he was a useful citizen of the campus and . . . deserved to get tenure on the basis of fairly long service . . . to the campus.”<sup>190</sup>

If Bowker’s attitude toward blacks at Berkeley was decidedly instrumental—they were useful insofar as they were non-disruptive and studious—his approach to white radicals on the faculty or in the student body was entirely adversarial.<sup>191</sup> He saw them as bad role models for the

182. *Id.* at 14.

183. See Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 4, 1991), in BOWKER, *supra* note 173, at 36, 64–65 (discussing disruptive white radicals).

184. *Id.* at 64.

185. *Id.*

186. *Id.* at 64–65 (noting that he backed blacks at U.C. Berkeley, but only as professional and graduate students).

187. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 5, 1991), in BOWKER, *supra* note 173, at 155–58.

188. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal., (Sept. 3, 1991), in BOWKER, *supra* note 173, at 166, 167.

189. *Id.*

190. *Id.*

191. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 4, 1991), in BOWKER, *supra* note 173, at 36, 64–65; see also

student body and sources of public embarrassment.<sup>192</sup> No issue makes this plainer than his decision, soon after arriving at U.C. Berkeley, to dissolve the School of Criminology and fire some of its faculty.<sup>193</sup>

As might be expected for a world-class university, the faculty at U.C. Berkeley have long been moderate or moderate-leftist in their politics and behavior. An exception to this generalization was the School of Criminology, which in the 1960s and early 1970s was a hotbed of Marxism and other far-left approaches to crime and delinquency.<sup>194</sup>

At that time, mainstream criminology featured a “war on crime” mentality. This approach emphasized crime control, the use of innovative police tactics and hardware, rehabilitation of offenders who were capable of being retrieved from a life of crime, and warehousing of the rest.<sup>195</sup>

At U.C. Berkeley, a large corps of left-wing criminologists taught that crime was a product of poverty, bad schools, and racism.<sup>196</sup> Many of the faculty refused to apply for or accept federal grant money, believing it tainted.<sup>197</sup> One, Anthony Platt (discussed below), led opposition to the city of Berkeley’s plans to use federal funds to acquire a helicopter to monitor crowds and police protests.<sup>198</sup> Many of the professors in the School of Criminology were popular with the students, drawing hundreds to their classes on race, crime, politics, and the need for structural reform, all with a decidedly Marxist bent.<sup>199</sup>

Bowker, who wanted to depoliticize the campus as much as possible and prided himself on having blacks in his pocket, found the criminology school a public-relations nightmare. Since he could not easily de-tenure established professors, he opted for a twin policy: denying those who were coming up

Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 21–22 (noting his calculating attitude toward Willie Brown and other black politicians in California and New York).

192. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 21–22.

193. *Id.* at 16–19; see also *infra* Part III.B.4 (discussing criminology professor Anthony Platt).

194. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 16–19; Interview with Anthony Platt, Professor of Soc. Work, Cal. State Univ.-Sacramento, in Berkeley, Cal. (June 12, 2007). See generally Anthony Platt, *Prospects for a Radical Criminology in the United States*, 1 CRIME & SOC. JUST. 2, 7 (1974) (describing the need to support the “victims” of closing the school); Richard Schaufli, *Criminology at Berkeley: Revisiting Academic Repression*, 1 CRIME & SOC. JUST. 58 (1974) (describing the events at U.C. Berkeley).

195. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 17–19 (noting that the criminology school was, for Bowker’s predecessor, departing from its mission of training police chiefs); Interview with Anthony Platt, *supra* note 194.

196. See *supra* notes 194–95; *infra* notes 258–75 and accompanying text (discussing career of criminology professor Anthony Platt).

197. Interview with Anthony Platt, *supra* note 194.

198. *Id.*

199. *Id.*

for tenure and moving the rest to other departments.<sup>200</sup> With the criminology school effectively disbanded, U.C. Berkeley returned to a less activist approach to crime taught by departments such as sociology and a new law-and-society program housed at the law school.<sup>201</sup> Bowker's sweeping and somewhat draconian solution to the criminology problem sent a message to faculty radicals that, if they valued their jobs, they should remain quiet and cause as little trouble as possible.

B. *LIBERAL MCCARTHYISM: HOW FOUR RADICAL PROFESSORS LOST THEIR JOBS*

In the late 1960s and early 1970s, a wave of firings of left-wing professors swept academia. The four cases discussed below—Trubek, Abel, Lynd, and Platt—are only a few of many such cases. I focus on these four because each, years later, played a part in the birth of cis or critical race theory. Each of these professors lost his job due to liberal, not conservative, pressure and action. These four cases are only the proverbial tip of the iceberg. The discipline of sociology may have suffered as many as two-hundred losses during this period for political reasons.<sup>202</sup> Intriguingly, Canada also saw a similar mini-purge of leftists.<sup>203</sup> Each of the professors—and probably many others—lost his job under circumstances suggesting that his superiors did not want him consorting with, mobilizing, serving as a role model for, or teaching leftist philosophy and social analysis to the many students of color who were arriving on campus around this time. I have enumerated examples of this attitude and mindset among top educational leaders.<sup>204</sup> Now, I show how these forces played out in four specific careers.

200. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 17–20; see also John Keilch, *Students Rally at Berkeley*, N.Y. GUARDIAN, June 19, 1974 (triggering over 3,000 students to engage in a weeklong rally in protest).

201. Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 17–20 (noting that this may have been hard on some of the faculty and students, but was the right thing to do).

202. See Abigail A. Fuller, *Producing Radical Scholarship: The Radical Sociology Movement, 1967–1975*, 33 SOC. IMAGINATION 37, 49 (1996), available at <http://comm-org.wisc.edu/si/fuller.htm> (stating estimates that universities fired over two hundred radical faculty members); see also KABASERVICE, *supra* note 80, at 138 (detailing the effects of McCarthyism on liberal Harvard administrators); Carl Mirra, *Radical Historians and the Liberal Establishment: Staughton Lynd's Life with History*, 11 LEFT HIST. 69, 69 (Spr. 2006) (noting that history, as a field, went through forcible “mass departures” in the late 1960s and that “[l]iberal . . . historians . . . were often hostile to radical scholars”).

203. See MARLENE DIXON, *THINGS WHICH ARE DONE IN SECRET* 14, 23–55 (1976) (noting that the purge began in the United States but spread to Canada in the late 1960s and that academic liberals often administered the *coup de grâce*).

204. See *supra* Part III.A (discussing the roles of four prominent educational leaders).

## 1. David Trubek

David Trubek was a young, Yale-trained professor who taught at Yale Law School during the turbulent period of the late 1960s through the early 1970s. He attended college at the University of Wisconsin, after which he enrolled at Yale Law School.<sup>205</sup> Trubek excelled academically, serving on the Yale Law Journal and earning honors from the Order of the Coif.<sup>206</sup> Upon joining the faculty of Yale Law School, in addition to teaching his classes, he directed a research program on the role of law in Third World countries.<sup>207</sup> Earlier, Trubek had worked as an attorney for the State Department and as a legal adviser at the Agency for International Development Mission in Brazil.<sup>208</sup> He also served as a consultant for the State Department in Africa and for the Ford Foundation in Brazil.<sup>209</sup>

Despite his establishment credentials, Trubek provoked the ire of some of the older faculty when he took part in a study group at Yale that included students Duncan Kennedy and Mark Tushnet and led, a few years later, to the formation of the critical-legal-studies movement.<sup>210</sup> The old guard took an even dimmer view of him when, along with five other young left-leaning faculty members, he sided with the students who were clamoring for change at the law school.<sup>211</sup> Yale was then shell-shocked by the protests that had rocked the school beginning earlier in the decade and in no mood for more.<sup>212</sup> According to two writers, the school was particularly leery of the possibility that the new generation of black students who were beginning to arrive would turn out to be just as hard to control as the white students who had been protesting the war, racial injustice, and grading policy.<sup>213</sup>

205. See ASS'N AM. LAW SCH., DIRECTORY OF LAW TEACHERS 2007–08, at 1103; David Trubek, Curriculum Vitae, <http://www.law.wisc.edu/facstaff/trubek/vitae.html> (last visited June 11, 2009) (listing highlights of Trubek's career).

206. Trubek, *supra* note 205.

207. See Tracy Dingmann, *Law Prof Named New Dean at UW*, CAPITAL TIMES (Madison, Wis.), June 9, 1990, at A3.

208. *Id.*

209. *Id.*

210. See KALMAN, STRANGE CAREER, *supra* note 89, at 82 (noting that others who participated in forming the movement include Morton Horwitz, Mark Tushnet, and Duncan Kennedy); KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 262 (listing participants in the movement).

211. *E.g.*, KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 259–63 (describing the populist role of various young Yale professors, including Trubek).

212. See generally *supra* Part III.A.1 (describing Kingman Brewster's presidency).

213. *E.g.*, KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 6, 111–24 (describing tumult over the new generation of black students' demands); *id.* at 239 (describing faculty's fear of "Dark Age barbarians"); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 392–93 (1984) (describing Trubek as a victim of a "slaughter of the innocents," sacrificed to buy Yale social peace).

The Yale law faculty were champions of legal realism—a school of thought that saw law as a tool of social reform.<sup>214</sup> When student protesters charged them with being liberal apologists for an unjust system, the faculty were shocked and taken aback.<sup>215</sup> Many of them had advocated for civil rights in the South, established the Peace Corps, and served in liberal administrations.<sup>216</sup> Yet, their own students were accusing them of being incremental reformers and apologists for an unfair social order.<sup>217</sup>

The faculty must have thought that the students—all from good families—would settle down one day. But what about the blacks? If they became radicalized, all of Yale's investment in them would be wasted. Thus, Yale professors were more solicitous of black students than white ones.<sup>218</sup> Accordingly, when Trubek, Richard Abel (discussed below), and four other young radical professors sided with the students, the older faculty must have been particularly concerned over the influence they might have on the first generation of blacks that had made Yale Law School their home.

Yale Law School dean Louis Pollak was particularly outspoken in his belief that Yale must train black leaders, not revolutionaries. Meanwhile, his faculty worried about black radicals and the Black Law Student Union more than their noisier, more numerous white counterparts in the protest movement.<sup>219</sup> When some of the six professors supported closing Yale Law School to enable a student moratorium and a teach-in to proceed, faculty attitudes against the group hardened.<sup>220</sup>

When, in a short span, Yale Law School denied tenure to each of the six, Trubek among them, one termed it—probably correctly—a structural firing that was not a series of individual actions necessary to re-establish Yale's center.<sup>221</sup> Some of the six wore long hair and sided conspicuously with the students. All had excellent records—one was a double Supreme Court clerk—and had published, in some cases, copiously.<sup>222</sup>

After leaving Yale, Trubek secured a position at the University of Wisconsin where he played a part in strengthening that school's law-and-society emphasis and, later, its international programs.<sup>223</sup> In an ironic twist,

214. KALMAN, *REVOLT AND REVERBERATIONS*, *supra* note 68, at 32–38. See generally KALMAN, *STRANGE CAREER*, *supra* note 89 (on legal realism at Yale in general).

215. KALMAN, *REVOLT AND REVERBERATIONS*, *supra* note 68, at 7, 98–139 (discussing “[s]tudent [p]ower”).

216. *Id.* at 32–46.

217. *Id.* at 98–139.

218. *Id.* at 138.

219. See *id.* at 57–66, 111–18 (discussing Yale Law School dean Louis Pollak and his position on student activism and minorities); *id.* at 138 (explaining the central administration's position on these matters).

220. KALMAN, *REVOLT AND REVERBERATIONS*, *supra* note 68, at 165.

221. *Id.* at 239 (citing a statement by Professor John Griffiths).

222. See *id.* (describing John Griffiths).

223. See Trubek, *supra* note 205 (listing Trubek's career and highlights).



his excellence as a teacher and publisher led, years later, to an offer to serve as a visiting professor at Harvard Law School.<sup>224</sup> During his visiting term at Harvard, the law faculty voted to make him a permanent offer, which then-president Derek Bok vetoed, most likely on political grounds.<sup>225</sup> Trubek thus suffered a double purge at the hands of the nation's two leading law schools.

Trubek never relaxed his efforts on behalf of social reform, however. Back at Wisconsin a second time, he worked to strengthen the Hastie Fellow program, which trains promising minority law graduates for careers in teaching.<sup>226</sup> His efforts on behalf of one of that program's star graduates, Kimberlé Crenshaw, played a direct role in the development of critical race theory when he advised her in connection with a dissertation that became a landmark critical-race-theory article.<sup>227</sup> Years later, when Crenshaw, then a UCLA law professor, proposed to convene a small group of professors of color at a convent outside Madison, Wisconsin, Trubek readily agreed to sponsor the event,<sup>228</sup> which turned into the founding critical-race-theory conference mentioned earlier.<sup>229</sup>

## 2. Richard Abel

Richard Abel was also one of the six young faculty members purged at Yale in the late 1960s.<sup>230</sup> Like Trubek, he was interested in comparative legal sociology, as well as African law.<sup>231</sup> A graduate of Columbia, his interests and personal style were nontraditional; his scholarship and thought, forceful and, at times, scathing. He believed American law was poorly theorized and

224. David A. Kaplan, *Academic Freedom in Peril? Letter Calls for Harvard Probe*, NAT. L.J., Aug. 10, 1987.

225. *Id.* (describing a letter from two hundred professors calling for an investigation of Harvard's treatment of Trubek and a second professor); see also Jennifer A. Kingson, *Harvard Tenure Battle Puts 'Critical Legal Studies' on Trial*, N.Y. TIMES, Aug. 30, 1987, at A21 (detailing Harvard Law School's internal fight concerning Trubek and the cls movement).

226. See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA. L. REV. 1343, 1359, 1362-64 & n.21 (2002) (discussing Trubek's mentoring of a prominent Hastie fellow, namely herself, and his subsequent sponsorship of a critical-race-theory workshop).

227. *Id.* The article is Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988), in which Crenshaw thanks Trubek, see *id.* at 1331 (author's footnote), and cites his scholarship, see *id.* at 1349-50 n.72. A landmark of the critical-race-theory genre, Crenshaw's article points out the defects of both liberal and conservative approaches to antidiscrimination law and calls for a new, critical alternative.

228. See Crenshaw, *supra* note 226, at 1361, 1363 n.21 (describing the planning of the first critical-race-theory workshop); Mutua, *supra* note 44, at 347.

229. See *supra* notes 42-43 and accompanying text (describing the foundation of a workshop at a convent outside Madison, Wis.).

230. See KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 63, 234, 239, 263-66 (discussing Yale's refusal to grant Abel tenure).

231. *Id.* at 263, 265 (describing Abel and his interests and manner).

inadequate in its conception of society.<sup>232</sup> With the New Haven Black Panther trial approaching, Abel focused his torts class on the police–citizen relationship.<sup>233</sup> Later, he began offering classes that focused on family law and the relation of families to the state.<sup>234</sup>

As a junior faculty member, Abel produced a relatively large volume of scholarship, some of which took the form of critical reviews of his Yale colleagues' work.<sup>235</sup> When he regularly sided with the students and opposed the university's policy of neutrality vis-à-vis the Vietnam War, dressed more casually than the other professors, and avoided eating with them in the law-school cafeteria, his fate was sealed.<sup>236</sup>

Abel left Yale quietly, without challenging the faculty's decision, after being told that if he did so the law school would not stand in the way of his finding another job.<sup>237</sup> He secured a position at UCLA, where he wrote a great deal and became editor of the prestigious *Law & Society Review* and president of the national association of the same name.<sup>238</sup> Abel later said that he believed the firing of "so many in his generation" was the product of a broadly felt desire to appease conservative interests and ensure that schools performed their function of passing on cultural values without discordant notes.<sup>239</sup>

Like Trubek, Abel would go on to play an important, although indirect role in the formation of critical legal studies and critical race theory. He had been a member of cls dating back to his student days. As a UCLA professor, he served on the planning committee of that organization's national conference in Los Angeles in the mid 1980s. When two young minority professors requested a forum at the conference to present their critique of the cls position on race, Abel readily agreed and organized a panel where a group of young professors of color delivered the papers that laid the foundations of critical race theory.<sup>240</sup>

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232. *Id.*; see also UCLA Law School, Biography of Richard Abel, <http://www.law.ucla.edu/home/index.asp?page=383> (last visited June 11, 2009) (listing Abel's professional background and interests).

233. KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 264.

234. *Id.*

235. *Id.* at 264–65.

236. *Id.* at 265.

237. *Id.*

238. See UCLA Law School, *supra* note 232 (providing Abel's biography).

239. See KALMAN, REVOLT AND REVERBERATIONS, *supra* note 68, at 263–66 (describing Abel's experiences on the Yale faculty).

240. See *supra* text accompanying notes 56–59 (describing how a minority panel gained a place on the program of the cls conference).

### 3. Staughton Lynd

Unlike the other professors shown the door at Yale during this period, Staughton Lynd was a professor of history rather than of law.<sup>241</sup> The son of sociologists Robert Staughton Lynd and Helen Lynd—the authors of a groundbreaking study (“Middletown”) of social relations in Muncie, Indiana—Lynd absorbed some of the socialist idealism and scholarly drive of his prominent parents.<sup>242</sup> After serving in a noncombatant, conscientious-objector role in the U.S. military, Lynd earned his doctorate at Columbia and began his teaching career at a historically black college, Spelman, where he met Howard Zinn.<sup>243</sup>

During the early 1960s, Lynd directed a Student Non-Violent Coordinating Committee (“SNCC”) educational program in the American South before relocating with his wife, Alice, and three children to New Haven, where he accepted a position teaching history at Yale.<sup>244</sup>

Early in his career, Lynd emerged as an outspoken opponent of the Vietnam War, basing his objections to it on his nonviolent pacifism, nurtured in the Quaker religion.<sup>245</sup> He drew intense criticism from the public and many in the Yale community when he made an unauthorized trip to North Vietnam,<sup>246</sup> causing many Yale alumni to erupt in indignation and demand that Kingman Brewster fire him.<sup>247</sup> Many of his colleagues shook their heads, as well.

Brewster criticized the young scholar’s judgment in going to Vietnam and getting his head bloodied in demonstrations, yet he adamantly defended Lynd’s right to protest against the war.<sup>248</sup> At that time, Lynd was developing an approach to history that was both activist and concerned with “history from below”—the stories of workers, blacks, and war resisters who shaped history through small, nearly invisible actions—rather than the traditional version emphasizing generals, kings, and wars; for example, Lynd wrote one book that expressly linked black radicals to principles of

241. For a concise summary of Lynd’s life, see Biography Resource Center, Biographical Essay: Staughton Lynd (on file with author) [hereinafter Biographical Essay]. See also Interview with Staughton and Alice Lynd, in Pittsburgh, Pa (Dec., 2005) (in which I confirmed most of the biographical details described herein). For an interpretive essay on the activist’s life, see Kent State University, Staughton Lynd Collection, <http://speccoll.library.kent.edu/labor/lynd.html> (last visited June 11, 2009).

242. See Biographical Essay, *supra* note 241; Mirra, *supra* note 202, at 70.

243. See Biographical Essay, *supra* note 241; Interview with Staughton and Alice Lynd, *supra* note 241.

244. Biographical Essay, *supra* note 241.

245. KABASERVICE, *supra* note 80, at 235; Biographical Essay, *supra* note 241.

246. KABASERVICE, *supra* note 80, at 235.

247. *Id.*; *The Class Gift Fund*, YALE DAILY NEWS, Oct. 17, 1968, at 2, available at <http://images.library.yale.edu:2007/cdm4/document.php?CISOROOT=/yale-ydn&CISOPTR=9494&REC=1> (noting that a graduate threatened to withhold his contribution).

248. KABASERVICE, *supra* note 80, at 256–57.

American democracy and noted that they were truer to those principles than were the founding fathers.<sup>249</sup>

Lynd became a frequent speaker at rallies and demonstrations and authored a series of well-received books on history, resistance, and radical politics.<sup>250</sup> When it became clear that, like Trubek and Abel, he would not receive tenure at Yale, he began searching for history jobs at lesser schools, including ones in Chicago. Roosevelt University offered him an appointment, which he accepted. However, the university soon rescinded its offer in the face of public pressure.<sup>251</sup>

Lynd then understood that he could not teach history at any American university and was effectively blacklisted. He thus enrolled at the University of Chicago Law School, determined to learn and practice labor law.<sup>252</sup> His wife, Alice, followed his path a few years later, earning her law degree from the University of Pittsburgh.<sup>253</sup> Lynd then settled in nearby Youngstown, Ohio, a steel town, where he practiced labor law, represented unions, and has devoted the rest of his career to improving the life of America's working men and women.<sup>254</sup>

Even after he left academic life, Lynd continued to publish books and articles about workers, U.S. history, and nonviolent socialism.<sup>255</sup> A number of his writings appear excerpted in Derrick Bell's casebook *Race, Racism, and American Law*, where they document various vital points enabling Bell to establish his material-determinist view of American racial history.<sup>256</sup> Among other things, Bell cites Lynd to support Bell's view that the framers implicitly aimed the Constitution at protecting the institution of slavery through no

249. STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* (paperback ed. 1982); see also Mirra, *supra* note 202, at 72–75. Other historians who write in this vein (history from below) include ACUÑA, *supra* note 19; VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* (1988); PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST* (1987); and HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* (2003).

250. Biographical Essay, *supra* note 241; see KABASERVICE, *supra* note 80, at 235 (describing Lynd's view of history).

251. KABASERVICE, *supra* note 80, at 82; Stephen Armstrong, *Lynd Accepts Teaching Job in Chicago*, *YALE DAILY NEWS*, May 4, 1967, at 1, available at <http://images.library.yale.edu:2007/cdm4/document.php?CISOROOT=/yale-ydn&CISOPTR=9153&REC=36>; Biographical Essay, *supra* note 241; see also Biographical Essay, *supra* note 241; Mirra, *supra* note 202, at 81–82 (describing the events leading up to and following Lynd's firing).

252. Biographical Essay, *supra* note 241; Kent State University, *supra* note 240; see also Mirra, *supra* note 202, at 86 (discussing Lynd's inability to find a teaching position); Chi. State Univ. Libraries, *A Decade of Progress: Illinois Teachers College*, <http://libweb.csu.edu/digitallibraries/csuhistory/ChicagoSouth.html> (last visited Feb. 17, 2009) (reporting that Lynd never received an offer for a "meaningful teaching position").

253. ALICE LYND & STAUGHTON LYND, *STEPPING STONES: MEMOIR OF A LIFE TOGETHER* 4–5 (2009).

254. Biographical Essay, *supra* note 241; Interview with Staughton and Alice Lynd, *supra* note 241.

255. Biographical Essay, *supra* note 241.

256. See BELL, *supra* note 17, at 36–40.

fewer than six clauses, none of them mentioning the word but nevertheless calculated to ensure its continuation in a nation ostensibly committed to equality for all.<sup>257</sup>

Like the abovementioned figures, Lynd played a significant role in setting the stage for critical race theory. Even after his expulsion from the academy, Lynd contributed to a climate—and, indirectly, through his influence on Bell—that enabled radical history and critical approaches to law to develop and flourish.

#### 4. Anthony Platt

When Anthony Platt arrived in Berkeley in the mid 1960s to begin a tenure-track professorship in the School of Criminology, he was, in his own words, “the golden-haired boy.”<sup>258</sup> With a degree from Cambridge, a Ph.D. from the University of California, Berkeley, and a book in the works that was to become *The Child Savers*, an award-winning study of the American juvenile-justice system, Platt’s prospects seemed limitless.<sup>259</sup> When his classes on crime and policing became hugely popular, drawing hundreds of students and filling large lecture halls, his tenure seemed assured.<sup>260</sup>

And so it was through the succession of committee votes, all enthusiastic, including the seeming final approval by Chancellor Albert Bowker. Platt’s file had proceeded through every single university step but the last: approval by the University of California Board of Regents,<sup>261</sup> when something unprecedented happened.

Platt, who was as sympathetic to student causes as were Trubek, Abel, and Lynd on the East Coast, had gone as an official observer to a demonstration in 1969 at People’s Park in Berkeley.<sup>262</sup> This traditional grassy gathering place for street people, students, protesters, speakers, and campus hangers-on was in transition.<sup>263</sup> The university claimed it, planning to develop it for a new campus facility.<sup>264</sup> The town wanted it closed in the

257. *Id.* at 37–38 (“[T]he delegates artfully avoided the use of the term ‘slavery,’ referring instead to ‘persons’ whom the states shall think it proper to import, or ‘persons’ bound to service or labor.”).

258. Interview with Anthony Platt, *supra* note 194; *see also* Platt Archive, box 1, folder 4 (on file with author) (containing a timeline of Platt’s tenure case).

259. Interview with Anthony Platt, *supra* note 194.

260. *Id.*; *see also* Richard Schaffler & M. Hannigan, *Struggles for Justice: Criminology at Berkeley: Resisting Academic Repression, Part 2*, 2 CRIME & SOC. JUST. 42, 42 (1975) (describing the criminology courses as highly popular with black students).

261. *Id.* at 43; *see* Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 16–17 (describing Bowker’s recollection of the incident); Platt Archive, *supra* note 258 (containing Platt’s timeline and notes of the event).

262. Interview with Anthony Platt, *supra* note 194.

263. *Id.*

264. *Id.*

interim, so that it would not continue to serve as a magnet for drug dealers and petty criminals.<sup>265</sup> A large, floating contingent of radicals, students, and street people claimed it as their own.<sup>266</sup>

When word of an impending clash, with the park's defenders on one side and the city of Berkeley and campus police on the other, reached Platt, he went to the park with the intention of helping keep order and preventing violence.<sup>267</sup> When the demonstration did, indeed, turn violent, Platt approached one police officer who was forcibly subduing one of the protesters.<sup>268</sup> Identifying himself as a University of California, Berkeley faculty member, Platt asked the officer whether it was absolutely necessary to beat the young man, who was not resisting arrest but merely trying to shield himself from the rain of blows the officer was inflicting on him.<sup>269</sup> The officer immediately turned his attention to Platt and placed him under arrest. The incident became a minor cause célèbre when the local and national press covered the event, mentioning the arrest of a University of California professor.<sup>270</sup>

On learning of the incident, the regents withdrew Platt's file from consideration and sent it back to the chancellor for further review.<sup>271</sup> Ordinarily, files that reach the regents receive rubber-stamp approval. But this one did not. The regents were then a conservative body, and any whiff of an anti-authority attitude from a professor could easily arouse their attention.

When the case reached Bowker a second time, he convened a committee to re-examine Platt's scholarship, teaching, and other credentials and advise him whether they justified tenure. The second committee caught the chancellor's drift and, after reviewing Platt's file, recommended against tenure.<sup>272</sup> Shortly after that, a Berkeley jury acquitted Platt of charges arising

265. *Id.*

266. *Id.*

267. Interview with Anthony Platt, *supra* note 194.

268. *Id.*

269. *Id.*

270. *Id.*; see also Miroslava Chávez-García, *In Retrospect: Anthony M. Platt's The Child Savers: The Invention of Delinquency*, 35 *J. REVS. IN AM. HIST.* 464 (2007) (discussing Platt's arrest and subsequent career and scholarship); *Bowker Says No to Tenure for Criminologist Platt*, *CAL. MONTHLY*, June–July, 1972, at 11 [hereinafter *Bowker Says No*] (mentioning role of the arrest); Jeffrey Hamerling, *Criminology Professor Fights UC*, *DAILY CAL.*, Nov. 15, 1972.

271. *Bowker Says No*, *supra* note 270; see also William A. Sievert, *Faculty Units at Berkeley Seek to Force Professor's Promotion*, *CHRON. HIGHER EDUC.* (Wash., D.C.), Dec. 24, 1973, at 1 (noting this sequence of events and a subsequent investigation by a campus committee on privilege and tenure that concluded Platt's rights were violated by this second review).

272. Sievert, *supra* note 271; Interview with Anthony Platt, *supra* note 194; see Hamerling, *supra* note 270 (noting that the Chancellor ruled that improper motivation was not a factor for the tenure committee but that a different faculty committee (Academic Freedom) had insisted on a right to review that issue, given that Platt had made an "unusually strong showing of substantive First Amendment issues").

out of his People's Park arrest.<sup>273</sup> He returned to his department and classes and filed a series of university appeals, all of which were unavailing.<sup>274</sup> After winning his criminal case, he filed a civil case in a local court for false arrest, winning a substantial judgment.<sup>275</sup>

The golden-haired boy's career at elite U.C. Berkeley was over. Unlike Staughton Lynd, however, Platt was able to secure a position teaching social work at California State University, Sacramento.<sup>276</sup> The reader who has come this far will remember that, under Clark Kerr's Master Plan laid down some twelve years earlier, the universities in the California state system cater to those in the top one-third of their high school classes. Unlike the elite campuses of the U.C. system, which enroll only the top one-eighth (and in Berkeley's case, much higher), California State campuses like the one in Sacramento where Platt got his second job neither offer Ph.D. degrees nor emphasize research in the way the U.C. schools do.<sup>277</sup> Bowker continued with his plan for eliminating the criminology school.<sup>278</sup> Platt married a prominent historian, Cecilia O'Leary, who currently teaches at California State University-Monterey Bay and is the author of leading books and articles.<sup>279</sup> For his part, Platt continued to write about politics and analysis of the social order, including a book about the Nuremberg Laws.<sup>280</sup> He also serves on the editorial board of *Social Justice*, a leading outlet for left-wing thought that has published a great deal of work on critical criminology, race, and critiques of capitalism.

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273. Beverly T. Watkins, *Berkeley Finally Drops its Criminology School*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 9, 1976, at 4; Interview with Anthony Platt, *supra* note 194; *see* Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 34.

274. Watkins, *supra* note 273. When he sued in civil court, seeking reinstatement of his job, the judge ruled against him, finding that the court had no power to order the university to make an academic appointment. *Id.*; Interview by Harriet Nathan with Albert H. Bowker, Sixth Chancellor, Univ. of Cal., Berkeley, in Berkeley, Cal. (Sept. 3, 1991), in BOWKER, *supra* note 173, at 1, 34.

275. Interview with Anthony Platt, *supra* note 194; Watkins, *supra* note 273.

276. Frederick N. Rasmussen, *City-born Sociologist was Authority on Black Life in U.S.; One Scholar Sees Renewed Interest in the Life and Work of Edward Franklin Frazier*, BALTIMORE SUN, Feb. 4, 2006, at 2B.

277. *See supra* notes 116–17 and accompanying text (describing Clark Kerr's Master Plan for California higher education).

278. *See supra* notes 192–200 and accompanying text; Schauffler, *supra* note 194, at 43 (noting that "liberal faculty played a crucial role in implementing the administrations' attack on the (criminology department's) radicals"); *id.* at 42–45 (describing how Bowker moved some of the former criminology professors, who were not particularly radical, to other departments, including a law-and-society program at the law school); Watkins, *supra* note 273.

279. *See CSUS Professor Sees His Life Brought to the Stage*, CAL. ST. UNIV.-SACRAMENTO BULL., Oct. 13, 2003, at 3, available at <http://www.csus.edu/bulletin/101303bulletin.pdf> (discussing a playwright that has modeled plays on Platt's life).

280. *See* CECILIA O'LEARY & ANTHONY PLATT, BLOODLINES: RECOVERING HITLER'S NUREMBERG LAWS (2005) (discussing the Nuremberg laws).

#### IV. LIFE IN THE HINTERLANDS: HOW FOUR RADICAL PROFESSORS EXPERIENCED LIFE AFTER ELITE ACADEMIA

As mentioned, each of the professors considered above continued teaching and writing about law, history, or sociology after suffering rejection from an elite school. Each made peace with his departure, either with a new career (Lynd) or life at a school outside the top tier (Abel, Trubek, Platt). Each wrote books or articles contributing to radical scholarship and taught students, some of whom, like Kimberlé Crenshaw, went on to make contributions almost equal to those of their mentors and teachers.

One, Abel, helped form a new legal movement (cls) and played a part in helping give birth to another (critical race theory). A second, Trubek, went on to contribute to two leftist movements in the law (law-and-society and cls). He also helped nurture Kimberlé Crenshaw's career and scholarship, and when she decided to convene the founding conference of critical race theory, his institute at the University of Wisconsin sponsored the event.

Lynd continued to write, speak, and litigate on behalf of unions and workers' rights. His work found its way into one of the founding documents of critical race theory, Derrick Bell's casebook, six editions of which have been influencing generations of law students.

Platt easily taught the largest number of students. Over a nearly forty-year career, he has taught thousands of California youth, many of them nonwhite, and has written scholarship and edited a journal that has published the work of many scholars across the nation of a persuasion similar to his.<sup>281</sup>

As we have seen, none of the scholars stole away into oblivion. Each continued teaching and writing about radical thought. Far from discouraging them, the establishment merely forced them—at some inconvenience, to be sure—to carry out their work somewhere else. A fair observer would conclude that this is something that each did with dispatch and more than a little success.

#### V. CONCLUSION: WHY IT IS HARD TO KILL AN IDEA

Critical race theory grew and thrived in part because of the imaginative and organizational skills of small groups of scholars and organizers.<sup>282</sup> But it also appeared at a particular moment and on a set scene. An earlier purple of

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281. Past issues of the journal include a range of topics virtually identical to those contained in any critical-race-theory collection. These topics include biological racism, crime, neoimperialism, prisons, critiques of liberalism, environmental justice, immigration law and policy, justice for workers, race and imperialism, and native women and violence. See *Social Justice: A Journal of Crime, Conflict & World Order*, Social Justice Contents, <http://www.socialjusticejournal.org/Backiss.html> (last visited June 11, 2009) (listing the contents of the journal's previous issues since 1974).

282. See *supra* Part II (describing role of three groups in forming a new movement).



campus leftists, hounded out of their jobs by a liberal educational establishment, ironically released energies and talents that produced writing, student scholarship programs, mentors, journals, and specialized classes in a number of non-elite colleges and universities.<sup>283</sup> Administrators at elite schools believed they were acting in the best interests of minority students, who were beginning to arrive at their campuses in great numbers.<sup>284</sup> But by purging their ranks of nonconforming professors, they ended by increasing the dissemination of radical thought around the nation.<sup>285</sup>

In particular, two leftist legal movements (cls and critical race theory), as well as radical criminology, flourished following geographic relocation of these rejected scholars from elite schools. What lessons might we draw from this sequence of events? First, if Karl Marx was even partially right about the instability of a system of rigid capitalism,<sup>286</sup> it would appear that ideological rigidity is apt to produce its own paradoxical effect as well. Ideas are not easy to kill, and, as we have seen, education is an inherently destabilizing force that cannot readily be contained.<sup>287</sup> The young seem, by nature, particularly receptive to new ideas, especially when the person in front of the classroom offers provocative insights.

Will the lesson of the late 1960s and early 1970s have any bearing on today's scene? To this writer, it seems that it might well. As the United States confronts a growing population of color, economic contraction, the war on terror, worldwide religious fundamentalism, and challenges from overseas competitors, elite forces in government and education seem poised to respond with pressures for conformity in order to maintain the current order as long as possible.<sup>288</sup> If so, the handful of celebrated cases (such as Ward Churchill and Norman Finkelstein, sidetracked at the University of

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283. See *supra* Part III.B (describing the careers of four leftist professors). As mentioned, these are far from the only radicals who lost their jobs during this period or shortly afterward. See, e.g., THE DERRICK BELL READER 9–14 (Richard Delgado & Jean Stefancic eds., 2005) (describing Derrick Bell's difficulties at Stanford and Harvard law schools); Tamar Lewin, *Job Offer to Feminist Scholar May Mark Turn*, N.Y. TIMES, Feb 24, 1989, at B5 (describing a long period when leading feminist scholar Catharine MacKinnon was an academic nomad). On purges in other disciplines, such as sociology, and in Canada, see *supra* text accompanying notes 201–02.

284. See *supra* Part III.A (describing the presidencies or chancellorships of four visionary leaders).

285. See *supra* Part IV (summarizing how this happened).

286. See *supra* text accompanying note 31 (discussing Marx's theory of surplus value).

287. See *supra* text accompanying notes 30–32 (listing a number of ways this can easily happen).

288. My candidates for behavior likely to call down the wrath of the gods are any race scholar who: insists on linking race thoroughly with class and economic inequality; demonstrates an affinity for Muslim thought; documents interest convergence between domestic minorities and their counterparts in the Third World; urges minority youth not to enlist in the U.S. Army; or teaches students of color any story of America that puts it on a par with other, more repressive regimes.

Colorado at Boulder and DePaul University, respectively) appearing in the headlines may be harbingers of things to come. More intellectual diasporas may lie ahead, resulting in a further cycle of incubation, gathering forces, and organizing, into the foreseeable future.

