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WHAT'S WRONG WITH CRITICAL RACE THEORY?: REOPENING THE CASE FOR MIDDLE CLASS VALUES

Daniel Subotnik†

> One of the subtlest challenges we face . . . is how to relegitimate the national discussion of racial, ethnic and gender tensions so that we can get past the Catch-22 in which merely talking about it is considered an act of war, in which not talking about it is complete capitulation to the status quo. . . .[1]
>
> If engagement is the first step in healing, then the second is pure unadulterated struggle. . . . We will never achieve racial healing if we do not confront one another, take risks . . . say all the things we are not supposed to say in mixed company. . . .[2]

INTRODUCTION

Scarcely fifteen years old, Critical Race Theory ("CRT") has generated a passion among its adherents, mostly minority academics, that has already fueled at least a dozen books, probably 250 law review articles[3] and a half-dozen conferences. And though the academy, along with the country, has moved somewhat to the right in recent years, this shift has

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1 PATRICIA WILLIAMS, THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE 40 (1995) [hereinafter ROOSTER] (Williams is Professor of Law at Columbia University School of Law.).

2 HARLON DALTON, RACIAL HEALING 4, 97 (1995) (Dalton is Professor of Law at Yale Law School).

3 *See* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

neither shaken the faith of CRT's advocates ("CRATs"[4]) nor diminished its drawing power. If anything, the movement seems stronger than ever.[5]

Its successes notwithstanding, in one important respect CRT has not yet been taken seriously.[6] Over the course of the last eight years, the period of its greatest flowering, CRATs have mounted a relentless attack upon mainstream institutions. But while their charges have elicited an occasional response,[7] there has been, until very recently, almost no broad-based evaluation of CRT during the 1990s from outside the movement.[8] Are CRATs right? To the extent that they are, their message needs to be heard rather than evaded. To the extent not, CRATs need to be challenged. A systematic and comprehensive public review of CRT is overdue. This article—by an author unwedded to both traditional and Postmodernist legal scholarship[9]—is offered as a contribution to such a review.[10]

What (briefly) is CRT and where did it come from? CRT, reports Derrick Bell, one of the movement's two founders, embraces "an experi-

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4 I use this acronym to distinguish race theorists from CRITs. *See infra* note 17.

5 *See* Robert Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 59 (1995).

6 *See* Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115-16 ("To be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism.") (If such criticism is not forthcoming, those new to the field will tend to assume it is flawed or marginal.).

7 *See, e.g.*, Lloyd Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301 (1992) (offering an incisive and well-written early critique); Dennis Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503 (1997) (This is a no less useful, if less acidic, current essay based in part on a new anthology of CRT writings.).

8 *See* Eleanor Brown, Note, *The Tower of Babel: Bridging the Divide between Critical Race Theory and "Mainstream" Civil Rights Scholarship*, 105 YALE L.J. 513, 515 (1995):

> [I]t is striking that despite the existence of critical race theory for nearly a decade, the response to it has generally been a conversation among those who identify themselves as other critical race theorists. There simply has not been the sustained self-examination by traditional civil rights scholars that should result from the powerful critiques that critical race theory has posed to the fundamental tenets of the academy.

Id.; *but see* DANIEL FARBER & SUZANNA SHERRY, BEYOND ALL REASON (1997) (representing an important compilation of narrowly focused articles previously written by one or both of the authors, together with some integrative and updated commentary).

9 *See infra* notes 24, 63, 130 and accompanying text. *See, e.g.*, Dan Subotnik, *"Sue Me, Sue Me, What Can You Do Me? I Love You": A Disquisition on Law, Sex and Talk*, 47 FLA. L. REV. 311 (1995); Dan Subotnik, *Wisdom or Widgets: Whither the Academic Enterprise?*, 4 THOUGHT & ACTION 67 (1988).

10 *See* Randall L. Kennedy, *Racial Critiques of Academia*, 102 HARV. L. REV. 1745 (1989) (for an early systematic study). Writing before the era of Patricia Williams, Kennedy focused his attention on such then-fashionable issues (raised by Bell, Delgado and Matsuda) as whether blackness was a credential for a law faculty position or clerkship, whether blacks spoke with a "special voice," and whether minority scholarship was being ignored. *Id.* at 1747. At the same time Kennedy foresaw many of the larger problems that CRT style and method would create. *See id.* at 1760. *But see* Scott Brewer, *Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844, 1845-47 (1990) (severely criticizing Kennedy).

entially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies."[11] Writes Richard Delgado, the other progenitor: "Virtually all of Critical Race thought is marked by deep discontent with liberalism, a system of civil rights litigation and activism, faith in the legal system, and hope for progress . . . ."[12] The reader is asked to recall these characterizations, because the way in which CRATs experience race, the manner in which they convey this experience, and the likelihood and nature of the change that they anticipate will receive considerable scrutiny here.

As for the history of CRT, Richard Delgado will be our guide. When he took his first faculty position in the early 1970s, Delgado tells us, a white male elite dominated civil rights discourse in our law schools.[13] These "giants in the field," including some who were "strongly supportive of minority rights," published in the major law reviews and regularly cited one another's works in their efforts to build a civil rights discipline.[14] A few black academics were around, some of whom were writing in this area, but little, if any, effort was made to welcome them into the conversation.[15] Bell and Delgado, however, needed no invitation. Fervently arguing at the turn of the decade that whites did not—and probably could not—adequately represent minorities in these discussions, they helped crush the white civil rights cartel and encouraged a host of minority academics to enter the field.[16]

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11 Derrick Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 906 (1995).

12 Richard Delgado, *Critique of Liberalism*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 1 (Richard Delgado ed. 1995) [hereinafter CRITICAL RACE THEORY I]. Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlé Crenshaw have helped fill in the radical picture of race in America.

> Critical race theory recognizes that racism is endemic to American life. . . . [W]e ask how . . . traditional interests and values . . . federalism, privacy[, and] property interests . . . [s]erve as vessels of racial subordination. . . . Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindedness, and meritocracy. These claims are central to an ideology of equal opportunity that . . . tells an ahistorical, abstracted story of racial inequality as a series of randomly occurring, intentional, and individualized acts. . . . Critical race theory insists on recognition of the experiential knowledge of people of color. . . . [For this purpose we use] personal histories, parables, chronicles, dreams, stories, poetry, fiction and revisionist histories. . . .

MATSUDA ET AL., WORDS THAT WOUND 6 (1994).

13 Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 562-63 (1984); *see* Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Cases*, 85 YALE L.J. 470 (1976).

14 Delgado, *supra* note 13, at 563.

15 *See id.*

16 *See id.* at 566-73. I assume that the reader has some familiarity with the background of the CRT movement. *See* CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED A MOVEMENT, xii-xxxii (1995) [hereinafter CRITICAL RACE THEORY II] (for a more thorough treatment of the subject).

At about the same time, a leftist oppositionist movement calling itself Critical Legal Studies ("CLS") was arising. It held that the law is not apolitical, neutral or determinate and that therefore the law and legal institutions, including law schools, necessarily reflected and sustained power relationships. This group of primarily white scholars (known as CRITs[17]) gained considerable force at some of the major law schools. Scholars of color initially gravitated toward CLS. At a crucial point, however, rifts developed between CRITs and black scholars as the former criticized the academy's focus on legal rights, a perspective that black scholars were reluctant to abandon.

As an outgrowth of these two developments, a new school took root in the mid-1980s that subsequently called itself Critical Race Theory.[18] Within a few short years, in a remarkable turnabout, not only black, but also Latino/a and Asian writers were deeply engaged in race scholarship.[19] Their works, appearing in all the elite journals,[20] were regularly cited[21] and the new school came to dominate race discourse.

How did CRT manage such a stunning reversal? The most successful campaigns result from drawing opponents away from the battlefield. The CRATs did this with a potent weapon. White males tempted to participate in the conversation were condemned in advance as interlopers, even imperialists.[22]

> The time has come for white liberal authors who write in the field of civil rights to redirect their efforts and to encourage their colleagues to do so as well. . . . There are many other important subjects that could, and should, engage their formidable talents. As these scholars stand

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17 This acronym is commonly applied to CLS scholars. *See Introduction, in* CRITICAL RACE THEORY II, *supra* note 16, at xviii; *see generally* CRITICAL RACE THEORY I, *supra* note 12.

18 *See* Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717, 721 n.34 (1992) (for this new school a name was formally adopted at a convention in 1989). CRT can be fairly dated back to the early 1980s when Delgado joined Bell in writing about race.

19 A number of them were women. *See* Fred Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996).

20 The works that will be cited here, for example, appear, among other places, in the following law reviews: California (Berkeley), Colorado, Cornell, Duke, Harvard, Illinois, Michigan, Southern California, Yale. Harvard Press published Patricia Williams's first two books. *See* ROOSTER, *supra* note 1 and accompanying text; ALCHEMY, *infra* note 56 and accompanying text.

21 Among the most frequently cited authors reported in a recent study were a number of CRATs, including Richard Delgado, Mari Matsuda, Kimberlé Crenshaw, Charles Lawence III and Gary Peller. *See* Shapiro, *supra* note 19, at 758-61. The question is thus raised as to "whether the outsiders have become insiders in the legal academy. . . ." *Introduction, Symposium on trends in Legal Citation and Scholarship*, 71 CHI.-KENT L. REV. 743, 744-45 (1996).

22 *See* Delgado, *supra* note 13, at 577.

> aside, nature will take its course [through] talented and innovative minority writers and commentators. The dominant scholars should affirmatively encourage their minority colleagues to move in this direction, as well as to make the change possible.[23]

In effect, CRATs are saying: It's a black—or race—thing; you wouldn't understand. In an atmosphere heady with the prospects of a total surrender, CRATs lost interest in compromise and collaboration. The old guard had to go; and go it largely did.[24]

With control of race discourse in their hands, CRATs could turn their attention away from the academy and toward American culture in general. And this they have done with enthusiasm. Developing and then applying new methods for the purpose, and scouring the broad landscape of American life, they have found race and racism implicated in a terrifying array of institutions and practices.[25] African-Americans will never

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[23] *Id.*; *see also* Trina Grillo & Stephanie Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons between Racism and Sexism (or Other-isms)*, *in* CRITICAL RACE THEORY I, *supra* note 12, at 564, 569.

> [Whites] may believe that their opinions and judgments about race are as fully informed and cogent as those of victims of racism. In this circumstance, something approximating a lack of standing to speak exists because the insight gained by personal experience cannot be duplicated—certainly not without careful study of the oppression under scrutiny.

Id. at 569.

[24] *See* Richard Delgado, *The Imperial Scholar Revisited: Ten Years Later*, 140 U. PA. L. REV. 1349, 1353-55 (1992); *but see* Daniel Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (white scholar still addressing such issues). A small number of still younger white males have recently tried to articulate a role for themselves in the debate on race. Their voices, however, are curiously self-enfeebled. We need only listen to Peter Halewood:

> [P]rogressive, committed white male law teachers should engage in scholarship investigating the relation of law to social and political subordination, provided that they do so in ways that respond to . . . minority critiques of scholarship, and provided that in doing so they do not preempt or displace scholars who are . . . people of color. . . . [A] limited, contingent accountability can be *earned* by a white male scholar with sufficient dedication. However he must observe the cautions of the diminished stature of his scholarship implicit in the . . . critical race theory critique of epistemology. [The white scholar] should strive to become less the prevailing neutral expert (Kingsfield) or master theoretician (Kennedy) than an interpretivist, promoting the exploration of *someone else's* . . . perspective and insights in one's scholarship. . . . The legitimacy of white male scholarship, however, must be tested by the approval of the groups whose subordination one is interpreting in one's scholarship. If these groups voice objections to such scholarship, in particular instances or in general, then the white male scholar must reconsider whether he may legitimately proceed.

Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Scholarship*, 7 YALE J.L. & FEM. 1, 6-7, 10, 14, 25 (1995) (footnotes omitted).

[25] *See* Beverly Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 751-52 ("One main thrust of critical race theory is a belief that racial subordination is everywhere, a structural aspect of all parts of American society.").

fare well in America, in this view, until the spirit behind such cultural phenomena, largely blocked from the view of whites, is destroyed. This spirit can be thought of as white middle-class values.[26]

Whites, then, stand accused—and have remained (largely) undefended. Can a spirited defense be constructed? To what extent do proverbial logs (or even tree trunks) in their own eyes[27] preclude a useful assessment by CRATs?[28] More particularly, what responsibility, if any, can be assigned to minority groups for our deplorable social conditions and race relations? Is the function of CRT to validate anything and everything that African-Americans and some other minorities do[29] and, if so, what is the effect of that validation? Scholars, it is suggested, need to address all of these questions.[30]

The vastness of the territory annexed by CRT precludes, within the space of this article, a fair account of its reach. Accordingly, the article

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26 *See infra* notes 128-29, 209 and accompanying text.

27 *See Luke* 7:41-42 (King James).

28 *See* PAUL HARRIS, BLACK RAGE CONFRONTS THE LAW 144 (1997).

> We submit that it is necessary for a blackman in America to develop a distrust of his fellow white citizens. . . . He must cushion himself against cheating, slander, humiliation. . . . If he does not so protect himself, he will live a life of such pain and shock as to find life itself unbearable. For his own survival, then, he must develop a *cultural paranoia* in which every whiteman is a potential enemy unless proved otherwise and every social system set against him unless he personally finds out differently.

Id. (quoting WILLIAM GRIER & PRICE COBBS, BLACK RAGE (1968)) (providing first examination of black rage).

Is *cultural paranoia* thirty years later, still, on balance, adaptive behavior? *See, e.g.*, Clarence Page, SHOWING MY COLOR 60 (1996) (highlighting the effect of paranoia as a response to perceived racism. "Whether we actually are *subjected* to contempt or not we are enraged by the very vulnerability that makes us forever *subject* to it."). The more we allow ourselves to feel vulnerable, then, the greater the rage. And what, in turn, are the consequences of cultivating rage? *See, e.g.*, BELL HOOKS, KILLING RAGE: ENDING RACISM 18 (1995) ("My rage . . . burns in my psyche with an intensity that creates clarity. It is a constructive healing rage."); Kenneth Lasson, *The Tintinnabulation of Bell's Letters*, 36 WASHBURN L.J. 18, 22 (1996) ("'*The intoxication of anger, like that of the grape, shows us to others, but hides us from ourselves.*'") (quoting clergyman Caleb Cotton).

29 Consider one of Ice-T's rap lyrics: "I'm 'bout to bust some shots off. I'm 'bout to dust some cops off . . . die pig die." ICE-T, BODY COUNT (Warner Brothers Records 1992). How should these words be evaluated? Should we roundly condemn them as the destructive ravings of a madman? If not, do we need at least to evaluate the life experience of the lyricist? Apparently not. *See* MATSUDA ET AL., *supra* note 12, at 39 ("I would interpret an angry, hateful poem by a person from a historically subjugated group as a victim's struggle for self-identity in response to racism."). *See also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 124 (1992) (Regarding the condition of the underclass, what blacks in a perilous position need is "reassurance that others, not they, are the cause of the wretched circumstances in which they live . . . .").

30 *See, e.g.*, CORNEL WEST, RACE MATTERS ix (1993) ("'For the sake of one's children, in order to minimize the bill *they* must pay, one must be careful not to take refuge in any delusion—and the value placed on the color of the skin is always and everywhere and forever a delusion. . . .'") (quoting JAMES BALDWIN, THE FIRE NEXT TIME (1963)).

will confine itself to a few basic themes. Part I focuses on CRT methods and how these methods have drawn minority academics to race theory while keeping potential critics at bay. Part II, *The Culture of Complaint*,[31] presents and evaluates some CRAT challenges to American culture. The first section in Part II evaluates the claim that integration, by eviscerating minority cultures, has led to the disintegration of minority communities. CRT positions on the notion of merit and on national immigration policy are examined here. The following sections deal briefly with CRAT critiques of such cultural artifacts as affirmative action and free speech, whose *raison d'être* is to protect nonmajoritarian elements. Parts III and IV explore in detail CRT positions on two aspects of social life that have drawn considerable public attention over the past decade—the decline of traditional family structure and crime. The Conclusion illustrates how I use the very techniques touted by CRATs to reach dramatically different policy judgments from the ones they make.[32]

I. THE METHOD AND THE MADNESS

> And while slavery is over, a racist society continues to exert dominion over black men and their maleness in ways more subtle but hardly less castrating than during slavery . . . .[33]

"Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings [in our] legal and political discourse. . . . They can show that what we believe is ridiculous, self-serving or cruel."[34] Storytelling, as will soon be clear, is a central feature of CRT dis-

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31 The title of this Part is lifted from the eponymous book by Robert Hughes published in 1993.

32 Parts III, IV, and the Conclusion are where my work differs most from that of Farber and Sherry. *See, e.g.*, FARBER & SHERRY, *supra* note 8 and accompanying text.

33 DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 205 (1987).

34 Richard Delgado, *Legal Storytelling; Storytelling for Oppositionists and Others: A Plea for Narrative*, *in* CRITICAL RACE THEORY I, *supra* note 12, at 65; *see* JAMES BOYD WHITE: HERACLES'S BOWS: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); WHEN WORDS LOSE THEIR MEANING (1984); THE LEGAL IMAGINATION (1973) (first to point out the usefulness of the narrative form in legal writing); *see also* Robert White, *Violence and the Word*, 95 YALE L.J. 1601 (1986). On the other hand, there is a long-recognized and strong tendency for storytellers to massage the stories they tell. *See, e.g.*, DAVID NYBERG, THE VARNISHED TRUTH 48 (1993); RICHARD POSNER, LAW AND LITERATURE 349 (2d ed. 1998).

> The significance of a story of oppression depends on its representativeness. In a nation of a quarter of a billion people, almost every ugly thing that can happen will happen. To react on the plane of policy sensibly . . . we have to know its frequency—a matter in the domain of social science rather than of narrative.

Id. A fuller evaluation of the literature on the narrative is beyond the scope of this article.

course;[35] indeed, since 1989, when these words were written, a thousand stories have bloomed.

Columbia University law professor Patricia Williams recounts a number of these stories in her book, *The Rooster's Egg*.[36] For example, while perusing the shelves of a five-and-dime store not long ago, she noted that some dolls were marked for sale at $3.99 each, while others, originally priced at $2.99, were marked down to the "must sacrifice" price of $1.99.[37] Since price differentials for similar goods are common, Williams at first made nothing of this one. But then she noticed that the cheaper dolls were identical to the more expensive ones in every respect but one: they were black.[38] Williams became distraught. Racism was "being made 'rational'. . . by market forces."[39] For Patricia Willams this story "captures" the "devalued condition" of blacks in America and the "absolute necessity of a corrective response. . . ."[40]

The cruel power of the market for Williams extends not only over the inanimate world but also, and most painfully, over flesh and blood. She tells of how she came to adopt a child.[41] When asked about ethnic preference, she is offended; she tells the agency that color does not matter.[42] When the time comes to pay, she learns that the fee for "older, black, and other handicapped" children is half of what it otherwise would be.[43] A frightening world opens up for Williams. She wonders how her son's "price" at birth [will] relate to what value doctors put on his various parts if he ever stubs his toe and shows up in a hospital, [whether he will be valued] more as a series of parts in the marketplace of bodies or more as a whole, as a precious social being with not just a body or a will but a soul.[44]

Who will rule the fate of this most precious bit of "living property"?[45] "[U]nable to conspire in putting a [lesser] price on [her] child's head,"[46] Williams ends up paying full price.[47]

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35 *See* Moran & Whitford, *supra* note 25, at 756 and accompanying text. Legal storytelling as a phenomenon dates back to about 1980. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

36 ROOSTER, *supra* note 1, at 105 and accompanying text.

37 *See id.* at 105-06.

38 *See id.* at 106.

39 *Id.*

40 *Id.*

41 *See id.* at 218-25.

42 *Id.* at 222.

43 *Id.* at 223.

44 *Id.* at 224.

45 *Id.* at 225 (Williams acknowledges her debt to Harriet Beecher Stowe for this term).

46 *Id.*

47 While claiming the high ground of rejecting the benefits that flow from the different "market prices" of adoptive children, Williams has, of course, enjoyed at least one of them—she was able to adopt an infant boy. *Id.* at 219.

Just why is Williams telling these stories? Is she using the oppositionist's craft to reveal new fault lines in the already dangerous terrain of race relations? Is she seeking to create new ones? Or, we might ask, is she just telling stories?[48]

As for the dolls, is Patricia Williams showing herself too ready to extract a global message from one experience? Is it racist, moreover, for a child to want a doll that looks like herself[49] or sexist when she favors a female doll over a male one? If it is the doll story—among all available evidence—that highlights "the absolute necessity"[50] for change, should the storeowner be presumed more interested in making a statement than a profit on her merchandise? Might the price differential for the dolls not reflect the impact of the harsher economic circumstances for blacks in our society, a condition that Williams never allows her readers to forget? If so, what relevance would this have? Would Williams have experienced less distress if the $1.99 dolls were of distinctly inferior quality or if the storeowner did not stock black dolls at all because of their lower turnover? Finally, let us suppose that the black dolls regularly sold not for $3.99, but for $5.99.[51] Surely Williams would not conclude that the prices reflect the skyrocketing status of blacks.[52]

The adoption story evokes similar responses. If there are more black babies available for adoption, for example, which is more cruel or ridiculous: To recognize supply and demand functions while trying to find a home for babies? Or to seek to preserve hobgoblinal equalities in "price"? And other, more subtle, questions arise as well. Is it ethical to have, let alone express, preferences for gender and race in adoption mat-

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48 *See* LOUISE HARMON & DEBORAH W. POST, CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING 189 (1996) ("And I [Deborah Post] prefer a different literary device, narrative. I like to tell stories. I think of stories as a form of logic, and that is why I use them.").

49 If it is, some of us are going to have a real problem. The *Brown v. Board of Education* decision, if the opinion is to be accepted at face value, was at least partially premised on research showing that black girls were favoring white dolls. 347 U.S. 403, 494 n.11 (1954). *See* RICHARD KLUGER, SIMPLE JUSTICE 313-18, 330-31 (1975) (describing (recently contested) doll experiments conducted by Kenneth B. Clark). If preferring a doll of the same color is evidence of psychopathology—as is preferring one of a different color—what is a doll-lover to do?

50 ROOSTER, *supra* note 1, at 106 and accompanying text.

51 We can imagine that the manufacturer had to charge more for the phenotypically-correct black dolls because the fixed cost of their production had to be spread over fewer dolls.

52 An anonymous referee writes of my work: "Of course every story can be recast, but it is the symbolism of the narrative that matters, not the truth of the conclusions. . . . The author here is being literal without defending why literal reading is a necessity in scholarship. . . . The question is one of possible interpretation; can we learn from it?" (correspondence on file with author). *See infra* Part II (for discussion).

ters? Finally, is Williams, the CRAT and storyteller, fully credible when she claims indifference to race?[53]

Williams helps us answer none of these questions.[54] Nor does she offer practical solutions to the problems she raises. May we not then conclude, if only tentatively, that her heated prose is largely the product of the terrible frustration felt by most feeling people over an intractable and unacceptable racial status quo? But while helpful in understanding Williams's work, this notion does not explain one of its most distinctive features. So we ask: How has it come to pass that Patricia Williams—and, as we shall soon see, a goodly number of her CRT colleagues—take the slightest opportunity to find a slight?[55]

A. A NEW WAY OF TRUTH

To answer this question we must focus on the development of CRT in some detail. It seems fair to say that CRT was never designed as a discipline for ascetics content to produce incremental truths through the suppression of personal preference and the painstaking weighing of evidence. Rather, CRT is a movement whose objective has been nothing short of shaking the existing epistemological and ontological orders. Traditional legal scholars imagine that they have already mastered the Word, suggests Williams, and that with but a little more effort, "superunderstanding" is within their grasp.[56] But she says they are misguided.[57] Their thinking exhibits some fundamental flaws, among them (1) "[t]he hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication,"[58] and (2) "[t]he existence of objective, 'unmediated' voices, [such as those of judges,

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53 Consider the title of Williams's first book, *The Alchemy of Race and Rights*, or the subtitle to the one under discussion, *On the Persistence of Prejudice*.

54 Perhaps she believes that she does not have to do so. *See* Halewood, *supra* note 24, at 13 ("The critical literature demonstrates that white male academics must defer to others' epistemology, others' account of subordination.").

55 One way is to avoid questioning one's responses to life experiences. *See* Catherine Wells, *The Theory and Practice of Being Trina*, 81 MINN. L. REV. 1381, 1387 (1997).

> One thing I learned [from Trina Grillo] was that I should not overlook the racist and sexist incidents in my own life. . . . [D]etachment [allows me] to think about these problems in serious and constructive ways: . . . [This] process has grounded me in my own perspective. I no longer think about whether I *should* be offended. Instead, I am able to know that I *am* offended. The result is a feeling of wholeness that has made me less angry but more determined.

Id. (emphasis in original). The *Minnesota Law Review* dedicated volume eighty-one to Trina Grillo, who was a great influence on Wells. *Dismantling The Master's House: Essays in Memory of Trina Grillio*, 81 MINN. L. REV. 1377 (1997).

56 PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS, *Preface*, (1991) [hereinafter ALCHEMY].

57 *Id.*

58 *Id.* at 8; *see also* MOLEFI KETE ASANTE, AFROCENTRICITY 58-65 (1988).

lawyers and logicians, through whom] those transcendent, universal truths find their expression."[59] We can now understand the partiality of Williams, and of CRATs in general, to stories[60]— because stories neither analyze nor appeal to authority they do not mislead. And since "abstract analysis and formal empirical research are less appropriate than stories for communicating the understandings of women and people of color,"[61] it follows that the latter can bring us closer to the truth than can traditional methods of scholarly discourse.

If CRATs have the tools to see the world holistically, their mission should be clear. They must endeavor to break down categories, Williams says, and she works to "reveal[ ] the [subtle] intersubjectivity of legal constructions, that forces the reader both to participate in the construction of meaning and be conscious of that process."[62] This will be hard work, acknowledges Williams, but there is a reward—personal liberation:

> [B]oundary crossing, from safe circle into wilderness[,] . . . [i]s the willingness to spoil a good party and break an encompassing circle . . . . The transition is dizzyingly intense, a reminder of what it is to be alive. It is a sinful pleasure, this willing trangression of a line, which takes one into a new awareness, a secret, lonely and tabooed world—to survive the transgression is terrifying and addictive. . . .[63]

What a heady prospect for the stereotypically repressed academic! Regina Austin[64] offers academics even wilder pleasures. She writes:

Whites, or at least white males, may be at a substantial disadvantage in developing a higher consciousness. HARMON & POST, *supra* note 48, at 22-55 (A four-step scale of cognitive growth first developed by William Perry, and later refined by Lee Knefelkamp, is described and further refined). Under this construct, cognitive development begins with step one, *duality*—where the world appears in black and white and questions have answers. It proceeds to *early multiplicity* and then *late multiplicity,* where truth and meaning are understood to come in many shades. The process ends with contextual relativism. According to Perry, as accepted by Post, minorities and women *begin* at step three. *Id.* at 63, 141. At what step, one wonders, do they develop caution about stereotyping?

59 ALCHEMY, *supra* note 56, at 9. It is hard to imagine even the most unenlightened legal scholar claiming ready access to "transcendent, universal truths."

60 Charles Lawrence, *The Word and the River, Pedagogy as Scholarship as Struggle, in* CRITICAL RACE THEORY II, *supra* note 16, at 344-45 ("We must 'flood the market with our stories.' Only when these stories are told will we begin to recognize the distortions of traditional legal analysis [and] to shape a new public discourse. . . . Patricia Williams's work . . . [is] exemplary in [its] use of narrative. . . .") (quoting Robin West).

61 Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 810 (1992) (offering a useful and comprehensive, if not altogether persuasive, view of the value of storytelling in the academic setting).

62 ALCHEMY, *supra* note 56, at 7-8.

63 *Id.* at 129. I have to agree with Williams here.

64 Professor of Law, University of Pennsylvania Law School.

> I grew up thinking that "Sapphire" was merely a character on *Amos 'n' Andy*, a figment of a white man's racist/sexist comic imagination. . . . Sapphire is the sort of person you look at and wonder how she can possibly stand herself. All she does is complain. Why doesn't that woman shut up?[65]

After pondering whether blacks should renounce or embrace her, Austin concludes that "the time has come for us to get truly hysterical, to take on the role of 'professional Sapphires' in a forthright way . . . to testify on her own behalf, *in writing*, complete with footnotes."[66]

What precisely should CRT's mission be? "[O]ur jurisprudence should create enough static to interfere with the transmission of the dominant ideology and jam the messages that reduce our indignation, limit our activism, misdirect our energies, and otherwise make us the (re)producers of our own subordination."[67]

Given this rhetoric of victimization, could CRT develop free from stultifying self-righteousness?[68] And when that rhetoric is combined with that of transgression, provocation and transcendence—especially in the absence of fully-elaborated critiques to provide discipline[69]—would

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65 Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539-40 [hereinafter *Sapphire*].

66 *Id.* at 542 (emphasis in original). To set the appropriate tone—though without providing the footnotes—Austin announces that "Black bitch hunts are alive and well in the territory where minority female law faculty labor." *Id.* at 540; *see also* Sumi Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Susie Wong*, *in* CRITICAL RACE FEMINISM 203, 204 (1997) ("At almost every campus I have been on both as a student and faculty member I have encountered appalling cases of sexual harassment against Asian Pacific and Asian Pacific American women.") (Like Austin, Cho provides no supporting footnotes.).

67 *Sapphire, supra* note 65, at 544.

68 *See* Michael Dyson, *Seeing the Simpson Verdicts in Black and White*, NEWSDAY, Feb. 9, 1997, at G5.

> Whites who have benefitted whether explicitly or unconsciously, from racial inequality must now be courageous in rejecting a belief in the moral equivalency of black and white views about race. [Dyson also defends verdicts like the one in the O. J. Simpson case in the light of the principle where] white skepticism about black juries' ability to convict black criminals doesn't have the same moral gravity as the claims of blacks victimized by a legacy of racial injustice.

Id. But without denying the powerful claim of blacks to be heard on racial matters, is the principle of *my claim trumps yours* not only an invitation to, but also a guarantee of, gross abuse and therefore of dubious operative value in any specific case?

69 *See* Randall L. Kennedy, *My Race Problem—and Ours*, ATLANTIC, May 1997, at 65. Do groups that have been kept down also need such discipline or does their oppression serve as an adequate substitute?

> [U]nless inhibited every person and group will tend towards beliefs and practices that are self-aggrandizing. This is [not only] true of those who inherit a dominant status, [b]ut [also] of those who inherit a subordinate status. . . . Surely one of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents it-

it be surprising if CRT attracted those who are champing to shuck the coils of traditional scholarly rigor and self-restraint?[70] Indeed, could CRT avoid evolving into How Dost Thou Offend Me: Let Me Count the Ways?[71]

B. AND THE CONSEQUENCES

Having traced a major strand in the development of CRT, we turn now to the strands' effect on the relationships of CRATs with each other and with outsiders. As the foregoing material suggests, the central CRT message is not simply that minorities are being treated unfairly, or even that individuals *out there* are in pain—assertions for which there are data to serve as grist for the academic mill—but that the minority scholar himself or herself hurts and hurts badly.

An important problem that concerns the very definition of the scholarly enterprise now comes into focus. What can an academic trained to

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> self. . . . [Thus] it is not premature to worry about the possibility that blacks or other historically subordinated groups will abuse power to the detriment of others.

Id.

[70] *See* HARMON & POST, *supra* note 48, at 9. Would any non-CRAT scholar open her book as follows? "Louise, I have a confession to make. This research is about vindication. I know it's dangerous to begin a project with the hope and expectation that my own beliefs will be vindicated, but that's what this research is all about. Self-affirmation is seductive." *Id.* Is only Professor Post being forthright while the rest of us are happy in our self-delusion? Perhaps. But if we do not make self-affirmation an explicit goal there is at least a chance that contrary evidence will change our minds.

[71] *See, e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, in* CRITICAL RACE THEORY I, *supra* note 12, at 322, 329. Chang is offended by the notion that Asian-Americans are a model minority. *Id.* His indignation is fueled by a variety of studies, including one showing that in 1980 Japanese Americans had 5 percent more years of education and worked 2 percent more hours than whites, yet they earned the same. *Id.* Chang further objects because:

> [T]he model minority myth works a dual harm by hurting other racial minorities and poor whites who are blamed for not being successful like Asian Americans. "African-Americans and Latinos and poor whites are told, 'look at those Asians—anyone can make it in this country if they really try.'" This blame is justified by the meritocractic thesis supposedly proven by the example of Asian Americans. . . . To the extent that Asian Americans accept the model minority myth, we are complicitous in the oppression of other racial minorities and poor whites . . . . This blame and its consequences create resentment against Asian Americans among African Americans, Latinos, and poor whites.

Id. By this account, then, reference to the staggeringly successful adaptation of so many Asians to American conditions is offensive. What this means is that Asian-American assimilation should go unmentioned and unexamined—not because it is not true, or because even if true it is not flattering, or because even if in a way flattering it suggests a willing rejection of indigenous culture, but because it creates tensions with other Americans.

It is surely because of arguments such as Chang's that Henry Louis Gates suggests that academia should consider recognizing the minority faculty member who is "most oppressed; at the end of the year, we could have the 'Oppression Emmy' Awards." HENRY LOUIS GATES, LOOSE CANONS: NOTES ON THE CULTURE WARS 185 (1992).

question and to doubt[72] possibly say to Patricia Williams when effectively she announces, "I hurt bad"?[73] "No, you don't hurt"? "You shouldn't hurt"? "Other people hurt too"? Or, most dangerously—and perhaps most tellingly— "What do you expect when you keep shooting yourself in the foot?" If the majority were perceived as having the well-being of minority groups in mind, these responses might be acceptable, even welcomed. And they might lead to real conversation. But, writes Williams, the failure by those "cushioned within the invisible privileges of race and power . . . to incorporate a sense of precarious connection as a part of our lives is . . . ultimately obliterating."[74]

"Precarious." "Obliterating." These words will clearly invite responses only from fools and sociopaths; they will, by effectively precluding objection, disconcert and disunite others. "I hurt," in academic discourse, has three broad though interrelated effects. First, it demands priority from the reader's conscience. It is for this reason that law review editors, waiving usual standards, have *privileged* a long trail of undisciplined—even silly[75]—destructive and, above all, self-destructive arti-

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72 *See* JACOB BRONOWSKI, THE ASCENT OF MAN 360 (1973) ("It is important that students bring a certain ragamuffin, barefoot irreverence to their studies; they are not here to worship what is known but to question it.").

73 ROOSTER, *supra* note 1, at 198-99. Williams describes a particularly painful experience when a blond, blue-eyed woman chastised her after she remarked to the woman that she did not "look Chicano [sic]." *Id.* at 199. Williams cried, she tells us, as she revealed her reaction to being told that she did not sound black. *Id.* Williams goes on to tell of a Chicano friend who complains "bitterly" when "non-Hispanics affect fractured, macho-aspiring 'Spanishisms' like the Terminatoresque 'Hasta la vista, baby.'" *Id.*

74 *Id.* at 200. A good example might be a joke told on a Phil Donahue show devoted to the subject of princess stereotypes and anti-semitism. What is the recipe for Jewish American Princess Fried Chicken? "Send your chauffeur to your favorite butcher shop for the chicken" and "Watch your nails" when you shake it. "Have cook prepare the rest of the meal while you touch up your make-up." *Id.* at 118. Williams writes that "there is a real risk of destructive impact in jokes that make fun of the supposed characteristics of historically oppressed and shunned people." *Id.* at 113.

It is not only Jews who need to be protected from brutish jokesters, according to Williams, it is also rednecks—"[d]rinks beer, drives a pickup, low-class, talks bad"— and even, it seems, blonds. *Id.* at 114. The world, as Horace Walpole has suggested, may well be a "comedy to those that think, [but it is] a tragedy to those that feel." Horace Walpole, *Letters to the Countess of Upper Ossory* (August 16, 1776), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 324 (16th ed. 1992).

The sensibilities of minorities are so raw that humor cannot—must not—be used against them even in political and social debate where, customarily, robust discourse can be helpful. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, FAILED REVOLUTIONS 129 (1997). Though considering satire a useful rhetorical device and with a long and distinguished history, Delgado and Stefancic warn that "Satire, sarcasm, scorn, and similar tools should only be deployed upwards, at actors and institutions more empowered than oneself," never downwards. *Id.* But people positioned at the highest levels of legal academia, I suggest, have no claim to special dispensations.

75 This characterization may help frame an important philosophical issue in the debate over CRT. *See* FARBER & SHERRY, *supra* note 8, at 3 ("'I should be happier [keeping quiet] if I did not believe that it matters, it always matters, to name rubbish as rubbish, that to do

cles.[76] Second, by emphasizing the emotional bond between those who hurt in a similar way, "I hurt" discourages fellow sufferers from abstracting themselves from their pain in order to gain perspective on their condition.[77]

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otherwise is to legitimize it.'") (quoting Salman Rushdie). For CRATs, however, rubbish-bashing is highly problematical. *See* Deborah W. Post, *Power and the Morality of Grading—A Case Study and A Few Critical Thoughts on Grade Normalization*, 65 UMKC L. REV. 777, 812 (1997).

> The importance of nonsense hardly can be overstated. The more clearly we experience something as 'nonsense,' the more clearly we are experiencing the boundaries of our own self-imposed cognitive structures. 'Nonsense' is that which does not fit into the prearranged patterns which we have superimposed on reality. There is no such thing as 'nonsense' apart from the judgmental intellect which calls it that.

Id. (quoting GARY ZUKAV, DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS (1980)). It is a truism, of course, that things that appear to be foolish can turn out not to be so. So Post and Zukav, smart people that they are, seem to be saying something more, to wit, that "nonsense" has no meaning; that nothing is nonsense; that all positions make sense. *Id.*; *see* DELGADO & STEFANCIC, *supra* note 74, at 128-29 (appearing to concur in this assessment). Why, one wonders, does nonsense need such a strong defense? *See* Dan Subotnik, *The Joke in Critical Race Theory*, (forthcoming) (for more on the effect and use of jokes).

[76] Perhaps "self-serving" should be added to the list. Consider the possible motive of those asserting "different" black epistemologies and styles. *See* Trina Grillo, *Tenure and Minority Women Law Professors: Separating the Strands*, 31 U.S.F. L. REV. 747, 754 (1997) (writing in the year when she was being considered for promotion).

> Maybe we should hire all minority women with tenure. While this is not exactly a likely development, it does make a fair amount of sense—the experience of minority women faculty is so different from that of other faculty that it is hard for other faculty to make realistic evaluations.

Id.; Sumi Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1033, 1037-38 (1997) (strongly defending the application of affirmative action to upper middle-class minority families, presumably like her own). If it is critically important to carefully examine claims to neutrality and objectivity in legal discourse—surely the strong self-interest of CRATs in the foregoing positions needs to be considered.

The privileging of CRT articles may have had the indirect result of making it harder to get articles published that challenge CRT. Consider that this article has been rejected in writing by no fewer than forty-seven law reviews (including one that is faculty-run) and that an additional fifty law reviews either rejected the article over the phone or effectively rejected it through inaction. Though some law reviews informally said that they would publish this article but for its controversial subject matter, only one student law review, the present journal, was willing to publish this piece on a free-standing basis. Is there an irony here also begging to be explored? *See* Delgado, *supra* note 13, at 566. CRATs have changed the paradigm and laid the foundation for an explosion of CRT writing. But if they have succeeded in their efforts to the point where excellence is now defined in a way that precludes opposition to CRT, have CRATs not undermined the commitment to diversity that was ostensibly the basis of their challenge in the first place?

[77] *See, e.g.*, CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 30 (1997).

> The public expression of pain summons God into our presence. . . . When we acknowledge pain that comes from oppression or racism or alienation or violence there is a moment of epiphany when we can see that our pain is shared. In this moment, we have a chance to breach the barriers that divide us.

Id. (quoting an unnamed theologian). Who will be so bold as to challenge a colleague's expression of pain and thus risk banishing the Divine Presence from the scene? *See, e.g.*,

Last, as we have seen, it precludes the possibility of open and structured conversation with others.[78]

Deborah W. Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136, 163 (1990-91):

> Two things are forbidden: (1) The public criticism of those who have chosen to confront the majority, to condemn cultural domination and the more coercive elements of the politics of assimilation, and (2) conduct which offers apologies for injustice, belittles members of the group . . . or aids and abets acts of oppression. [Each of these] is an act of betrayal tantamount to treason.

Id. Is it any wonder that, "so many [blacks] are afraid of being called self-hating or neoconservative that we function too often like espionage operatives who cannot be expected to tell the truth publicly for fear of being castigated unto unemployment or ostracized as traitors"? STANLEY CROUCH, THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF RACE 53 (1995).

> Were a black Balzac writing material about, say, Washington, D.C., the charge of self-hatred would quiver with rage from the pages of reviewers. . . . If we are to rise above the mud of racial limitation and put our experience within the largest possible context, we have to go far beyond the overstated racial paranoia and insecurity that can ensure the success that results from guilt-ridden responses. We have to assert our human heritage and understand where we truly come from in intellectual and moral terms, which means that we must be willing to let the dogs bark as our caravan moves by.

Id. at 53-54.

Less heavy-handed than Post, but no less determined to keep CRAT attention directed outward, Delgado suggests that it is "too early" to evaluate CRT, "if it is ever a good idea [to do it, and that] CRT should devote its efforts to critiquing social institutions, legal doctrine and the culture of racism—not itself or its own members." Richard Delgado, *The Inward Turn to Outsider Jurisprudence*, 34 WM. & MARY L. REV 741, 766 (1993). To the best of my knowledge, Delgado has not yet authorized, much less authored, such a study. Given these rules of engagement, it should not be surprising that few dissenting black academic voices, whether within or outside CRT, have been recorded. It is the failure of insiders to record disagreement with one another that makes it seem fair to treat CRT as a unified school.

[78] *See, e.g.*, JEFFREY TOOBIN, THE RUN OF HIS LIFE 381-82 (1996). You do not have to be a certified CRAT to appreciate this principle. No one has played the "You hurt me" card to greater advantage than Johnnie Cochran. For instance, Robert Heidstra, Nicole Simpson's neighbor, testified that he was walking his dogs on the night of the murders. *Id.* At one moment during the O.J. Simpson double murder trial, Prosecutor Christopher Darden was telling the judge about a report that at the time of the murder a neighbor had "heard the very angry screaming of an older man who sounded black . . . ." Toobin reports what happened next:

> "I resent that statement," he [Cochran] thundered. "You can't tell by someone's voice when they're black. I don't know who's made that statement, Baret or Lange. That's racist." Cochran continued his tirade. "This statement about whether somebody sounds black or white is racist, and I resent it. . . . I think it's totally improper in America, at this time in 1995, just to hear this and endure this."

Id. at 381-82 (end of discussion).

Am I being unfair, insensitive or worse in questioning Cochran's sincerity? I do not think so. If there is an African-American culture—a question we shall return to—a comment that someone sounds black should be no more offensive than that the person sounds like a New Yorker. This is especially the case since the comment was obviously not meant as a putdown. Most important in helping to evaluate Cochran's reaction is a conversation that began just as the other ended. Pulling Cochran aside, Carl Douglas, his assistant who is black had a brief interchange with his boss:

It is because of this conversation-stopping effect of what they insensitively call "first-person agony stories" that Farber and Sherry deplore their use. "The norms of academic civility hamper readers from challenging the accuracy of the researcher's account; it would be rather difficult, for example, to criticize a law review article by questioning the author's emotional stability or veracity."[79] Perhaps, a better practice would be to put the scholar's experience on the table, along with other relevant material, but to subject that experience to the same level of scrutiny.

If through the foregoing rhetorical strategies CRATs succeeded in limiting *academic* debate, why do they not have greater influence on public policy? Discouraging white legal scholars from entering the national conversation about race,[80] I suggest, has generated a kind of cynicism in white audiences which, in turn, has had precisely the reverse effect of that ostensibly desired by CRATs. It drives the American public to the right and ensures that anything CRT offers is reflexively rejected.

In the absence of scholarly work by white males in the area of race, of course, it is difficult to be sure what reasons they would give for not having rallied behind CRT. Two things, however, are certain. First, the kinds of issues raised by Williams are too important in their implications

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> "If you said that to rattle Darden, it was brilliant . . . if you said it because you believe it, I disagree." Cochran brushed him off. Douglas refused to drop the matter. "It was both" [Cochran insisted]. "Of course, I wanted to rattle him. But I also think it was racist to say that about how a voice sounds." "Johnnie, that's bullshit," Douglas retorted.

LAWRENCE SCHILLER & JAMES WILLWERTH, AMERICAN TRAGEDY 509 (1996).

White retreat from those areas of cultural life where minorities express special sensibilities should not be overstated. White authors of constitutional law textbooks do not ignore the problem of employment discrimination because minorities are the ones primarily affected. But it is worth considering their skittishness on such subjects. *See* DANIEL FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY vii (1993)

> We need to admit up front our collective disadvantage in making multiculturalism a focus of this book. We are three bland middle class white men whose academic careers have focused on mainstream doctrine and the application of positive political theory to public law issues. Though one of us . . . is a Jew and one of us . . . is a gay man, we have not experienced exclusion in the same way as women, lesbians, Asians, African Americans, Hispanics, and Native Americans. Partly for this reason, in our treatment of discrimination-related issues, we have relied less on our textual exposition of different points of view . . . and more on excerpting the view of scholars whose work reflects other perspectives.

Id. at vii n.4. Is this, we might ask, a useful position for a trained academic to take? Are readers not well-advised upon reading these words to put the book down and look elsewhere for enlightenment?

79 Farber & Sherry, *supra* note 61, at 836.

80 *See, e.g.*, DALTON, *supra* note 2, at 94 ("The idea that affirmative action is bad because it stigmatizes those it seeks to benefit" is not just benighted, it is an example of 'soft racism.'").

for American life to be confined to communities of color. If the lives of minorities are heavily constrained, if not fully defined, by the thoughts and actions of the majority elements in society, it would seem to be of great importance that white thinkers and doers participate in open discourse to bring about change. Second, given the lack of engagement of CRT by the community of legal scholars as a whole, the discourse that should be taking place at the highest scholarly levels has, by default, been displaced to faculty offices and, more generally, the streets and the airwaves.

C. WHAT IS TO BE DONE

Since such a situation cannot be salutary, we need what Williams has so substantially contributed to, and what she has called, that "long-overdue national dialogue about race, gender . . . and all the other divisive issues that block the full possibility of American community."[81] Williams recognizes, as many others surely will, that such discourse will be painful. But "we must get beyond the stage of halting conversations filled with the superficialities of hurt feelings."[82]

In sum, what is needed is to crack the "hermetic bravado celebrating victimization and stylized marginalization"[83] that leads to the virtual hegemony on the discussion of race relations that the academic community

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81 ROOSTER, *supra* note 1, at 186. You do not have to be a CRAT to believe that a certain artificiality characterizes current discourse on the subject of race. *See also* Shelby Steele, *The Race Not Run*, NEW REPUBLIC, Oct. 7, 1996, at 26. For Shelby Steele, what passes for such discourse is but a dance of dissimulation. Instead of giving rein to the full range of thoughts and feelings, both whites and blacks tend to scale back their discourse to avoid feelings of vulnerability. For whites, according to Steele, that vulnerability is that they are racist; for blacks it is that they are inferior. *Id.* So a bargain is struck. Individual whites will defer to black claims of victimization in return for which they will not be called racist.

> At the center of national social conscience is the idea that virtue is served more by helping people hide from their vulnerabilities than by helping them to overcome them. [But this accomplishes little.] An activism of deference will not affirm that whites are not racist (uncritical deference to the black "victim" is a form of racism). And the insistence that black difficulty is still the result of racism will not affirm blacks against the stereotype of inferiority.

Id.

82 ROOSTER, *supra* note 1, at 24. In calling for active participation by whites in the debate on race, I do not, like Williams, want to emphasize the intense cathartic pleasure such participation would bring. ALCHEMY, *supra* note 56. To be sure there would be enormous satisfaction for many whites in easing the burdens of guilt laid on them by CRATs, in countering anger with anger, in pulling down the Ozian curtain on humbug and can not, in short, in reestablishing a rhetorical balance. White law academics should, rather, be motivated by Richard Posner, who has suggested that criticizing CRT may "oddly . . . save [it]. White scholars have largely ignored this movement. This has been no favor to it. Criticism is the oxygen of a scholarly movement." Richard Posner, *Beyond All Reason*, NEW REPUBLIC, Oct. 13, 1997, at 42 (book review).

83 This phrase is attributed to Todd Gitlin in Robert S. Boynton, *The New Intellectuals*, ATLANTIC, Mar. 1995, at 53, 66.

has ceded to CRATs. No matter how raw sensibilities might understandably be after centuries of slavery and racism, a position must be staked out that allows for a rejoinder to a Derrick Bell when he says self-mutilating things like "while slavery is over, a racist society continues to exert dominion over black men and their maleness in ways more subtle but hardly less castrating. . . ."[84] Locating that position is precisely what is attempted here.

CRT encompasses the works of a great many authors. Accordingly, I quote as many sources as my reading and space permit. At the same time, in the interests of a more consistent and thematic exposition, I focus particularly on the oeuvre of two notable CRATs, Patricia Williams and Regina Austin.[85]

Why Professor Williams? Most importantly because she is, according to Cornel West, "a towering public intellectual of our time [who] articulates a synoptic vision, synthetic analysis, and moral courage with great power."[86] And why *The Rooster's Egg* in particular? Harvard Professor Sacvan Bercovitch calls it "a stunning achievement . . . a prophetic

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[84] BELL, *supra* note 33, at 205 and accompanying text; *c.f.* Daryl Scott, CONTEMPT & PITY 180 (1997) (Social science is a "'propaganda device which functions to rationalize racist institutions' . . . . [A point illustrated with the representation of] "black males as psychologically impotent and castrated.") (quoting sociologist Robert Staples). Did Professor Scott anticipate Bell when he wrote that "damage imagery has ever served the cause of hegemonic political ideology"? *Id.* at 202. We have not, I suggest, even begun to assess the damage flowing from what can be called the CRAT theory of pencilism.

Consider also in this regard Bell's pronouncement on the employment scene: "[R]acial Discrimination in the workplace is as vicious—if less obvious—than it was when employers posted signs 'no negras need apply.'" BELL, *supra* note 33, at 5. I do not wish to suggest that Bell's excesses have provoked no response. *See* Leroy Clark, *A Critique of Professor Derrick Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23 (1995) (an excellent article); *see also* RANDALL L. KENNEDY, RACE, CRIME AND THE LAW 389-90 (1997) ("The most salient feature of race relations at the end of the twentieth century is its complexity—a complexity that renders unfit as [a] guide to action . . . the claim that racial bias is as dominant now as it once was.").

[85] In drawing on the CRT literature, I have tried hard to avoid misrepresenting the views being assessed. Accordingly, I have endeavored to limit paraphrasing—even at the cost of brevity—so that writers can speak in their own voices.

[86] ROOSTER, *supra* note 1, at book jacket. Moreover, Williams is a paradigm "outsider" scholar. *See* Mary Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 712, 713 (1992) (Outsider scholarship should be judged by its "ability to advance the interests of the outsider community [with] definitionally . . . high marks [given] to the works of Patricia Williams."); Jerome McCristal Culp, Jr., *You Can Take Them To Water, But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021, 1034 (1992) ("There is no better writer in American legal education today than Patricia Williams."); MICHAEL ERIC DYSON, RACE RULES: NAVIGATING THE COLOR LINE 74 (1996) (asserting that Williams is "astonishingly smart"); Robin West, *Murdering the Spirit: Racism Rights and Commerce*, 90 MICH. L. REV. 1771, 1773 (1992) (Williams's groundbreaking success in "[t]he use of narrative, the insistence on the acknowledgment of authorial perspective, and the blending of interpretation and objective analysis . . . [have] gone a long way toward rendering [her method] noncontroversial, [and indeed,] set an intimidating standard of performance that is well-nigh impossible to meet."); *see also* Lawrence, *supra* note

testament. . . . It bears much the same relation to the Civil Rights movement of the 1960s which *The Souls of Black Folk* does to the era of Reconstruction. . . . It deserves national attention."[87] To be sure, these accolades appear on the book jacket and must be construed in that light. But even when subjected to the ordinary discount, they suggest that wrestling with Williams can offer great spiritual, as well as intellectual, rewards. Regina Austin's prominence, meanwhile, is evidenced by her recent appointment to the William A. Schnader chair at the University of Pennsylvania Law School, and her central role in a major controversy at the Harvard Law School.[88]

Towards the end of *The Rooster's Egg,* Williams recounts a story first told by black New York Times columnist Brent Staples, then a student at the University of Chicago.[89] Staples liked to take walks at night near the lake on the south side of the city. He realized early on that these strolls, which gave him much pleasure, were terrifying to the whites he would encounter. Being basically a man of peace, he was much distressed. He tried first to be "innocuous" in his gait. Then he began whistling Vivaldi so people would hear him coming and take him for the student he was. All this, however, came at a price.

> Then I changed. . . . The man and the woman walking toward me were laughing and talking but clammed up when they saw me . . . I veered toward them and aimed myself so that they'd have to part to avoid walking into me. The man stiffened, threw back his head and assumed the stare: eyes ahead, mouth open. I suppressed the urge to scream into his face. Instead, I glided between them, my shoulder nearly brushing his. A few steps beyond them I stopped and howled with laughter. I came to call this game "Scatter the Pigeons."[90]

Williams laments, "The gentle journalist who stands on a street-corner and howls. . . . What upside-down craziness, this paradoxical logic of having to debase oneself in order to retrieve one's sanity. . . ."[91] And yet, we may ask, how far should our hearts go out to Williams, who articulates such anguish, and to the extent they are at one with her, to her fellow CRATs? For in describing their lives as one extended *I hurt,* CRATs, as has been suggested, disconcert and disjoin their alleged vic-

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60. Finally, I have focused on Patricia Williams because she is a regular columnist for *The Nation.*

87 ROOSTER, *supra* note 1, at book jacket.

88 *See infra* note 214 and accompanying text.

89 ROOSTER, *supra* note 1, at 227.

90 *Id.* at 228.

91 *Id.*

timizers.[92] And so, is it not conceivable that at this very moment in a convention hall somewhere, Williams and her friends are doubled over, convulsed with laughter, delighting in their own versions of "Scatter the Pigeons"?[93]

II. THE CULTURE OF COMPLAINT

> [Integration has] come to mean a form of assimilation that demands self-erasure rather than engagement of black contributions and experience.[94]

The focus on victimization has, not surprisingly, led CRATs to antiblack conspiracies. "We live in conspiratorial times. Almost everyone has a favorite conspiracy theory or two."[95] Blacks espouse more than their proportionate share of such theories. Regina Austin lists O.J. Simpson, Clarence Thomas, Malcolm X, Marion Barry, Coors Brewing Company, and Church's Chicken as subjects of antiblack conspiracies. But it is the broader, more amorphous and thus more insidious conspiracies that primarily capture her attention. For instance, the AIDS virus was "either

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92 *See* text accompanying *supra* notes 74-75.

93 If it seems unseemly to raise questions about Williams's motives, consider that questioning motives is central to CRT method. *See infra* discussion Part II & notes 229, 284 and accompanying text. More important, consider a story told by Shelby Steele which, he laments, illustrates an unhealthy aspect of black talk on the subject of race. Steele acknowledges that he used to take

> a delinquent's delight in playing [a role]. Those were the days of flagellatory white guilt, it was such great fun to pinion some professor or housewife or, best of all, a large group of remorseful whites, with the knowledge of both their racism and denial of it. The adolescent impulse to sneer at convention, to startle the middle-aged with doubt could be indulged under the guise of racial indignation. And how could I lose? . . . My victims—earnest liberals for the most part—could no more crawl out from under my accusations than Joseph K. in Kafka's *Trial*. . . .

SHELBY STEELE, THE CONTENT OF OUR CHARACTER 2-3 (1990).

Harlon Dalton is concerned about the price that the *black* community pays for its insincere talk on race.

> Too often, [blacks] have simply walked away [from other blacks] . . . who believe . . . that "The White man has his foot on my neck" . . . and have winked at those who are just trying to get over. We need to somehow reach out to the former and rein in the latter . . . .

DALTON, *supra* note 2, at 150. Dalton is hardly alone in wanting to question the motives of blacks who speak on race; Stanley Crouch spends a good part of his life investigating—and exposing—quackery in this area. *See* CROUCH, *supra* note 77 and accompanying text. Although not an academic, Crouch is such a powerful and wide-ranging critic whose work stands as a direct counterpoint to that of CRATs that frequent reference will be made to his work here.

94 *See* ROOSTER, *supra* note 1, at 25.

95 Regina Austin, *Beyond Black Demons and White Devils: Antiblack Conspiracy Theorizing & the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021 (1995) [hereinafter *Beyond*].

specifically developed to ravage African peoples or resulted from uncontrolled biological experiments conducted by the U.S. Government."[96]

Is there any truth to any of these theories? Austin does not say. She does, however, admit that, in general, "[a]ntiblack conspiracy theories are not uniformly accepted by black people, not the least because the theories often rest on the slenderest of factual foundations."[97] Austin concedes that "conspiracy theorizing . . . can generate individual and collective paranoia."[98] One would think, then, that Austin would want to highlight the risks to the black community of its antiblack-conspiracy theorizing, or at least put a stop to those theories that are clearly false. Far from it.

> Antiblack conspiracy theorizing generates a counter-response to exclusion and discrimination by mobilizing collective black self-interest in a way that contributes to the growth and strength of the black public sphere . . . . [I]f properly understood and responded to, [such theorizing] can lead to a genuine public criticism and the creation of a decent social space for blacks and others dissatisfied with contemporary conditions.[99]

These theories can be "energizing." Conspiracy theories "'enable[ ] people to personalize their ideas and feelings, and focus[ ] attention on a real or imagined enemy.'"[100] "Invoking the name of historic adversaries . . . like the Ku Klux Klan and the United States Government . . . puts limits on the forgetting and forgiving."[101] In sum, while perhaps not always literally true, these theories are valuable for their "symbolic truths."[102] The AIDS conspiracy theory, for example, reminds us of the

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96 *Id.* at 1025-26. Two others: that drugs and guns were introduced into the black community in order to destroy it and that another such conspiracy underlies "efforts to encourage or force black women to utilize specific forms of birth control, such as the long-term implanted contraceptive Norplant. . . ." *Id.* at 1026, 1034.

97 *Id.* at 1022.

98 *Id.* at 1045.

99 *Id.* at 1022, 1032.

100 *Id.* at 1042 (quoting *Preface*, *in* CHANGING CONCEPTIONS OF CONSPIRACY vii-viii (Carl F. Graumann & Serge Muscovici eds., 1987)).

101 *Id.* at 1035.

102 *Id.* at 1033. Austin is not the only one who refuses to condemn conspiracy theorizing. *See* Wil Haygood, *True or False, Rumors Spread*, BOSTON SUNDAY GLOBE, Dec. 15, 1996, at 1, 46.

> Rumor allows black people to take back the power they lost, to reclaim a sense of authority over the forces that have taken over their lives. . . . So often reason obscures basics of reality and truth. . . . Reason is often the handmaiden of evil. Black folks know this. . . . [Rumors should be treated in accordance with] Pascal's Wager.

Id. (quoting Michael Dyson). Pascal's Wager is defined as "either God exists or not. If God does exist, the stake to be gained is infinite life. If God does not exist, there are no winnings. Because the potential winnings are infinite, religious belief is more rational than unbelief be-

infamous Tuskeegee experiment where the government prevented blacks with syphilis from getting treatment. "The conspiracy theorist understands that the solution to the scourge of AIDS, like the solution to the problem of syphilis, lies not in the cause, but in the cure and that is in the government's hands."[103] Indeed, for the conspiracy theorist, "[t]he absence of large-scale efforts to cure AIDS in the so-called "Third World" is tantamount to the government's causing the disease."[104]

But if we follow Austin and abandon the search for *literal* truth in favor of another, "higher" order, are we prepared to accept the consequences?[105] Some, like Austin, may well understand that antiblack conspiracy theories "often rest on the slenderest of factual foundations."[106] But surely we have to worry about those less secure about their place in the world and thus more easily influenced. Will cynicism help them when the government sets out to do some good?[107] Are such people likely to invest in their futures if they are led to believe that the rug can be pulled out from under them at any time? Finally, who will repair the social fabric once it has been recklessly shredded?

On a different level, who will control the images that are used once the focus on Truth is abandoned? Austin, in short, is unsheathing a double-edged sword. If O.J. Simpson is a wife-batterer, maybe he

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cause of its greater expected value." CAMBRIDGE DICTIONARY OF PHILOSOPHY 563 (1995). There is a cost, however, to belief in antiblack conspiracies which Dyson ignores. *See, e.g.*, text accompanying note 107.

103 *Beyond, supra* note 95, at 1033; *but see* HENRY LOUIS GATES, THIRTEEN WAYS OF LOOKING AT A BLACK MAN xxi (1997) for an alternative view of the origin and value of conspiracy theories.

> [C]onspiracy is a nearly irresistible labor-saving device in the face of recalcitrant complexity. One of the reassuring things about talk of conspiracy is that it posits a bright line between victims and victimizers. Of course, it is all too simple. Consider those terrible myths about the extraordinary sexual prowess of the black man. How badly they serve us!

Id.

104 *Beyond, supra* note 95, at 1033. In a world where government is responsible for, and may even promote, AIDS and drugs, one has to wonder why government would campaign for safe sex. In the logic of the antiblack conspiracy theorists it must be because government understands the cynical and oppositional nature of black culture.

105 Are white supremacists' theories also valuable because they are energizing? Consider the rampaging white mobs in "Birth of a Nation." Their theories were also energizing.

106 *Beyond, supra* note 95, at 1022 and accompanying text.

107 What is the impact of antiblack conspiracy theorizing, one wonders, on government-sponsored campaigns against sexually transmitted diseases? *See* Sara Rimer, *Blacks Urged to Act to Increase Awareness of AIDS Epidemic,* N.Y. TIMES, Oct. 23, 1996, at A16. According to Rimer, AIDS, by all accounts, is ravaging the black community. *Id.* Current projections are that by the year 2000 one-half of all AIDS cases will be among blacks. *Id.* A black person at that time will be nine times as likely to acquire AIDS as a non-black. *Id.* Even as things stand now more blacks die from AIDS than from homicide in the age twenty-five to forty-four cohort, and more black children have AIDS than do those of all other races and ethnic groups combined. *Id.* "'This is a tragedy of monstrous proportions, which could have been, and should be avoided.'" *Id.* (quoting Henry Louis Gates at a recent conference).

should be convicted of murder because of the *symbolic* truth of the charge.[108] Finally, what should be the role of academics in all of this? Should we be participating in the conspiracy through law review articles that validate racist claims merely because they open up space in which "blacks can speculate about the macroeconomic forces oppressing them and the actors who are in a position to do something about it"?[109] To ask these questions, it would appear, is to highlight both the vacuousness and the danger of Austin's conspiracy theory theories.

A. THE COMPLAINT OF CULTURE

Perhaps no issue has served more "to open up space" for CRATs—no issue has been used more for rhetorical advantage—than whether blacks can be "authentic" in American society.[110] Patricia Williams's equation of integration and self-erasure has already been noted.[111] For Gary Peller the threat posed by integration is cultural "genocide."[112]

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108 *See* ALCHEMY, *supra* note 56, at 11 (Is finding O.J. Simpson guilty what Williams has in mind when she writes "that one of the most important results of reconceptualizing from 'objective truth' to rhetorical event will be a more nuanced sense of legal and social responsibility. . . ."?).

109 *Beyond*, *supra* note 95, at 1034.

110 *See* GATES, *supra* note 103, at 207 (for a little perspective on "authenticity," which has been called "among the founding lies of the modern age"). Here is how Gates puts it:

> There is a certain way of living that is my way. I am called to live my life in this way. . . . If I [do] not, I miss the point of my life; I miss what being human is for *me*. [T]he Romantic fallacy of authenticity is only compounded when it is collectivized. . . .

Id.

But now let us assume that there is something to be said for the authentic lifestyle. The question of whether blacks can live authentically in *America* may be premised on a gross fallacy. *See* STANLEY CROUCH, ALWAYS IN PURSUIT 141 (1998). American culture, even in its most rigidly segregated precincts, is patently and irrevocably composite. *See id.*

> It is regardless of all the hysterical protestations of those who would have it otherwise, incontestably mulatto. [Indeed, for all their traditional antagonisms and obvious differences,] the so-called black and so-called white people of the United States resemble nobody else in the world so much as they resemble each other.

Id. (quoting Albert Murray, a black social critic).

111 ROOSTER, *supra* note 1 and accompanying text.

112 Gary Peller, *Toward a Critical Cultural Pluralism: Progressive Alternatives to Mainstream Civil Rights Ideology*, *in* CRITICAL RACE THEORY II, *supra* note 15, at 135. *But see* K. Anthony Appiah, *The Multiculturalist Misunderstanding*, N.Y. REV. BOOKS, Oct. 9, 1997, at 36 (book review):

> [T]he trouble with appeal to cultural difference is that it obscures rather than illuminates. . . . It is not black culture that the racist disdains, but blacks. There is no conflict of visions between white and black cultures that is the source of racial discord. . . . Culture is not the problem, and it is not the solution. . . . So maybe we should conduct our discussions of education and citizenship, toleration and social peace without the talk of cultures.

Id.; *see also* CROUCH, *supra* note 77, at xiv.

> In order to be 'authentic,' Negro Americans, so goes the politics of perpetual alienation, aren't suppose to identify with the ideals of the country at large. We are sup-

What is the connection between integration and self-erasure? For one thing, writes Peller, it is whites who define knowledge.[113] "[K]nowledge [is] itself a function of the powerful to impose their own views, to differentiate between knowledge and myth, reason and emotion, and objectivity and subjectivity. . . . Understanding what society deems worthy of calling 'knowledge' depends on a prior inquiry into a social situation. . . . Culture precedes epistemology."[114]

Out of the reigning cultural epistemology, writes Peller, the notion arises that "merit itself is neutral, impersonal and somehow developed outside the economy of social power—with its significant currency of race, class, gender—that marks American social life."[115] But the reality, according to John Calmore, is that "[c]ultural bias sets standards for performance in terms of the tendencies, skills, or attributes of white America, and it is against these standards that all other groups are measured."[116] Implicit in these notions is the question: How can blacks be authentic when, at best, they are measured by standards not of their own creation and, at worst, by standards created "to help justify racial domination"?[117]

The public schools have played no small role in perpetuating this state of affairs.[118]

> Liberal integrationism entailed a trade-off of . . . "redneck culture" with African-American culture: in consideration for the suppression of white, southern working-

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posed to enlist all of our energies in pretending that we are somehow part of another tradition. . . .

. . . .

. . . All of that is just so much more hogwash.

Id.

113 Peller, *supra* note 112, at 142.

114 *Id.* at 143.

115 *Id.* at 132.

116 John Calmore, *Critical Race Theory, Archie Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, *in* CRITICAL RACE THEORY II, *supra* note 16, at 324.

117 Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 9 (1991) ("[M]erit is that which I, the preexisting and presituated self, use to judge you, the Other. The criteria I use sound suspiciously like the description of me and the place where I stand."). But if merit is only in the "I" of the beholder, one wonders: How does Delgado merit the title of Charles Inglis Tomson Professor of Law at the University of Colorado School of Law? Why should that honor not have been bestowed on me, or on you, the reader? Now, suppose there is, after all, such a thing as objective merit. And suppose such merit can be shown to underlie Delgado's claim to his title precisely because his white appointers did not share his values and thus appoint him in order to validate their own values. If this is so, we have a problem. Since by CRAT hypothesis America is characterized by universal white hegemony, only blacks can be confirmed as having merit. Is this ultimately the key to understanding CRT?

118 Peller, *supra* note 112, at 133 and accompanying text.

> class culture in schools, blacks were expected to accede to the suppression of African-American culture as well. Instead, school life would be characterized by the . . . culture of technology and professionalism, presented as the aracial face of 'quality' in education, and the transcendence [over] localism and particularity.[119]

How have the schools achieved this transformation?

> The advanced degrees of administrators . . . the implementation of standardized tests on a widespread basis, the exclusion of religion from the schools, and the . . . replacement of corporal punishment . . . with therapeutic . . . counseling—these all reflect the attempt to substitute a standardized national culture of public school administration. . . . The formerly maternal relationship between student and teacher has been replaced by the cool of professional distance; graduate schools teaching expertly tested methods of instruction replaced traditional training of teachers through contact with older faculty. . . . The standardized test and the cultural commitment to the No. 2 pencil are the lived, institutional rituals that reflect the commitment to impersonality and objectivity. . . . [120]

What sense can be made of all this? Let us look at some of the foregoing observations in order. If CRATs believe that there is no knowledge that exists independently of culture then there can be no universal knowledge; for, to put it simply, the only way to understand a culture (like anything else) is to apply some knowledge that exists outside of it which, according to CRATs, does not exist. Which brings us to standards of performance. Do we really want them to be abolished because we cannot agree on them? Should everyone be passed into law

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[119] *Id.* at 133-34.

> One gets the sense that if at any point in American history, a nationalist program of race reform had been adopted [i.e., integration had not been pursued] African-Americans in virtually every urban center would not be concentrated in disintegrating housing, would not be sending their children to learn a nationally prescribed curriculum, in underfunded, overcrowded schools and to play in parks and on streets alongside drug dealers and gang warriors. . . .

Id. at 151 (Peller offers no basis for this conclusion).

[120] *Id.* at 134.

school and medical school?[121] *Out* of law school and medical school and into the professions?[122]

As for the public schools, one can hardly conceive of a more reactionary message. Over the last fifty years social and economic development in the South has been nothing short of miraculous. And that growth is hard to imagine without the changes in public education that have taken place. Shall the nation head back in the direction of the rod and the one-room schoolhouse out of empty sentimentalism and the terror of a No. 2 pencil?[123]

Who can doubt that black culture today lacks the autonomy and vitality it had before the age of mass communications and the advent of a national and subsequently global economy?[124] The problem is that Peller's work and that of other CRATS fails to provide even an outline for a substitute culture. What standards of performance would Peller adopt? What subjects would be taught in the schools and how would

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121 *See* Derrick Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 1, 8 (1979) ("Although the debate over traditional admissions criteria continues, there is impressive evidence that grades and test scores cannot predict success in the practice of law and medicine."). Since Bell does not offer alternative criteria for testing preparedness for graduate study, or even an approach to developing such criteria, it would seem that Bell is advocating open admissions at the nation's professional schools.

122 *See* Cecil Hunt, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. L. REV. 721, 729, 792-93 (1996) (arguing that since the bar exam has "a discriminatory impact along racial, ethnic, and gender lines," and since it is at best "nothing more than a law school synthesizing experience, more akin to a law school comprehensive examination than a professional entrance examination," bar examiners should redouble their efforts to make the exam fair and valid). To be sure, creating a fair and valid exam is the examiners' obligation. Like Bell, Hunt offers nothing that might help evaluators do their jobs better. Since a statewide comprehensive exam might well ensure a minimum level of doctrinal knowledge on the part of graduates, one cannot help but conclude that Hunt's purpose is to see bar exams abolished.

There is another way to look at the disparate impact of the bar exam and, indeed, at the attack by CRATs on standards generally. *See* CROUCH, *supra* note 77, at xiv, xv, 44.

> Now separatist self-esteem is said to be the high road. We aren't supposed to have standards because standards were all developed as forms of exclusion and oppression. . . .
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> . . . .
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> . . . [W]e all deny that tradition of hard-won achievement whenever our conciliatory cowardice gets the better of us and we treat black people like spoiled children who shouldn't be asked to meet the standards that the best of all Americans have met.

Id.; *see generally* Daniel Farber and Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995) (for yet another response to the CRAT attack on current notions of merit).

123 *See* Alan Wolfe, *The Facts and the Feeling*, NEW REPUBLIC, Sept. 29, 1997, at 27, 28 (reporting that in *America in Black and White*, Stephan and Abigail Thernstrom conclude that the Jim Crow Schools were "dreadful."); *see also* Shelby Steele, *The Race Not Run*, NEW REPUBLIC, Oct. 7, 1996, at 28 ("I often hear other blacks say that black students will never have the SAT scores of whites or Asians. . . . We will not overcome history until blacks are competitive with all others. . . .").

124 Surely a similar observation about other American subcultures is equally valid.

students of different backgrounds be taught to engage one another?[125] Without answers to such questions, must we not, at least tentatively, incline towards skepticism?

Patricia Williams puts the issue of mainstream pressure on black culture into a broader perspective. For her the problem is the steamroller of middle-class values. Middle class, she writes, means variously, and contradictorily, "thrifty, greedy, smug, conventional, commonplace, respectable, hard-working, and shallow."[126] While not without redeeming aspects—a subject we will come to[127]—this group of features, which according to Williams seems especially characteristic of the "amalgamated" white middle class,[128] has led to a general "demand for conformity to what keeps being called the 'larger' American way, a coerced rather than willing assimilation. . . ."[129] Middle-class values impose "high cost: . . . some 'successfully assimilated' ethnics have become so only by . . . burying forever languages, customs and cultures."[130]

What is the solution to the problem? Williams elaborates:

> [If we are] to be anything more than a loose society of mercenaries—of suppliers and demanders, of vendors and consumers—then we must recognize that other forms of group culture and identity exist. We must respect the dynamic power of these groups and cherish their contributions to our civil lives, rather than pretend they do not exist as a way of avoiding arguments about their accommodation. And in our law we must be on guard against either privileging a supposedly neutral "mass" culture that is in fact highly specific and historically contingent or legitimating a supposedly neutral ethic of individualism that is really a corporate group identity, radically constraining any sense of individual-

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125 *See* Tamar Jacoby, *Day of the Race Men*, COMMENTARY, Apr. 1997, at 37 ("[B]eing black is not a program.") (quoting a remark reputed to have been made by Bayard Rustin).

126 ROOSTER, *supra* note 1, at 63.

127 *See* discussion *infra* Conclusion.

128 ROOSTER, *supra* note 1, at 67.

129 *Id.* at 66.

130 *Id.* at 68. Williams uses the story of a Russian immigrant girl as her paradigm case. The girl loses her Russian accent, goes to college and, when she comes home, not wanting to be taken as "too ethnic" or too ignorant, starts holding herself out as a citizen of the world. *Id.* While recognizing that "this should in no way be taken as a necessarily bad thing, it can signal a lost balance, a sacrifice of appreciation for the bonds, the links, the ties that bind, that make family, connection, identity." *Id.* at 66. Perhaps. But perhaps the student is merely using her early college years to experiment with different identities to see which fits best? If we wish to make sense of the young woman's college experience, must we not wait until she is thirty, or even forty?

> ity, and silently advancing the claims of that group identity.[131]

For Williams and Peller, then, it will be hard to find authentic blacks or other minorities until American culture is thoroughly decentralized.[132]

B. THE COST OF COMFORT

But if, accepting Peller's and Williams's criticism, we sought to make all Americans feel at home, what precisely would it mean? What would be the price? We begin with the case of language. Emphasis on command of English, Williams suggests, is now the Jim Crow position.[133] The implication is that standard English is now being foisted upon millions who are otherwise perfectly well-adjusted in their own cultures, for the sole purpose of keeping them down. But mastery of a hegemonic language always serves as a determinant of social standing, at least in complex societies. It was, for example, through such mastery that Eliza Doolittle could be taken for a princess.[134] As English becomes the first of the world's second languages[135] in this, the information age, we can hardly insist on anything but mastery in our own country.

We shall come back to the question of language. In the meantime, if we are to evaluate the message of multiculturalism in Peller's and Williams's work, we must look to our schools, for the schools have taken the message most closely to heart. In the name of inclusion, over the past ten years textbooks have been purged, demasculinized, and reconstructed. A wide array of new authors now grace reading lists. Ethnic holidays of all kinds are celebrated in the classroom. A more diverse group of teachers and administrators populate our urban schools than

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131 *Id.* at 79-80.

132 *See id.* at 80. Interestingly, in all her talk of the importance of preserving cultures, Williams makes no claim, explicit or otherwise, for the existence of a black culture. Nor, it might be added, do other CRATs. Williams goes only so far as to say that she rejects the idea of a "universal" culture. *Id.* It might be useful to speculate about why the claim is not made. After all, the weaker the case for a black culture, the lesser the need for its preservation. Perhaps the answer lies in CRATs' desire to keep critics away. A claim to the existence of black culture could lead to a demand for a description of it which, in turn, could lead to attempts at faultfinding. Better, in this view, to speak in generalities. This technique of not exploring the obvious implications of their assertions is a common feature in the work of CRATs. *See, e.g., infra* notes 218, 222, and 307.

133 *Id.* at 26. Does Williams's interest in preserving black culture coupled with her concern about sacralizing standard English lead her to support the Oakland School Board's recent decision to train teachers in ebonics? It is hard to say. *See* Patricia Williams, *The Hidden Meanings of "Black English,"* N.Y. TIMES, Dec. 29, 1996, at A4, A9.

134 *See* GEORGE BERNARD SHAW, PYGMALION (1881).

135 *See* William Safire, *Quo Lingua*, N.Y. TIMES MAGZINE, Sept. 9, 1996, at 61.

ever before. But what do schools have to show for their efforts? Have comfort levels and test scores for minorities gone up?[136]

A recent video of life at Berkeley High School provides an instructive answer. Filmed during the 1993-94 school year, *School Colors*[137] tells a story about one of the first high schools to voluntarily integrate, a school that today is 38 percent white, 35 percent African American, 11 percent Asian-Pacific Islander, 9 percent Hispanic, and 7 percent mixed race, a school that has an Afro-American Studies department that sponsors fifteen courses ranging from black economics to Swahili.[138] One cannot be sure of the extent to which the film accurately represents the school, or to which the school represents urban America, but to the extent that these are representative, *School Colors* gives its viewers pause about Williams's and Peller's prescriptions.

Here are some vignettes from the video. A Hispanic student says it is an insult to be called an American. A black teacher tells his African-American students that "America denotes the nation you live in . . . but the African part is your essence."[139] A Chinese-American boy is labeled "whitewashed" because he has white friends. A Hispanic girl breaks down when she is accused of betraying her group by dating a white boy. A white boy describes himself as "White, real white" and goes on to say he "likes to promote whiteness."[140] A Hispanic boy complains of the Greek statue overlooking the campus, while the narrator explains that owing to concerns about ethnocentrism, "Toga Day" is now "Ethnicity Day."[141]

These sentiments, as could be expected, are reflected in Berkeley High *geography*. A student, pointing, says, "This is Africa."[142] "That's Europe. I don't care to go over there. I stay here, maybe [at the] snack bar, something like that, but, that's about it."[143] "Berkeley High is like the real world," says another. "And the real world is totally segregated. No such thing as integration when it comes to America. We all want to be with our own kind and that's the way humans are."[144] "I mean you come here and it's nothing in the middle; it's just black, white, Asian,"

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136 It should be recalled that CRATs are dubious about assigning significance to test scores. *See supra* notes 116-23 and accompanying text.

137 *Frontline: School Colors* (PBS television broadcast, Oct. 18, 1994) [hereinafter *School Colors*].

138 *See id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

says a white girl. "[I]t's really hard."[145] It is not surprising that several students complained about being attacked by members of other groups.

To be sure, inter-ethnic harmony is not necessarily the highest social value. So we turn to the academic side; how are the kids doing? The answer is not reassuring. Eighty-five percent of the advanced placement kids, we learn, are white and Asian, while 85 percent of those in the lowest levels are black and Hispanic; in fact, the D and F rate for the latter groups is three times higher than for the former.[146]

This is not the place to discuss grading—or tracking. Our subject is what pursuing an *authentic* lifestyle might actually mean for young blacks—and for the rest of our community. Consider that in America today only a tiny fraction of our Ph.D.s in physics, astronomy, and mathematics are black.[147] If, as a result, science comes to be seen as *a white thing,* what will induce our brightest black students to enter these professions?[148] It is not only that to stay competitive we Americans need all the highly trained scientists we can get, but, to be brutally realistic, if minorities are not represented in the highest-prestige, highest-visibility occupations, what will counter the destructive conclusion that their absence stems not from lack of desire but from lack of ability? In short, can this country afford a definition of authenticity that amounts to a reification of the racial status quo?

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145 *Id.*

146 One must consider, of course, both the possibility that white teachers are grading minority students more harshly and the fact that placement of students in classes is through tracking, a policy which, as in other schools, is strongly attacked by some teachers. No teacher interviewed, however, suggests that any individual student was graded unfairly or placed in an inappropriate ability group. Moreover, at least for those at the top and those at the bottom of the academic scale at Berkeley, whom we come to know in *School Colors,* a policy of heterogeneous classes seems absurd. *See School Colors, supra* note 137.

147 In 1993 blacks represented only 1.4 percent and 1.1 percent, respectively, of working U.S.-educated Ph.D.s in the areas of computer/mathematical sciences and physical sciences. *See* NATIONAL SCIENCE BOARD, SCIENCE AND ENGINEERING INDICATORS 3-14 (1996). It should not be presumed that these low rates reflect employment discrimination. Employment rates apparently match degree conferral rates. *See id.* at 4-5.

148 *See School Colors, supra* note 137; *see also* ELLIS COSE, COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSESSED WORLD 45 (1997). John Ogbu, Nigerian-born anthropologist at the University of California, was interested in the question of why black students in the Oakland high school system were not preparing themselves for college with math courses as were the Chinese-American students. The reason is that "'they think it's white. Or it's hard.'" *Id.* (quoting John Ogbu). This finding is consistent with that of an earlier study by Ogbu and Signithia Fordham of a black high school in Washington, D.C. *See* Seth Mydans, *Black Identity vs. Success and Seeming "White,"* N.Y. TIMES, Apr. 25, 1990 at B9.

> Fear of acting white and becoming the other was a motivating factor in underachievement in the school context. [Among the behavioral characteristics to be avoided as *white* were investing in homework,] listening to so-called white music, . . . studying in the library, going to the Smithsonian Institution, doing volunteer work . . . and being on time.

Id.

A drive for authenticity will come at no smaller cost in the humanities. Here is what Judge, a young black student at Berkeley High, has to say to Tiaye, who has just argued for the importance of knowing and using standard grammar: "Elijah Mohammed, Martin Luther King, Malcolm X, Huey Newton—they didn't speak what you wanna call functioning grammar—they, they function in this world. You ain't gotta speak the cracker language to live in a cracker world."[149] The accuracy of the premise aside, is this a conclusion that our students should be drawing in school? Is Judge on his way to Columbia Law School? Would even Williams want him as her student? Black economist Glenn Loury has drawn what seems to be the logical conclusion. "Anything that either incites other Americans to look upon inner-city blacks as different from themselves, or suggests to the inner city blacks that their future is in any place other than the mainstream, is a dangerous thing."[150]

Once again, it is not clear whether Berkeley High is representative of the American urban high school. But even without further data one has to wonder whether life at Berkeley High as depicted in *School Colors* is not the natural consequence of the fear of cultural annihilation so promiscuously spread by CRATs.[151]

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[149] *School Colors*, *supra* note 137. The American-born black comes in with a feeling that in order to learn standard English, he has to give up his black English. *See* COSE, *supra* note 148, at 45. He has to give up a part of his identity and therefore resists. *See id.*

> After class a black teacher explains why he did not respond to Judge: "I try to have people who are self-thinkers, who are confident to express their own ideas and their own concepts without feeling as if they're constantly under the gun so to speak, or they're constantly under threat of having to shut up because what they're saying is quote unquote wrong."

See School Colors, *supra* note 137.

[150] *Sixty Minutes* (CBS television broadcast, Nov. 24, 1996).

[151] *See School Colors*, *supra* note 137; *see also supra* notes 138-146 and accompanying text; DALTON, *supra* note 2, at 198.

> [I]f we are indeed serious about getting rid of racial hierarchy, we need to have a better handle on which parts of our culture we want to preserve more or less in their present form and which parts we are willing to toss into the American stew. Fear of cultural loss is one of the hidden reasons that many of us are apprehensive about making peace with White America.

Id. Where the threat expressed is one of cultural obliteration, is it likely that the best result will be achieved?

The question of what can and should be given up arises frequently in relation to black hip-hop culture with its rap music and videos that glorify drugs, machismo, guns and even murder. Stanley Crouch offers a handle on this culture.

> In U.S. popular culture, we now see "the adored and feared terrible father" replaced within "the exalted tribe" by the naively admired black sociopath, the "alternately angry and orgiastic" gangster whose "street knowledge" supposedly expresses the truest, least miscegenated, version of black culture—"the real deal." This is the ultimate extension of the romantic love of the outlaw, the bad boy, the nihilist, he who lives at the fantasy center of rock-and-roll anger . . .
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> . . . .

C. ON BECOMING AN AMERICAN

If Berkeley High is not the model for advancing the psychological and educational well-being of our students—all our students—what is? Part of the answer is surely that schools must find a gentler way of promoting inclusion. That such a middle path exists should be incontrovertible. Another way is suggested by Art Yee's immigrant uncle.[152] Art, an Asian-American at Berkeley High who seems destined for academic success, is attending a family feast with his (unnamed) uncle.[153] The uncle is pointing to the *fat choy*. "Actually it's seaweed . . . but this is a good omen . . . [s]o everybody [eat] fat choy; that means make lots, lots of money."[154] Pointing to the dried fish, he explains that it means long life.[155]

Art Yee's uncle then turns philosophical as the issue shifts to whether the high school should create an Asian-American studies program.[156]

> I don't think high school . . . should specially set aside a department [to] study just . . . Asians. We would rather have the kids learn more . . . general knowledge, like, basic mathematics, basic English, how [to] compose a good English . . . paragraph. A culture is [to] pass from generation to generation. [B]asically, culture is directly [best] related in a small family unit instead of . . . in school.[157]

If whites have attempted to assert control over the schools, they have, according to Williams, been no less eager to control immigration.[158] She laments that the rich are gaining entrance to the United

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. . . [Hip hop] plays into the hands of those already convinced of Afro-American inferiority, those who would push Negroes into an iron suit of specious genetic theories and class-oriented ideas about the inevitability of lower-class failure.

CROUCH, *supra* note 77, at 249, 250.

But the internal price might be higher. *See* John Leland & Allison Samuels, *The New Generation Gap*, NEWSWEEK, Mar. 17, 1997, at 53. A youth counselor says: "[W]e don't need [hip-hop] to be part of our heritage. [T]here's a helluva gap [between what is and what needs to be] and that's why we're not showing continued progress, why we are retrogressing." *Id.* But one wonders how much "progress" there can be on this front when the issue is being framed in terms of cultural authenticity, when a new Harvard law school graduate starts a hip-hop magazine on a theory that "[e]ither you identify with white society, and that's disgustingly empty—not to mention you'll be rejected or go insane—or you look to something that's rich and real." *Id.*

152 *See School Colors*, *supra* note 137.

153 *See id.*

154 *Id.*

155 *Id.*

156 *See id.*

157 *Id.*

158 ROOSTER, *supra* note 1, at 68.

States while "the Statue of Liberty's great motto [is being] retired just when the homeless, huddled masses of the world are mostly brown and black. . . ."[159] The observation requires a range of responses. First, the rich only receive an immigration preference when they invest a substantial sum in an American business and create jobs for those same huddled masses that Williams seeks to protect.[160] Second, while the door to white immigration was open for most of our history, access to America has been substantially restricted for the last seventy years.[161] Third, if the brown and black masses are the least likely to assimilate—indeed are the most likely to insist that the emphasis be on how mass culture can accommodate outsiders rather than on how they can best assimilate into mass society[162]—what policy should Williams expect? By definition a national culture is a majority culture. And so the question arises, does a majority have a right to protect the national culture? The answer seems apparent.[163]

Last, and most important, the fact of the matter is that all the handwringing notwithstanding, in each of the last ten years the number of immigrants into this country has exceeded the number in each of the

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159 *Id.*

160 *See* 8 U.S.C. § 1153(b)(5)(A) (1996).

161 *See, e.g.*, 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 25 (1996). A historically sophisticated reader will understand that restrictions in the early years were clearly designed to discriminate against certain white immigrants on the basis of their countries of origin. *See id.* at 27.

162 *Compare* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* U.S. v. Fordice: *Why Integrationism Fails African-Americans Again, in* CRITICAL RACE THEORY I, *supra* note 12, at 362, 369.

> This vision [of the future] . . . rejects assimilationism and argues that integration is not a cultural one-way street in which African-Americans must absorb white norms in order to be assimilated into American society. Rather, when integration does occur, African-Americans should have as much influence on whites as whites have on African-Americans.

Id.

163 *See, e.g.*, Maria Ontiveros, *Rosa Lopez, Christopher Darden, and Me: Issues of Gender, Ethnicity, and Class in Evaluating Witness Credibility, in* CRITICAL RACE FEMINISM, *supra* note 66, at 269, (drawing a distinction between conceptions of time in Anglo and Latino cultures).

> Many Western cultures, including the United States, consider time to be objective—something true and mathematical that can and must be precisely measured. Other cultures approach time differently—they see it as a general reference for coordinating activity, not a set schedule. . . . In [such] polychronic cultures, set time schedules are not as important as forming and nurturing human relationships, even if that requires "taking" more time or being "late." Thus, many Latinos[, for example,] naturally view information about time more generally and simply cannot see the judicial system's need for specificity and exactitude.

Id. at 273.

I suggest that we need not concern ourselves with charges of cultural imperialism when an American court requires Rosa Lopez to adopt an Anglo mode of telling time when testifying about what she was doing at 10:00 P.M. on the night Nicole Simpson was murdered.

previous seventy and a large number of these have been brown and black (and, for that matter, yellow).[164] Many of them have achieved a measure of social and economic success that is stunning. They have done so precisely because, given the opportunity to assimilate, they have willingly distanced themselves from their old cultures to some extent to devote their energies to the new one.[165] How can one say they are wrong?

These considerations seem to apply to blacks in America as well. According to Jennifer Hochschild, a professor of political science at Princeton, 20 percent of employed blacks worked as managers in 1990, up from 5 percent in 1950.[166] Identical numbers describe the increase in black employment rates in clerical and sales positions.[167] Thus, Hochschild concludes, up to 40 percent of black workers can now be counted as middle class.[168] This extraordinary transformation cannot have taken place without some assimilation. Does the black middle class consider its birthright sold, as Williams implies?[169] Would members of this class happily send their teenagers to Berkeley High for a different kind of education than they had? Williams offers no data.

No one would dispute that far greater social and economic gains would have been registered in the absence of the still widespread racism that wears down black body and spirit. And surely no reasonable person will deny that this problem still requires the wholehearted attention of the nation. But what follows from this? Does the authentic lifestyle require that blacks withdraw from mass culture like the Amish or the Hasidim?

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164 *See* 1994 STATISTICAL YEARBOOK, *supra* note 161, at 21-22. It is not clear whether recent immigrants are categorized by race upon arrival. The face of immigration, however, can be determined by focusing on country of origin. According to the latest data, only 20 percent of immigrants come from Europe (representing a 30 percent decrease from twenty-five years ago.). Mexico is far and away the largest supplier of immigrants (110,000). Supplying slightly less than half that amount are China, Phillipines, Dominican Republic. Next on the list are Vietnam and India. The suggestion that there is a bias in immigration policy in favor of non-Hispanic Caucasians seems baseless. *See id.*

A charge of white racism in immigration policy would seem to fail on another count as well. *See* Nestor Rodriguez, *U.S. Immigration and Intergroup Relations in the Late 20th Century: African Americans and Latinos,* SOCIAL JUSTICE, Sept. 1, 1996, at 111. It is not clear at all that black attitudes differ from those of whites. What I offer is hardly conclusive, but recent polls have shown considerable concern by African Americans on the subject of immigration. A 1995 survey of African-American residents of Houston showed that only 36 percent of them viewed "the impact of immigration" as "good" or "very good," while 54 percent rated it "bad" or "very bad." *Id.* at 118. That economic factors might be at play seems irrelevant.

165 *See supra* notes 137, 152-57.

166 JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM 43 (1996).

167 *See id.*

168 *Id.*; *see also* Sam Roberts, *The Greening of America's Black Middle Class,* N.Y. TIMES, June 18, 1995, at D1. According to a recent survey, there are about as many college graduates among black workers ages twenty-five to forty-four as there are high school dropouts. *See id.* Twenty years ago there were five times as many black dropouts as graduates in the workforce. *See id.*

169 *See supra* notes 127-31 and accompanying text.

D. NO HOLIDAY FROM COMPLAINT

If CRATs express displeasure over American culture generally, they are no less critical of those aspects of the culture that are specifically designed to enhance the comfort and standing of nonmajoritarian elements. The nation, for example, has honored Reverend Martin Luther King—and his African-American roots—with a national holiday. What is the CRAT response? "The holiday," says Geneva Crenshaw, Derrick Bell's fictional interlocutor, "is just another instance—like integration—that black folks work for and white folks grant when they realize that it is mostly a symbol that won't cost them much and will keep us pacified."[170] But since the holiday was resisted by some, does it not ultimately represent a victory for those who believe that Dr. King should be honored?[171]

Derrick Bell has sown similar seeds of discord and dissension in the area of affirmative action:

> [A]ffirmative-action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities. . . . Rather than overhaul [invalid] admissions criteria . . . officials claimed they were setting lower standards for minority candidates. This act of self-interested beneficence had unfortunate results. Affirmative action now "connotes the undertaking of remedial activity beyond what would normally be required. It sounds in *noblesse oblige,* not in legal duty, and suggests the giving of charity rather than the granting of relief. . . ."[172]

But in what way are white institutions advantaged by admitting members of minority groups? Because they avoid a potential uprising? Do colleges actually claim that they are "setting lower standards for minorities"?[173] Or do they announce that they are applying alternative criteria to determine academic potential? Should colleges abolish SAT and grade point requirements on the grounds of their invalidity or because

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170 BELL, *supra* note 29, at 18 ("It's an updated version of the glass trinkets and combs they used in Africa a few centuries ago to trick some tribes into selling off their brothers and sisters captured from neighboring tribes.").

171 On another level, what significance does the existence of a secondary purpose, or even an ulterior motive, have in political life? Surely, very little ever gets done in a democracy without serving multiple agendas? Stanley Crouch recommends that blacks be discriminating when evaluating majority decision-making. *See* CROUCH, *supra* note 77, at 69 ("One should always keep a hot poker ready for the backside of injustice, but it is important to polish the crown when you've damn well earned it.").

172 BELL, *supra* note 33, at 154-55 (quoting Derrick Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, CAL. L. REV. 67 (1979).

173 *Id.*

some minorities are not competitive in those areas?[174] How would telling minority students that they were admitted because of legislative or judicial action help to make them feel more welcome? Finally, as Dennis Litowitz acutely asks, if "affirmative action benefited whites, why were [and are, we might add,] whites so resistant to [it]"?[175]

But these are global concerns. What would Bell tell a majority student who, notwithstanding top grades and board scores, cannot get into Berkeley? That he is not such a hot student after all? That a minority student has accomplished more given his or her disadvantages? How would we go about measuring these disadvantages? By reference to family income? Family education? Age of parents? Teachers? I.Q.? Quality of parenting? Is defining away absolute achievement a prescription for psychological and social peace? Bell does not say. Under the circumstances, is not the better response one recently suggested by Christopher Edley, Jr.: though at odds with some key elements of American ideology, affirmative action should be seen as the best current solution to a horrific social problem that needs to be resolved?[176]

The most striking charge by CRATs relates to free speech, surely among America's greatest gifts to all minority and oppressed popula-

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174 While not abandoning the general use of standardized tests and grade point averages, at least in 1992, the University of Texas Law School downgraded their significance and applied other standards for minority candidates. *See* Hopwood v. Texas, 861 F. Supp. 551 (W.D.Tex. 1994), *aff'd.* 78 F.3d 932 (1996), *cert. denied,* 116 S.Ct. 2581 (1996). There was evidence that but for this deviation no more than nine black students would have been admitted that year. *See* 861 F. Supp. at 574. In fact, forty-one blacks enrolled at the school in 1992 (and presumably even more were admitted). *See* 78 F.3d at 937. To be sure, CRATs might not have applied the same standards in the admissions process, though again, what criteria they would have used is unclear. But unless one concludes that the generally applicable criteria were adopted to keep minorities out and that a specified, and fair-minded, substitute method would have produced more minority admittees, is it useful to speak of how affirmative action "further[s] the self-interest of the white majority"? BELL, *supra* note 33, at 155.

175 *See* Litowitz, *supra* note 7, at 524 and accompanying text.

176 *See generally* PAUL REIDINGER, EQUALITY WONK: EX-PRESIDENTIAL ADVISOR GETS BEYOND THE POLITICAL RHETORIC (1996).

> [T]here is indeed a moral cost to race-based decision making and that moral cost stands independent of any utilitarian calculations of the effectiveness of antidiscrimination laws. . . . It is important in both instrumental and noninstrumental terms that proponents of affirmative action endure the discipline of continually making a case for it, including trying to persuade [adversely affected groups] that these measures are pursued carefully. [Members of these groups] might not be persuaded, but the conversation is nonetheless important.

Id. (quoting Christopher Edley).

From both a philosophical and moral standpoint, the idea that people have to be treated differently to be treated equally "is a powerful and provocative pronouncement. It is also arguably wrong. . . . [T]he racial bean-counting business . . ." will not solve the problems of racism and will understandably "feel like plain old discrimination" to whites who are passed over for jobs or promotion. COSE, *supra* note 148, at 99-100, *reviewed by* Alan Wolfe, *Beyond Black and White,* N.Y. TIMES, Feb. 9, 1997, at 11.

tions.[177] Not, however, in the eyes of CRATs. In theory, write Delgado and Stefancic, free speech is premised on the notion that we "can somehow control our consciousness despite limitations of time and positionality."[178] But, they claim, "modernist and postmodernist insights about language and the social construction of reality show that reliance on countervailing speech . . . is often misplaced . . . . [O]ur ability to escape the confines of our own preconceptions is quite limited."[179] The notion that more speech can counter racism is appealing, lofty, romantic—and wrong.[180]

In practice, free speech often makes matters far worse by encouraging culture-makers to be amoral because they believe that racist messages can be neutralized with antiracist ones.[181] We are left with a "parade of Sambos, mammies, coons, uncles—bestial or happy-go-lucky, watermelon-eating—African-Americans."[182] The problem, we are told, is not only the effect on the majority, but that minorities internalize the images, become demoralized, and blame themselves.[183]

The effect of free speech on race in America is an enormously complicated matter that cannot be dealt with fairly in a short article. But is there not a central contradiction here? If words have no consequences, if they cannot allow us "to escape the confines of our own preconceptions,"

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177 *But see* Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy and the State*, 41 UCLA L. REV. 721, 725, 729-32 (1994) (making an even more startling charge, though it is perhaps unfair to ascribe it to the Movement generally). Rodrigo, Delgado's interlocutor and alter ego, advances the proposition that:

> We . . . are practically alone in our systematic mistreatment of our own minorities . . . . Minorities always have done better—relatively speaking—and will continue to do better—in other types of regimes. And this is systemic and intrinsic, not incidental. [What is the problem?] [E]nlightenment-style Western democracy is . . . the source of black people's subordination. Not just in a casual sense. Rather, racism and enlightenment are the same thing. They go together; they are opposite sides of the same coin. . . . The metaphors, the myths and stories of Snow White, white man's burden, dark villains and continents, and the rest are but surface manifestations of something deeper, something that lies at the heart of Western-style government and politics. The Framers . . . thought they were establishing a perfect machine. . . . Such a machine could scarcely need systemic correction—that would be contrary to its nature. Intrinsic to Enlightenment thought are the ideas of order, balance, symmetry and control. So the idea of perfection, of perfect arrangement, made it hard for the minority to get its pleas heard or taken seriously.

Id. Enlightenment advocates have at times been mocked for believing that ours is the best of all possible worlds. Delgado is simply taking the idea one step further; ours is the worst of them. Obviously Delgado cannot be adequately answered here.

178 Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, *in* CRITICAL RACE THEORY I, *supra* note 12, at 218.

179 *Id.* at 221.

180 *See id.* at 221.

181 *See id.* at 222.

182 *Id.* at 218.

183 *See id.* at 223.

how can the images that the authors decry have caused any damage? If words do have consequences, if we have paid a heavy price for the imagery just referred to,[184] why can we not combat these images through argument and counterimages? Why must we "deepen suspicion of remedies for deep-seated social evils that rely on speech and exhortation"?[185] If restrictions were to be imposed, moreover, who would decide what could be said by and about minorities? Finally, who gets more from free speech than a group for whom the truth-value of language seems to be of only secondary import?[186]

In this part of the essay we have heard Williams charge that the steady, unyielding, destructive assault of mass culture is producing countless inauthentic Americans, especially in minority populations.[187] But are there no victories worth acknowledging, if not celebrating, in the battle for minority well-being?[188] Are there no stories to at least help

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184 *See id.*

185 *Id.* at 225. Charles Lawrence has himself highlighted the cost to the civil rights community of attacking free speech. Charles Lawrence, *If He Hollers Let Him Go*, *in* WORDS THAT WOUND, *supra* note 12, at 57.

> I fear that by framing the debate as we have—as one in which the liberty of free speech is in conflict with elimination of racism—we have advanced the cause of race oppression and placed the bigot on the moral high ground, fanning the raising flames of racism.

Id.

186 *See, e.g.*, *supra* notes 97-106 and accompanying text. *See also* RICHARD A. POSNER, OVERCOMING LAW 377 (1995) (charging that Williams's bald assertion that Beethoven was a mulatto "conveys an impression wildly at variance with the known facts of his ancestry. . . . Williams ought to be scrupulous about the facts or acknowledge that she is writing fiction."); Robin West, *Constitutional Fictions and Meritocractic Success Stories*, 53 WASH. & LEE L. REV. 995, 998 (1996) (though an ardent supporter of Williams, West comments that Williams "conveyed her complex arguments about white racism with stories that purported to be factual, but which actually may not have been factually accurate."). I thank Richard Posner for this reference.

187 *See supra* notes 110-65 and accompanying text.

188 *See* KENNEDY, *supra* note 84, at 389.

> It is profoundly misleading . . . to focus exclusively on the ugliest aspects of the American legal order. . . . Doing so conceals real achievements: the Reconstruction Constitutional Amendments, the Reconstruction civil rights laws, *Strauder v. Alabama* . . . . Neglecting these achievements robs them of support. . . . Such one-dimensional condemnations of the racial situation [exact another price as well. They] render attractive certain subversive proposals that are, given actual conditions, foolish, counterproductive and immoral.

Id. Exclusive focus on the seamier side of life, moreover, is counterproductive in that it makes enemies of those who could and should be friends. *See, e.g.*, William Raspberry, *Eyes on the Problem*, BOSTON GLOBE, Jan. 3, 1998, at A11. Raspberry, a black columnist, asks his readers to imagine that they

> are confronted by a homeless guy who says: "It's people like you who are responsible for my homelessness in the first place. You got any spare change?" [When the homeless person] insists on making me the enemy, I find it easy to just keep walking. I think, white America is walking past black America's manifest problems in much the same way, and for much the same reason. . . . We insist that all white

bind wounds and provide consolation?[189] "I take life way too hard, I'm told," writes Williams.[190] That, of course, is her right. But is there not something, anything, in the record on which her readers might base some hope for better times to come? Holding out little, if any, "hope for progress,"[191] can CRT be "transformatively aspirational"?[192]

On another level, what if Williams has missed the central point? What if our already free-wheeling culture cannot be decentralized further because a modern nation, to be viable as such, must have a national culture? What if there is no acceptable substitute in this country for a more equitable distribution of wealth, and what if for this purpose more integration into mainstream society is required? What if most CRATs are, at bottom (as Williams says she has been charged with being), "lonely discontents . . . who don't know when to stop complaining,[193] [and worse]

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people play the villain's role and we seem endlessly surprised when they just keep walking.

Id. I can vouch that acknowledging success is a useful tactical device. I recall a lecture given at my school several years ago by the late Tom Stoddard, a leading gay-rights advocate. Far from chastising the audience for its connection to a corrupt society, he began by sharing with it step-by-step the successes of the gay-rights movement. The shock of his approach quickly dissipated whatever resistance the speaker would otherwise have encountered and, before long, he had the audience eating out of his hand.

189 *See, e.g.*, Clark, *supra* note 84, at 5-9 (telling a story of remarkable, if not exactly linear, black progress over the last fifty years); *see also* Charles Krauthammer, *Let's Shackle the Slavery Apology Idea*, NEWSDAY, June 29, 1997, at G4.

> The sociological truths are that America, while still flawed in its race relations, is now the least racist white-majority society in the world; has a better record of legal protection of minorities than any other society, white or black; offers more opportunities to a greater number of black persons than any other society, including all those of Africa.

Id. (quoting black Harvard sociologist Orlando Patterson).

190 ROOSTER, *supra* note 1, at 184.

191 *See supra* note 12 and accompanying text.

192 *See* ERIK ERIKSON, GANDHI'S TRUTH 154 (1970) ("Hope [is] the basic ingredient for all vitality."). Leroy Clark applies this truth to the matter at hand:

> Racism thrives in an atmosphere of insecurity, apprehension about the future and inter-group resentment. . . . Unrelenting unqualified accusations only add to the negative atmosphere; [and] telling whites that they are irremediably racist . . . is a force that helps create the future it predicts.

Clark, *supra* note 84, at 50.

A reader suggests that the key word is "transformatively," that CRATs are not looking for something additive, but for something magical, overwhelming, a *deus ex machina* resolution that is not dependent on anyone else's good will. "Progress" in this view is of little interest to CRATs because it does not satisfy the underlying hunger.

193 To place Williams in this category we need only consider her position on the "Gospel" tourists. *See* Frank Bruni, *Tourists Flocking to Harlem Churches,* HOUSTON CHRONICLE, Nov. 24, 1996, at 14. Apparently on Sundays busloads of European visitors descend on Harlem to witness, and sometimes even participate in, religious services. *See id.* There is an air of festivity as visitors anticipate an experience that, from all they have learned, will be new and uplifting. Notwithstanding the inconveniences, the churches are happy to share the Good News, an ineluctable conclusion from the fact that they keep the doors open and bring in tens of thousands of dollars per year. What is Williams's take? The scene smacks of racial

who fill in meaning when none was meant"?[194] And, last, what if because of their Ivy League affiliations, CRATs are having far more influence than their numbers would suggest?[195] "We must begin to think . . . about the fiercely coalescing power of the media to spark mistrust," writes Williams, "to fan it into forest fires of fear and revenge."[196] But, under these circumstances, who would Americans have more to fear from than the CRATs?

III. PARENTHOOD AND APPLE PIE

It is time to stop demonizing single mothers or anyone else who makes family where there was none before.[197]

If CRATs have strained to make mountains out of the molehills—that is, to portray American institutions as all but insurmountable hurdles for minorities to overcome—have they similarly endeavored to take mountains and label them molehills? Consider the following story.

Not long ago there lived a young unmarried woman named Crystal Chambers, who worked as an arts and crafts teacher at the Omaha Girls

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"voyeurism." "People don't just go there for the religion. They go for the show; there's this sense of whites being on safari. All that's missing is the hats." *Id.* No one likes to be gawked at, but is Williams's reaction not, once again, excessive?

194 ALCHEMY, *supra* note 56, at 206.

195 *See* Jeffrey Rosen, *The Blood and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27-42 (for a powerful argument that the line to O. J. Simpson's acquittal runs through CRT). To arrive at this conclusion one does not have to believe that large numbers of people have either read CRT writings or self-identify as CRATs. It would be sufficient that CRT ideas are picked up in the media, circulated in the community, and are absorbed. John Maynard Keynes noted how ideologies often develop unconsciously through a kind of osmosis. John Meynard Keynes, *The General Theory of Employment, Interest and Money*, *in* BARTLETT'S, *supra* note 74, at 652 ("Practical men, who believe themselves to be quite exempt from any intellectual influences are usually the slaves of some defunct economist."). Is there any reason why such a principle does not extend to living social critics?

Stanley Crouch offers an explanation for the influence CRATs have had.

> Our desperate goodwill pushes us to pretend that these flagellation rituals have something to do with facing the blue steel facts of unfairness in our country. . . . The refusal to accept the tragic fundamentals of human life has led to our bending before a politics of blame in which all evil can be traced to the devil's address, which is, in some way, the address of the privileged and the successful.

CROUCH, *supra* note 77, at 34.

196 ROOSTER, *supra* note 1, at 108. *But see* CHRIS ROCK, ROCK LIVES! 19 (1997) (Chris Rock is a black comedian.).

> I know what all you black readers think.
>
> "Man, why you got to say that? Why you got to say that? It isn't us, it's the *media.* The media has distorted our image to make us look bad. Why must you come down on us like that, brother? It's not us, it's the media."
>
> Please cut the shit. When I go to the money machine at night, I'm not looking over my shoulder for the media.

Id.

197 ROOSTER, *supra* note 1, at 180.

Club.[198] The Club, an organization whose clientele was 90 percent black, had as its goal "helping young girls reach their fullest potential."[199] Because "[t]eenage pregnancy often deprives young women of educational, social and occupational opportunities, creating serious problems for both the family and society,"[200] the Club had a policy against allowing pregnant single staff members to retain their jobs.[201]

When Ms. Chambers became pregnant she was forced to leave. She thereupon sued the Club, claiming that the Club's policy violated Title VII because its impact would fall most heavily upon black women, whose fertility rate was significantly higher than that of whites.[202] She further claimed that the "role model rule" constituted *per se* sex discrimination banned by the Pregnancy Discrimination Act of 1978.[203] The district court, while sympathetic, nevertheless rejected the claims, holding that

> the policy is a legitimate attempt by a private service association to attack a significant problem within our society. The evidence has shown that the Girls Club did not intentionally discriminate against the plaintiff and that the policy is related to [its] central purpose of fostering growth and maturity of young girls . . . .[204]

In sum, the argument with respect to disproportionate treatment was trumped by the "business necessity" defense.[205] The decision was upheld on appeal.[206]

While recognizing that the outcome of *Chambers* might be "born of sympathy for poor black youngsters and desperation about stemming 'the epidemic' of teenage pregnancy that plagues them,"[207] Professor Austin has condemned it arguing that

> [t]he club managed to replicate the very economic hardships and social biases that . . . made the role model rule necessary in the first place. [For another, the opinion evinces] a theory of reproduction that can only be termed "primitive," which posits that simply seeing an unmar-

198 Chambers v. Omaha Girls Club, 625 F. Supp. 925 (1986).

199 *Sapphire*, *supra* note 65, at 550.

200 *Id.* at 551.

201 *See id.* at 550.

202 *See id.* There was testimony, which the court seemed to accept, that the ratio of black to white teenage pregnancy in the county in question was two and one-half to one. *See id.* at 64.

203 *See id.* at 550

204 *Id.* at 552.

205 *Id.* at 550.

206 *See id.* at 552.

207 *See id.* at 553.

> ried pregnant woman can have such a powerful impact on adolescent females that they will be moved to imitate her . . . Surely the Club and the courts do not [really] believe that black teenage pregnancy is the product of social voyeurism or a female variant of "reckless eyeballing."[208]

If this is the case, why did Chambers lose her job? Austin speculates: "It is likely that the club sacked her in part because she resisted its effort to model *her* in conformity with white and middle-class morality . . . ."[209] How should minority academics respond?

> [A] black feminist jurisprudential analysis of Chambers must seriously consider the possibility that young, single, sexually active, fertile and nurturing black women are being viewed ominously because they have the temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist and class-stratified society would impose upon them.[210]

In short, we must treat every birth by a fifteen-year-old black mother as a potential blow for racial integrity.[211] Here is another product of the rhetoric of cultural annihilation.

The Chambers drama takes place on a specific historical stage.

> At bottom, unmarried black woman workers [sic] who have babies are being accused of carrying on like modern-day Jezebels when they should be acting like good revisionist Mammies. . . . When Crystal Chambers refused to subordinate her interest in motherhood to the supposed welfare of Club girls, she essentially rejected

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208 *Id.* at 555.

209 *Id.* at 557.

210 *Id.* at 555. *See* Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. J. GENDER & LAW 1 (1993) (complaining that racism and sexism have led to the current depreciation of single mothers):

> [Motherhood is a] rare source of self-affirmation [for the black teenager; single motherhood] has deeper roots in the lives of black women. . . . Motherhood is "sacred" so long as its offspring are "legitimate"—that is, as long as the child bears the name of a father who legally controls the mother.

Id.; *see also* Joan Tarpley, *Blackwomen, Sexual Myth and Jurisprudence*, 69 TEMP. L. REV. 1343, 1387 (1996) ("We must . . . authenticate our sexual selves [and] parent without shame."). You do not have to be black to be persuaded on this point. *See* Anthony Alfieri, *Black and White*, 85 CAL. L. REV. 1647, 1674-75 (1997) (book review) ("Austin's study of *Chambers* illustrates the continuing oppression of black women in employment as well as the diversity of black women's cultural practices in the areas of family and reproductive freedom.").

211 *See Sapphire*, *supra* note 65, at 555 and accompanying text; text accompanying note 210.

> the Club's attempt to impose upon her the "positive" stereotype of the black female as a repressed, self-sacrificing, nurturing woman whose heart extends to other people's children because she cannot (or should not) have kids of her own.[212]

Far from being a sucker in life's game, then, Crystal Chambers is a hero.

Not all young women who make families without husbands, of course, are like Chambers. Yet "all of them deserve a measure of freedom with regard to their sexuality that the dominant culture withholds. All of them have the potential of being guerrilla fighters. . . ."[213] And who should support these incipient Harriet Tubmans? "Economic resources should be available to both black men and women who want to maintain families with children. . . ."[214] This is apparently the position of major civil rights organizations like the NAACP and Operation Push, for it seems they are making little, if any, effort at discouraging unwed parenthood in the black community.[215]

Austin provokes a number of questions, both broad and narrow. Should all practices of protected groups—no matter how destructive or costly—come within the reach of Title VII? Is it so ludicrous to suppose that a teenager will be influenced by the behavior of a counselor? If "reckless eyeballing"[216] is as simple-minded a view of human behavior as Austin suggests, shall we abolish affirmative action in cases where providing role models for minority students is the basis for the policy?[217]

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212 *Sapphire*, *supra* note 65, at 569, 571.

213 *Id.* at 573. While all this is intriguing in the abstract, one cannot help but wonder how Austin would react to a fifteen-year-old daughter's announcement that she was going out tonight to join the insurrection.

214 *Id.*; *see also* DERRICK BELL, CONFRONTING AUTHORITY 54 (1994). Austin's analysis "had a profound effect on my students," writes Bell, a professor at Harvard Law School when the article first appeared. *Id.* He urged the Harvard administration "to do whatever was necessary to retain Austin," then teaching as a visitor, because "her views needed to be heard." *Id.* The administration was unpersuaded, and when the faculty did not recommend her or any other black woman for appointment that year, Bell resigned in protest. *Id.* at 54-57.

215 *See, e.g.*, Bob Herbert, *A Pitiful Giant*, N.Y. TIMES, July 18, 1997, at A29. The Urban League position would appear to be otherwise. *See infra* note 254 and accompanying text.

216 Text accompanying *supra* note 208.

217 *See* Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REFORM 281, 293 (1989) (the presence of minority faculty, in more than token numbers, provides "concrete role models for minority law students. They dispel the myth of preordained mediocrity for minorities . . . and challenge the idea of 'diversity' in law school admissions which is too often translated as the presence of interesting 'oddities' in the classroom."); *see also* WILLIAM WILSON, WHEN WORK DISAPPEARS xiii (1996) (offering other contexts in which role models may be important). Wilson starts his book as follows:

> For the first time in the twentieth-century most adults in many inner-city ghetto neighborhoods are not working in a given week. . . . The consequences of high neighborhood joblessness are more devastating than high neighborhood poverty.

Finally, does society not have a legitimate interest in promoting reduction of teenage pregnancy to protect itself against insolvency—or guerrilla fighters?

A. IMAGINING OUR PROBLEMS

Austin at least perceives a social problem, even if she, surprisingly, cannot see a connection between its perpetuation and her advocacy. "[D]esperation," "epidemic," "plagues"—the words she uses are telling.[218] The same cannot be said of Patricia Williams, for whom the schools are now filled only "with supposedly fatherless children,"[219] and for whom a teenager having children "makes biological sense, if not normative social sense."[220]

How does Patricia Williams *know* that unwed parenthood is a red herring and that the real objective is to attack minority women?

There are enough children in the world already, black women are told—care to try some Norplant? Yet this anxiety about population control does not extend to middle-class whites who are encouraged to spend tens of thousands of dollars on artificial means of reproduction if necessary.[221] But Williams is being disingenuous here about the basis for the attempted intervention. The concern is not population control; nor is it race or class. It is family status. Who is it that is seeking fertility treatments these days? Teenage singles? Or middle-aged *marrieds* at the end of their rope?[222]

In a similar vein Williams expresses suspicion that now, when there are so many black children of single parents around, the Horatio Alger myth is no longer in fashion.

Id. Would Austin dismiss an argument that ghetto children are harmed through absence of role models as founded on a "primitive" theory of "reckless eyeballing"? Or is "reckless eyeballing" just a another trope to be used for rhetorical advantage? *See supra* note 216 and accompanying text.

218 A final question. What if Crystal Chambers had been white? A black culture defense of her behavior implies that a white teacher could legally have been terminated. Is it healthy for America to continuously expand the notion of black exceptionalism?

219 *See* ROOSTER, *supra* note 1, at 7, 12.

220 *Id.* at 175.

221 *Id.* at 9. Williams does not make clear who is doing the encouraging.

222 Is the traditional family, at least, a desideratum for Williams? *See* ROOSTER, *supra* note 1, at 156. "'The family' is a complicated affair in America. One in three women and one in seven men have been molested by an adult before they reach the age of eighteen." *Id.* No evidence supports this fantastical assertion or the extremely dubious implication that there is less abuse in households where the father is gone but either the boyfriend or step-parent is around. Indeed, a recent study shows that "preschool children in step-families are forty times as likely as children in intact families to suffer psychological or sexual abuse." Barbara Whitehead, *Dan Quayle Was Right*, ATLANTIC, Apr. 1993, at 72. Sometimes the problem is himself, sometimes not.

> [This] myth, after all, was about captains of industry who came up the hard but noble way, the proud products of struggling widows, urban single mothers. And peaking in the 1930s there was a whole genre of Depression-inspired literature in which single mothers and their resolute sons plowed the fields and wrassled coyotes, milked their bone-dry cows with faith and patience. . . . Then a miracle would happen. . . .[223]

But surely the reader can see—if Williams cannot—that here too racism is no part of the explanation. The Horatio Alger hero was the product of a broken home, not of a home that, for traditionalists, never was. It was the death or disability of a parent, the loss of a parental job that placed a crushing burden on him. And in subscribing to the myth, society was telling him that notwithstanding the trying circumstances he could make it. As we shall see in a moment, the distinction is important.

To be sure, a revival of the myth would be helpful in many ways. Johnny needs all the help he can get, and, because he is no more responsible for his predicament than the Alger hero, he is entitled to it. But if someone is to breathe life back into the myth, it will not be Williams or any other CRAT.[224] The reason is simple. A reading of CRT literature quickly reveals that CRATs are not interested in stories highlighting black success in the world, especially the kind involving guts, ambition, and independence.[225] For CRATs, it seems fair to conclude, black success represents a failure of theory, living evidence that maybe Johnny can make it on his own, that maybe skin color is not the alpha and omega of human division and the ultimate determinant of all achievement. The

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223 ROOSTER, *supra* note 1, at 173-74.

224 *See* DALTON, *supra* note 2, at 132, 134-35.

> [I]n a nutshell, my objection to the Alger idea is that it serves to maintain the racial pecking order. It does so by mentally bypassing the role of race in American society. . . .
>
> . . . [B]y interring the myth of Horatio Alger, . . . we can give the lie to the idea that Black people can simply lift themselves up by their own bootstraps.

Id. Dalton's message is clear: the notion that blacks should aim at control over their own destinies is useless, if not destructive. For a different approach, *see infra* Conclusion. Meanwhile, consider that exposure to Horatio Alger's ideas seems not to have damaged one of the greatest judicial minds of this century, Alger's private tutee—Benjamin Cardozo. *See* RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION 2 (1990); *see also* PAGE, *supra* note 28, at 94 ("Racism cannot complete its deadly, dirty work unless we serve as its accessories, which we do every time we internalize the second-class-and-helpless image others try to project on us.").

225 *See, e.g.*, ROOSTER, *supra* note 1, at 60.

> [In holding out Bryant Gumbel and Oprah Winfrey as] icons of what ordinary blacks could achieve if only they worked a little harder[, whites] negat[e] not only the extraordinary talents, luck, and philanthropy of the black upper class but also the existence and vitality of the black working class. . . .

Id.

only dream Williams offers is one of a community in which "no child raised in this supposed 'man's world' should be without dozens of good men to look to for protection."[226]

Unfortunately, a new myth that encompasses Johnny cannot come into being at the hands of the majority community either. Why? It carries too great a risk. If a child born into a single-parent family is hero material merely by virtue of birth, as Williams implies, then does not the glory reflect on the parent producing it? But in a setting where producing out-of-wedlock children is defined as heroic, how can society be sure the children produced will be cared for? If they are not, who will pay for them?[227] Obviously, the very people who are asked to promote the new myth. There is, in short, no one left to create and promote the myth.

We are left in a dilemma. On the one hand, "[t]he war on illegitimacy is . . . a way of drawing lines between those who are thought legitimate and children who are not. In terms of its civic consequences, it builds a barrier between . . . those who are all in the family and those who are deemed alien."[228] On the other hand, if this painful distinction is completely abolished, the consequences could be disastrous.

Complicating the problem is a racial dimension that has not gone unnoticed. During the 1992 presidential campaign, Vice President Dan Quayle leveled an attack on Murphy Brown, the fictional newscaster on the eponymous television show, for having a nonmarital child and thereby effectively legitimizing such practice. According to Williams, "the ingredient that so distinguished Quayle's remarks was his bold equation of Ms. Brown's morals with those attributed to real women of color."[229]

There is only one sound way out of the quandary. We need to find someone who actually studies family life, and ask: what are the realities—racial and otherwise—of single-parent families in America today?

B. ANALYZING OUR PROBLEMS

Fortunately, there are a number of experts who can help here. Their views challenge the strongly staked-out positions of Austin and Williams and, for this reason, are set forth in some detail. David Blankenhorn, perhaps the best known of the authorities, sets the stage for us in his new

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226 *Id.* at 181. Williams does not explain why children who are of no interest to their fathers will be of interest to others.

227 Of course, as a colleague points out, there is no guarantee that a couple bound together in marriage will be able to nurture and support a child. But can we not agree that the chances are ordinarily greater that they will be able to do so?

228 ROOSTER, *supra* note 1, at 8-9.

229 *Id.* at 155-56. Williams offers no evidence that Quayle was directing his comments to blacks.

book, *Fatherless America.*[230] Blankenhorn writes that 40 percent of our children will go to bed in fatherless homes.[231]

> Never before in this country have so many children grown up without knowing what it means to have a father. . . .
>
> Fatherlessness is the most harmful demographic trend of this generation[, and is] . . . the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to *domestic violence against women.*
>
> [I]n personal terms, the end result of this process, the final residue from what David Guttman calls the "deculturation" of paternity, is narcissism: a me-first egoism. . . . In a larger sense, the most significant result is our society's steady fragmentation into atomized individuals, isolated from one another and estranged from the aspirations and realities of common membership in a family, a community, a nation, bound by mutual commitment and shared memory.
>
> . . .
>
> . . . [Since the father's biological role is terminated upon insemination, and since his role is so critical,] the supreme test of any civilization is whether it can socialize men by teaching them to be fathers—creating a culture in which men acknowledge their paternity and willingly nurture their offspring.[232]

There is enough data supporting these observations to choke the information superhighway. According to Professors Ruth McLanahan and Gary Sandefur, nearly one-third of American children today are born to unmarried mothers,[233] and though we do not lead the world in this category, we may well do so in the percentage of families headed by a single parent.[234] Basing their findings on four major national surveys, McLanahan and Sandefur conclude that, compared to children who grow up with both parents, children who grow up with one parent (almost always the

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230 DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995) (Blankenhorn, who is white, is chair of the National Fatherhood Initiative.).

231 *Id.* at 1.

232 *Id.* at 1, 3-4 (emphasis added); *see id.* at 18, tbl.1.2, 19, tbl.1.3 (in gauging the progress of various family arrangements in the U.S. over the last half-century).

233 SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 2 (1994).

234 *See id.* at 138.

mother) are approximately two and one half times more likely to become teen mothers, twice as likely to drop out of school, and almost one and one-half (1.4) times more likely to be idle (out of school and out of work).[235] Those who do stay in school have lower grades and poorer attendance records, even after test scores for aptitude are taken into account.[236] It should not be surprising under the circumstances that a national study of seventeen thousand children aged seventeen and under found that "young people from single-parent or step families were two to three times more likely to have had emotional or behavioral problems than those who had both of their biological parents living at home."[237]

Why? The absence of emotional and financial support undermines a child's trust in parents and increases uncertainty about the future,[238] and makes the child vulnerable to peer pressure.[239] Perhaps the father's most important contribution is to provide a model for discipline and self-

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235 *See id.* at 50 fig.3, 53 fig.4 (1994). The authors note that the outcomes, shown on bar graphs, are adjusted for race, sex, mother's education, father's education, number of siblings and place of residence and that all differences are statistically significant. *See id.* Dropping out of school has an impact not only on the mother but also on her child, for "[a] mother's education is generally regarded as the single best predictor of a child's school achievement. . . ." *Id.* at 42.

236 *See id.* at 46.

237 DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY 57 (1996) (citing data published by the National Center for Health Statistics). McLanahan and Sandefur do not want to overstate the case against single parenthood. They point out, for example, that low income—including that brought about by divorce—accounts for half the single/dual parent gap. MCLANAHAN & SANDEFUR, *supra* note 233, at 3 Because non-marriage is not the whole story, they do not tell single women to avoid having children. *See id.* Yet non-marriage is a cause of poverty, at least in the sense that it prevents parents from enjoying the economies of scale that would arise from sharing one household. *See id* at 10. Though unsure precisely of how these factors interact, the authors conclude that

> [C]hildren who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.

Id. at 1 (emphasis omitted).

238 *See id.* at 3.

> Having another parent around who cares about the child increases the likelihood that each parent will "do the right thing" even when otherwise inclined. In short, the two-parent family structure creates a system of checks and balances that both promotes parental responsibility and protects the child from parental neglect and, sometimes, abuse. This is an important function of social capital within the family.

Id. at 28 (footnote omitted).

239 *See id.* at 4. A strong father by contrast can provide guidance; he can highlight in word and deed that working hard and getting a good education has a payoff. *See id.* at 32-36. His participation in the family is important to a girl's ability to form healthy relationships with men. *See id.* at 37. As for his son's development, if the man treats his wife well, he provides a role model for the child in his future dealings with women. *See id.* By contrast, if he shirks his responsibility to his family, or even more damaging, fails to acknowledge his child at all, the message he gives his son is that it is easy and appropriate to do the same. *See id.* Through

control.[240] The record shows, tragically, that "sixty percent of America's rapists, seventy-two percent of [its] adolescent murderers, and seventy percent of [its] long-term inmates come from fatherless homes."[241]

The foregoing discussion has focused on fatherlessness generally. But if America indeed consists of two societies, as CRATs trumpet, specific attention must be given to the black community, where the percentage of children born out of wedlock approaches 70 percent,[242] and especially to the lowest socioeconomic classes in it where a child born to a married couple can be a rare event.[243] What, then, are the realities of black social life today? CRATs, focusing as they do on what whites are doing wrong, cannot help here. Fortunately, sociologist Orlando Patterson[244] is available to serve as our guide with his remarkably frank and subtle work, *The Crisis of Gender Relations Among African Americans*.[245]

C. AN INSIDER SPEAKS

Presumably addressing black culture preservationists like Patricia Williams, Patterson emphasizes that in the black middle class there is not "the slightest trace of a distinctively African American 'ethnic family form.'"[246] He goes on to describe a destructive cycle of behavior affecting primarily the lower classes but sparing no one. It begins, Patterson suggests, because mothers, being "desperately overstressed" and "physically overburdened" in attempting to raise children alone and in poverty, cannot help but express their anger and panic in their relationships with

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her dating behavior the single mother's influence on her daughter's relationships with men may be no less powerful. *See id.*

240 *See* Dennis Prager, *Why God is a Man; It's Our Father Figure Who Art in Heaven, for a Reason*, PHOENIX GAZETTE, Aug. 18, 1994, at B5 (speculating about why the Bible masculinizes the deity).

> When they are young, males need to feel accountable to a male authority figure. . . . Many mothers will tell you that if there is no male authority figure to give a boy rules, it is virtually impossible for her to control his wilder impulses. [Those women who feel] discriminated against because of the male depiction of God should ask themselves whether any discomfort resulting therefrom is comparable to the pain they will suffer if boys are not civilized into good men.

Id.

241 POPENOE, *supra* note 237, at 63.

242 Stephen Holmes, *Quality of Life is Up for Many Blacks, Data Say*, N.Y. TIMES, Nov. 18, 1996, at A1.

243 *See* PAGE, *supra* note 28, at 14 (In some areas of concentrated poverty such as the South Bronx the rate reaches 90 percent.).

244 Patterson is a professor at Harvard University.

245 Orlando Patterson, *The Crisis of Gender Relations Among African Americans, in* RACE, GENDER AND POWER IN AMERICA 56 (Anita Hill & Emma Jordan eds., 1995).

246 *Id.* at 75.

their sons, who are the embodiment of the men who abandoned them.[247] It is the son who must then find release. As Patterson puts it,

> [T]he violence of the mother toward her son is displaced in the violence of the son toward women, which is then reproduced in the violence of these women toward the sons they begin to generate while they are still children themselves, under the powerful influence of their own mothers. . . .
>
> [In other words,] "in the ghetto the sexes are pitted against each other from an early age," and "mistrust is built into the socialization process very early in a child's life."
>
> [As an outgrowth of this mistrust there is] throughout the underclass today, the vicious desire to impregnate and abandon women, as if Black men were unable to shake off the one role of value (to the master) thrust upon them during slavery, that of breeders. . . .
>
> [In this psycho-social setting t]he prevailing dogma that effective father substitutes exist in the network of support that poor Black women mobilize to raise their male children is pure Afrocentric myth, as is the twin dogma that father absence does not matter anyway.[248]

Patterson works out the long-term consequences of these patterns for mother and child.

> Teenage childbearing is usually catastrophic for the life chances not only of the teenage mother, but for her own mother, who is further burdened just when she begins to look forward to relief from the trials of childrearing under poverty; for younger siblings of the teenage mother, who receive even less attention as their already burdened mother now takes on the role of grandmother. . . .[249]

The children of teenage mothers, of course, pay the heaviest price, which Patterson catalogs: lower grades, risk of social impairment, behav-

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247 *Id.*

248 Patterson, *supra* note 245, at 67, 88, 73 (quoting DAVID A. SCHULZ, COMING UP BLACK 64 (1969) (footnotes omitted). Patterson's use of class as a lens to view race and gender issues in African American communities is, to say the least, "unsettling." *Forward, in* RACE, GENDER AND POWER IN AMERICA, *supra* note 245, at xv; *see also* ROOSTER, *supra* note 1, at 7 (reporting that 50 percent of women in homeless shelters "are associated with their having fled abusive relationships").

249 Patterson, *supra* note 245, at 69.

ioral disorders.[250] "Worst of all," Patterson maintains, "the children of adolescent mothers are far more likely to become adolescent mothers themselves, thus perpetuating the pattern of poverty and destructive gender and parenting behavior. This may be the single most important cause of chronic poverty among Blacks."[251]

Might bringing down the rate of unwed parenthood help here? Or are ghetto conditions too firmly entrenched? In spelling out the problem, Patterson certainly implies that there is hope. Social analysts William Galston and Elaine Kamark are more explicit on the subject. The relationship between family structure and crime is so strong, they have found, that "controlling for family configuration erases the relationship between race and crime and between low income and crime. [This conclusion, the authors announce,] shows up time again and time again in the literature; *poverty is far from the sole determinant of crime.*"[252]

The foregoing diagnosis of social conditions may, at last, be having an effect on the leadership of this country. In his *1995 State of the Union Address*, President Clinton asked community leaders for help in stopping "our most serious social problem: the epidemic of teen pregnancies and births where there is no marriage."[253] "The obvious place to begin" the rehabilitation process, writes Hugh Price, President of the Urban League, "is for individuals of child-bearing age not to bring children into this world until they are mature enough to love, nurture and provide for their offspring. The alarming incidence of out-of-wedlock teen births," he

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250 *Id.* at 69-70.

251 *Id.* at 70 (footnotes omitted). Not wanting to leave any doubt about the existence of a crisis among the black lower class, Patterson begins his conclusion as follows:

> This, then, is what we have inherited: a lower class with gender attitudes and behaviors that are emotionally and socially brutalizing and physically self-destructive; the posturing, pathological narcissism of "cool pose" masculinity, with its predatory, antimaternal sexuality, soul-numbing addictions, and murderous, self-loathing displacements; the daily and nightly carnage on the streets of the inner cities; the grim statistics on child and spousal abuse, rape, poverty, illiteracy and suicide. These are the gruesome manifestations of this historically, sociologically, and psychologically en-gendered crisis between lower-class Black men and women.

Id. at 93.

Patterson's assessment of ghetto conditions may explain why wife abuse is reportedly four times as common among blacks as it is among whites, and why black men kill their wives at a greater rate than any other ethnic group. *See* Richard Majors, *Cool Pose: A Symbolic Mechanism for Masculine Role Enactment and Coping by Black Males, in* RICHARD MAJORS & JACOB GORDON, THE AMERICAN BLACK MALE 253 (1994); *but see* MARI MATSUDA, WHERE IS YOUR BODY? 40 (1996) (insisting, without providing data, that the notion that men of color commit more crime against women is a lie.) If Majors, who is black, is right, how can non-CRATs respond except with deep cynicism? *See supra* text following footnote 80.

252 WILLIAM A. GALSTON & ELAINE CIULLA KAMARK, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990s 14-15 (1990) (emphasis added).

253 State of the Union Address, delivered Jan. 24, 1995. America has a teen pregnancy rate that is the highest in the industrialized world. *See* Editorial, *Battling Teen Pregnancy*, N.Y. TIMES, May 12, 1997, at A14.

continues, "undermines the viability of our community, by creating households, often headed by a lone teen mother, which lack the education and earning power to escape poverty. Though there are heroic exceptions," he concludes, "this is profoundly unfair . . . because it severely handicaps the children from the outset."[254]

This brings us back to the Omaha Girls Club. In dismissing Chambers, the Club was trying to do its part to break the cycle. Should it be condemned for imposing middle-class values? Should Crystal Chambers be revered as a black culture hero?[255] Such questions are not easy to answer. Unlike nations such as China, America is not one to lightly brook interference—whether governmental or private—in procreation and its cultural environs. This makes efforts at control such as those by the Girl's Club disquieting at best, and especially so when, as Williams has written, they "play dangerously against a social backdrop in which . . . white protectionism still demands black loyalty to white people and their lifestyle as a powerful symbolic precedent for deeming black social organization 'successful.'"[256]

On the other hand, there are so many problems identified with single-parent homes that one wonders whether, without a return to more traditional and typically middle-class family patterns, a black community can even exist, let alone thrive.[257] Of greatest concern is the reported link between the breakdown of the traditional family unit and criminal behavior. The many people fearful of crime, it hardly need be emphasized, may be willing to yield on issues of procreation and cultural autonomy. For purposes of making public policy, we need to know how reasonable that fear is. How does the victim experience the criminal act? What is the rate of crime? Do the two combine to turn crime into a social "problem"? Does crime emerge from different populations differ-

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254 Bob Herbert, *A Word to the Wise*, N.Y. TIMES, Feb. 14, 1997, at A37; *see also* JOCELYN ELDERS, M.D. & DAVID CHANOFF 329-30 (1996).

> My seven-plus years in public health only reinforced the conclusion I first drew in Arkansas . . .: that out-of-wedlock teenage pregnancy is *the* key factor in perpetuating the cycle of poverty. This is especially true in the Black and Hispanic Communities, but in the White community as well, where teenage pregnancy has also shot up wildly, with devastating social and economic results.

Id.

255 *See Sapphire*, *supra* note 65, at 565 (referring to Chambers v. Omaha Girls Club, 625 F. Supp. 925 (1986)).

256 *See id.* at 221.

257 *See* Roger Shattuck, *Defending the Middle Class*, N.Y. TIMES BOOK REVIEW, Feb. 1, 1998, at 11 (reviewing Peter Gay, 5 PLEASURE WARS: THE BOURGEOIS EXPERIENCE: VICTORIA TO FREUD (1998)).

> I am strong to declare even here in the heart of individualistic America that a material middle class with its straightened bond of family is the one thing always healthy, human, vital and from which has always sprung the best the world can know.

Id. (quoting Gertrude Stein).

ently? If so, what are the implications? The discussion will not be comfortable. "Americans," laments Paul Butler, "seem reluctant to have an open conversation about the relationship between race and crime."[258] But again, if we are to further our purpose, we cannot help but talk about the experience of crime in America.[259]

IV. THE STORY OF CRIME

> Whites must take into account how much this [racial] history has projected onto blacks all criminality and all of society's ills. It has become the means for keeping white criminality invisible.[260]

There would seem to be no better way to begin our discussion than with a story. Dissents by academic traditionalists notwithstanding,[261] there are without question certain aspects of human existence that are best captured and communicated in the form of stories. As lawyer and literary theorist Ruth Ann Crowley simply puts it, "narrative is the deepest-rooted of our learning methods, we learn law by stories; that is what the case method is. Any lawyer can say to another lawyer, 'hairy hand,' and the whole story comes to mind, attached to its lesson."[262]

Who can doubt that she and the CRATs are right?[263] Surely the perspective and emotional directness of Frederick Douglass, Jane Addams and Malcolm X have had an educational value not to be found in a hundred articles by *neutral* social scientists. No one would argue that they forfeited their credibility because their subject was born of personal experience. Recognizing the limitations of traditional scholarly methods, Richard Delgado has called on the entire academic community to tell more stories in his *Legal Storytelling: Storytelling for Oppositionists and*

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258 Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 681 (1995).

259 *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 73 (1997) ("One cannot be concerned about relations between blacks and whites in the United States without also being concerned about African-American violence.").

260 ALCHEMY, *supra* note 56, at 61.

261 *See, e.g.*, POSNER, *supra* note 34 and accompanying text.

262 For this reason, I suggest, the excesses of the deconstructionist/postmodernist movements cannot be allowed to blind us to the prime weakness of the earlier prevailing objectivist mode, to wit, the fiction of the purely rational disinterested writers.

263 Surely one reason people turn to Scripture for enlightenment is the truth-telling power of its stories.

Others: A Plea for Narrative.[264] Here is a personal narrative that may help advance that much-needed national discussion.[265]

> It was 9:30 on a warm and clear September evening almost four years ago, a perfect time for a walk. After a long day at work—and a morning jog of three and a-half miles—I felt entitled to a treat. Most enticing following a heavy fish dinner which left a strong aftertaste was a $.99 sale on Dove Bars at Cumberland Farms, our equivalent of the Seven Eleven.
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> On my way back home I noticed that my car was parked on the street. Since it was illegal to leave the car on the street overnight I decided to put it in the driveway rather than drag myself out later to do it. I was heading for the car, maybe forty feet away, when in the shadows I made out the silhouette of a man walking in my direction. At first I ignored him. But as I crossed the street I could see that he had shifted direction and was walking straight at me. I noted something else as well. He had pulled the hood of his sweatshirt down over his head so that most of his face was covered. I could tell, however, that he was young. Part of me wanted to change direction or even run since if I turned my back to him and fumbled with the keys at the car door, I would have no chance. At the same time I felt committed to continuing my course; for any evasionary action I took would be evidence that, without precise knowledge of his intentions, I feared the man, that I was assuming the worst about him. I kept walking towards the car.
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> As I pulled out the car keys he was in my face. In an instant he demanded my wallet and pulled up his sweatshirt to show a gun in his belt. I could have jumped him right there—I was bigger than he—but I was not sure I would win the fight and I had a wife and two children at home. I gave up forty dollars along with some identifi-

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264 *See* Delgado, *supra* note 34, at 65. Brown, who labels herself an "aspiring critical race theorist," contends that Patricia Williams "cannot ask (much less answer) the really difficult questions because she has not included the narratives of the White participants [in her stories]. . . . Critical race theory needs a formulation of race that takes account of White people's realities." Brown, *supra* note 8, at 518, 541, 545.

265 *See* Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2047 n.170 (1993) ("I contend that white males do not employ the narrative, storytelling style because to do so would result in their talking about their dominance and that currently is not socially acceptable discourse.").

> cation and credit cards. As he turned to leave, my heart started pounding. When he was about thirty feet away I could no longer control myself. "YOU SON OF A B[—], I'M GONNA GET YOU," I shrieked and started after him. I did not want to catch him, of course. But I knew he was not going to take the time to turn around and shoot at me either. And if he did, I could have ducked behind some cars. I had been violated and, if life was fair, terror had to be requited with terror. Neighbors started looking out their windows or came out to the street to offer consolation. Soon it was all over—or so it seemed.
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> The police came and took down the usual information. They asked whether I could identify the mugger and I told them it would not be easy. They asked if I was all right and, though shaking, I said yes. They offered little hope of recovery or (what I would call) justice.
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> Sleep did not come easily for weeks thereafter. I wondered whether my mugger would come back for revenge, this time shooting first. I thought of my vulnerability and that of my family if he was caught and I had to press charges; he knew where I lived. At the same time I fully understood that I had not been raped, slashed, or shot, as tens of thousands are each year; I could not even imagine the horror they went through.[266] Unlike them, I could laugh at the absurdity of a fifty-year-old chasing a twenty-year-old with a gun.

The incident I describe has been on my mind frequently since it took place. Mostly, I have wondered about my judgment, especially because, about a year earlier, after attending a late-night movie with a friend, I had experienced a virtual preview of the later incident. We had come out of the theater and, except for the two of us, the wide street seemed deserted. All of a sudden, as I was walking towards my car, I saw a young man heading in my direction. Here too I had done nothing to protect myself. My friend, however, less concerned with the proprieties than I, flashed her brights on us to divert my would-be assailant as he brushed by me.

Sometimes the incident comes back to me when I go out at night and, remembering two break-ins into my house over the last few years, I start thinking about which houselights to turn on and which valuables to

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266 The mere mention of Emmet Till, Kitty Genovese, the Clutter family, the Central Park jogger, and Ron Goldman and Nicole Simpson should suffice.

hide—and where. At 1:00 A.M. a few nights ago, the incident came back a different way. I saw myself walking down the street when I saw my assailant twenty feet ahead waiting for me to pass. This time I did not play his game. Summoning all my force, I let out a scream—HELP! My wife at this point was shaking me, telling me to shut up and go back to sleep.[267]

I will have more to say about both the incident and the mugger a little later on. For now, consider that stories like this can be useful in reminding us that even *minor* crime can leave deep wounds. But is crime a matter with which to be especially concerned? Being hit by a loose piece of Hale-Bopp, after all, can also leave a lasting impression. Recent data would appear to answer the question. Among developed nations the United States seems to have a homicide rate that is both the highest and five times the average for the rest of the group.[268] For all that American crime rates have gone down in the last few years, we probably remain the "most violent developed nation in the world."[269]

If crime is a serious problem, most of us will try to shape our lives so as to minimize the risk of victimhood. For this purpose we need, among other things, to identify our criminals. Who, then, are they? The tragic truth is that while white men are responsible for most violent crime,[270] there are about six times as many violent criminals per capita among blacks as there are among whites.[271] The disproportionate rate of

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267 *See* Johnson, *supra* note 265. Johnson's premise cannot be denied; white male academics do not use the narrative mode much. But is there something inauthentic about this story that should lead me to suppress it? If not, why do white male academics not tell more of them? The problem is not that my story tells of triumph, but that—as many of my white colleagues have explained in strongly urging me to take it out—it recounts victimization, and *that* is déclassé. In drawing elaborate conclusions from black storytelling, Johnson is simply wrong.

> Some of these same colleagues, I should add, have also suggested that recounting this painful experience will preclude the possibility of my work being taken seriously. But this seems silly. Do Patricia Williams's unhappy interactions with some white people disqualify her as a social critic? Whatever one may think of the way she interprets her stories, there is no reason to dismiss them out-of-hand. On another level, it should be pointed out, the way that I experienced the robbery is not all that unique. *See* SHELLEY NEIDERBACH, INVISIBLE WOUNDS: CRIME VICTIMS SPEAK (1986).

268 *See* ZIMRING & HAWKINS, *supra* note 259, at 8, 10.

269 Derrick Z. Jackson, *Before We Can Really Fight Crime, We Have to Get Over Race-Based Hysteria*, SUN-SENTINEL, Aug. 23, 1994, at A6.

270 *See* John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, 6 CITY J. 14, 27 (1996).

271 *See id.* at 25 (referring to Glenn Loury's writings). The black male homicide rate was recently determined to be 7.7 times the white homicide rate. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 195 (1993). The per capita rate of crime for a population is not, of course, a trivial datum. Thus, when Patricia Williams announces that whites were arrested for 71.7 percent of all crimes in 1986—without saying more—one has to wonder if she is being disingenuous. *See* ALCHEMY, *supra* note 56, at 73. Needless to say, the principal subject of this Part is the effect of crime, not its myriad and complex causes.

black crime will not come as news to most. But, as will soon be clear, the message seems not yet to have reached the CRATs. So, on a theory that if you cannot identify a problem you cannot be part of the solution, let us recite a few basic facts. In 1995, one in every three black men, from ages twenty to twenty-nine, was either in prison, jail, on probation, or on parole.[272] In some places, the number is closer to 50 percent.[273] Nor is it only young adults who terrorize. Among fourteen to seventeen-year-olds, violent crime has skyrocketed; murder rates within this group increased by 50 percent for whites and more than 300 percent for blacks during the period 1985-1992.[274] This may be the highest price paid for abandoning the traditional family and for having the highest rate of teen pregnancy in the industrialized world.[275]

A. ARGUING WITH STATISTICS

There is no shortage of attempts to soften the impact of this heart-breaking data. It has been suggested, for example, that the discrepancy arises from the racially motivated disparity in punishment meted out under federal law for crimes involving crack and for those involving powder cocaine, the drug of choice in non-minority communities.[276] Ronald Brownstein, however, explains that in 1993 only a fraction of the fifteen thousand black prisoners were serving time on account of federal crack convictions.[277] Brownstein reports, moreover, that for that year only ninety-eight federal defendants were convicted merely for possessing crack, while 3,100 were found guilty of trafficking.[278] There is another aspect to this. As DiIulio points out, "[m]ost drug offenders have long criminal histories. Indeed, in the year prior to incarceration, most

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272 Dilulio, *supra* note 270, at 22.

273 *See id.* at 23.

274 *See* John J. DiIulio, Jr., Commentary, *Moral Poverty: The Coming of the Super-Predators Should Scare Us into Wanting to Get to the Root Causes of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at 31; ("Nationally there are about 40 million children under the age of ten, the largest in decades. By simple math, in a decade today's 4 to 7 years olds will become 14 to 17 years olds. . . . By 2005, the number of males in this age group will have risen about 25 percent overall and 50 percent for blacks."); *but see* James Traub, *The Criminals of Tomorrow*, NEW YORKER, Nov. 4, 1996, at 52 (reporting that crime rates among juveniles dropped in 1995 for the first time since 1988).

275 *See* Editorial, *supra* note 253.

276 Randall L. Kennedy does not agree with this assessment. *See* KENNEDY, *supra* note 84, at 364-86 ("Maybe the crack-powder distinction and, indeed, the entire war on drugs is mistaken. But even if these policies are misguided, being misguided is different from being racist, and the difference is one that greatly matters.").

277 *See* Ronald Brownstein, *Why Are So Many Black Men in Jail? Numbers in Debate Equal a Paradox*, L.A. TIMES, Nov. 6, 1995, at 5.

278 *Id.* As for the states, Brownstein adds, most do not distinguish between crack and powder, and of the fourteen that do, the gap between penalties is narrower than under federal law. *See id.*

prisoners commit at least a dozen serious crimes, excluding all drug crimes."[279]

Commentators have also attacked the disparate crime data in a more general way. Racism so permeates society, they argue, that the criminal justice system cannot help but be hopelessly infected.[280] But how valid is this observation? DeIulio gives it little, if any, credence. He cites, *inter alia,* an elaborate study by Langan that finds "no evidence that in places where Blacks in the United States have most of their contacts with the justice system, that system treats them more harshly than Whites."[281]

Of other attempts that have been made to vicarate the effects of the data, I will have more to say shortly. For now let us consider: What have CRATs said about this grim portrait of inner-city criminality? Austin acknowledges only that "blacks are supposedly overrepresented among lawbreakers."[282] Deborah Post speaks only of the "perception" that blacks commit more crimes than whites and that blacks are disproportionately represented in the criminal justice system.[283] Implicit in Patricia Williams's work is the notion that black crime is the effect of hostility towards blacks, not the cause of it.

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279 John J. DiIulio, Jr., *Crime Truths*, PITTSBURGH POST-GAZETTE, Jan. 14, 1996, at B1.

280 *See* Deborah W. Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237-39 n.2 (1993).

281 John J. DiIulio, Jr., *White Lies About Black Crime*, PUB. INTEREST, Jan. 1, 1995, at 30. Indeed, and this comes as a surprise; a new study finds that blacks are less likely than whites to be convicted of serious crimes such as murder, rape and drug trafficking. *See* The Center for Equal Opportunity, *A Turnaround in Racial Justice*, briefly summarized in U.S. NEWS & WORLD REP., Oct. 14, 1996, at 20.

282 Regina Austin, *A Nation of Thieves: Securing Black People's Right to Shop and to Sell in White America*, 1994 UTAH L. REV. 147, 152 (1994).

283 *Compare* Post, *supra* note 280, at 237, 238; *and* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 39 (1997) ("[We might] assume—perhaps erroneously—that the rates of robbery by race are in some marginal sense 'statistically significant.'"); *and* David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's Politics of Distinction*, 83 GEO. L. REV. 2547, 2567 (1995) ("Even if it were true [note contrary-to-fact subjunctive] that African-Americans commit disproportionately more crimes than whites, the association of race and crime is a stereotype that is false in most instances."); *with* Butler, *supra* note 258, at 684 (among CRATs, the only one willing to face up to the data). With most CRATs hemming and hawing on the subject of black crime rates, again, what kind of credence should they be given?

Williams directs her attention to Michael Griffith[284] and Bernhard Goetz,[285] two individuals who, in her mind it seems, represent all blacks and whites respectively. The implication of this symbolism is clear: any black criminality directed against whites is far outweighed by white crime against blacks and, as a result, is not worth mentioning. But is this the case? Do blacks have as much to fear from whites and vice versa? It seems not. A newly developed statistic shows that blacks are fifty times more likely to commit violent crimes against whites than whites are against blacks.[286] It is in this light that we understand Jesse Jackson's tortured words on November 27, 1993: "'There is nothing more painful for me at this stage of my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody White and feel relieved. How humiliating.'"[287]

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284 *See* ALCHEMY, *supra* note 56, at 60, 78. Recall Michael Griffith was the tragic victim of the infamous *Howard Beach* case in which white teenagers with baseball bats chased a young black man onto a highway where he was killed by a passing car. *Id.* Williams writes about the aftermath of the incident when the police and media claimed that Griffith had been involved in a shooting incident two years earlier. This "is another way of saying 'He was a criminal who deserved it,'" *Id.* at 60 (quoting Vernon Reid, *Visible Man*, VILLAGE VOICE, Jan. 6, 1997, at 15). But is there not a less malignant way of looking at this reaction than to conclude that this is "how racial slurs and attacks objectify people"? *Id.* In the face of all the horror in the world, all potential victims need to tell themselves stories to mitigate the pain. If someone is killed in a car crash, it is comforting to know that the decedent was drinking or not wearing a seatbelt so that we can distance ourselves from the event. Reminding ourselves that the Central Park jogger had been attacked in the middle of the night, instead of the middle of the day, allowed us to go on.

285 ALCHEMY, *supra* note 56, at 73-78. The focus on the records of Goetz's attackers can be explained in a similar manner. Interestingly, Williams says nothing of their reputed admission of criminal intent. *See* People v. Goetz, 68 N.Y.2d 96, 103 (1986). Asserting a moral equivalence between them and Michael Griffith, I suggest, only diminishes the horror of what happened to Griffith.

286 *See* DiIulio, *supra* note 270, at 25. Others have confirmed the enormous discrepancy in interracial crimes of violence. Using his own method and data bank, for example, sociologist William Wilbanks has found nine times as many black-on-white interracial crimes of violence as white-on-black. William Wilbanks, *Frequency and Nature of Interracial Crimes*, 6 JUST. PROF. 1, 17 (1992). The foregoing data need to be analyzed further. *See* Wilbanks, *supra*, at 16. Nevertheless, it should be apparent that setting up the *Howard Beach* and *Goetz* cases as the best symbols of interracial crime in America is egregiously unfair. *See* notes 284-85 and accompanying text.

The rape data are even more terrifying. In one year under recent examination there were apparently only one hundred cases of white rapists assaulting black victims, compared to twenty thousand the other way around. *See* DINESH D'SOUZA, THE END OF RACISM 408 (1995).

I do not want to suggest here that black criminals in general are more likely to target whites qua whites than vice versa. For what its worth, I doubt it. But again, my focus here is on the effects of crime, not on motive.

287 DiIulio, *supra* note 270, at 27-28 (quoting Jesse Jackson). Is Jackson then a racist? *See* Roy Brooks & Mary Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction without a Difference?*, 82 CAL. L. REV. 787 (1994) ("[R]acism is not so much overt racial hatred as it is the subconscious assumption that an African American man walking in a white neighborhood is a dangerous criminal or up to no good."); KENNEDY,

While seeming to accept the data and perhaps even the validity of Jackson's reaction, a number of critics have argued that the *level* of fear of crime is magnified by racism and other factors.[288] Holding that the fear of crime is disproportionate to the actual danger, one editorial writer, for example, has pointed out that in New Orleans, a high crime city, the odds of being killed by a traffic accident are three times higher than by a black male.[289] But how much consolation does this statistic offer? Is the fact that the vast majority of drivers drive safely sufficient reason for letting down our guard when we enter our cars? In fact, we take precautions: we drive at reasonable speeds; we try not to drink; we wear seatbelts. Should we act less defensively with respect to crime? DeIulio puts things in a slightly different perspective: we are twice as likely to be victimized by violent crime, he tells us, than to be *injured* in a car accident.[290]

Attributing fear of crime to racism does not work for yet another—and perhaps the most important—reason. African-Americans are more fearful of crime than are whites. A poll several years ago revealed that 28 percent of blacks, as compared with 18 percent of whites, worried about being murdered.[291] Another poll showed that 77 percent of blacks, compared to 45 percent of whites, worried about becoming crime vic-

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supra note 84, at 146 ("Tragically from a short-term self-interested perspective, it makes sense for people to engage in racial discrimination given the many racially correlated stratifications that mark American society.").

If Jackson's response to black crime is fair, then so perhaps is Bill Clinton's. President William Clinton, Commentary, *Getting a Handle on America's "Race Problem,"* CHI. TRIB., Oct. 17, 1995, at 19.

> [B]lacks must understand and acknowledge the roots of white fear in America. There is a legitimate fear of violence that is too prevalent in our urban areas and often, by experience or [by] what people see on the news at night, violence for those white people has a black face. It isn't racist for a parent to pull his child close when walking through a high crime neighborhood. Or, to stay away from neighborhoods where innocent children can be shot in school or standing at bus stops [or] for parents to recoil in disgust when they read about a national survey of gang members saying that two thirds of them feel justified in shooting someone simply for showing them disrespect.

Id.

288 *See* John C. Hill, *Misperceptions, Fear Increase Racial Hostility*, NEW ORLEANS TIMES-PICAYUNE, Nov. 17, 1993, at A17; *see also* ROCK, *supra* note 196, at 19. "Ted Koppel never took anything from me. N[—] have. Do you think that I've got three guns in my house because the media are outside my door trying to bust in?" "Oh shit. It's Mike Wallace. Run!" *Id.*; *but see* KENNETH F. FERRARO, FEAR OF CRIME 118-19 (1995) (concluding that "people are fairly realistic in digesting the mountains of information [presumably from the media] regarding victimization and interpreting their risk. Although some have argued that fear of crime is a more serious problem than crime itself . . . [our findings] boldly reach the opposite conclusion. . . . Fear of crime is not the problem; crime is.").

289 Hill, *supra* note 288, at A17.

290 DiIulio, *supra* note 279, at B1.

291 Jim Phillips, *Fear of Violent Crime Greater Among Blacks than Whites*, AUSTIN AMERICAN-STATESMAN, Jan. 30, 1995, at A5.

tims.[292] Still another study concluded that blacks were four times as concerned about neighborhood crime as whites.[293] There is a good reason for the fear gap. Black youths, boys and girls, are the number one and two crime victim groups, respectively.[294] African-American males are three times as likely to be robbery victims as are white males.[295] And 80 percent of violent crimes against blacks in 1993 were committed by other blacks.[296]

Derrick Jackson (among others) has argued that because black crime is perpetrated primarily against other blacks, white fear of black crime is irrational.[297] But how relevant is this contention? Fear is not ordinarily free-floating; it is the result of being in an environment perceived to be dangerous. Here is the heart of the matter: fear is a function of the inferrred propensity for violence of a person we encounter.

If, as a group, young black men are so much more dangerous than the rest of the population, can this status help but have an effect on dealings that others have with them? Put another way, is it plausible that black crime is merely a consequence of racial antagonism, not also a cause of it?[298]

B. MORE STORIES

To answer this question, I offer another tale not to be found in the CRT storybook. I was walking up West End Avenue several years ago at about 11:00 P.M. The contents of the small suitcases in my hand were jangling. Ahead of me was a young (white) woman, perhaps thirty years old, heading in the same direction, albeit at a slower pace. When I was about thirty feet behind her, she turned around, anxiously, to size me up. A few seconds later, as I gained on her, she did the same thing. Then again. I did not know what to do. I moved to the other side of the sidewalk. It did not help. I wanted to tell her that I was intending no harm, that I was neither rapist nor mugger, but then I realized that attempting to speak to her would only make things worse. Finally, I passed her and returned to my life as a more or less respected member of bourgeois society.

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292 *See id.*

293 *See id.*

294 *See* Jackson, *supra* note 269, at A6.

295 *See* Phillips, *supra* note 291, at A5.

296 *See* DiIulio, *supra* note 279, at B1.

297 *See* Jackson, *supra* note 269, at A6 (claiming that 90 percent of American citizens, presumably whites, have less of a chance of being victimized by crime today than virtually at any time over the last twenty years); *see also* HOOKS, *supra* note 28, at 268.

298 *See* COSE, *supra* note 148, at xvi ("'The best way to reduce racism real or imagined is to reduce the black crime rate to equal the white crime rate.'") (quoting sociologist James Q. Wilson in a 1992 *Wall Street Journal* article).

Not having read Brent Staples at the time, I never even considered running at her.[299] At the time, however, like Staples, I resented being thought a criminal. It was only several days later that I came to understand that the woman in question was just playing the odds in a rational manner. She sought to keep a safe distance from me because of the not inconsiderable amount of crime perpetrated by men against women.

At one level, of course, it may seem wrong to extrapolate from groups to individuals. But is there an alternative? Suppose that 99.99 percent of a group, say people nine-feet tall, are known to be dangerous? Should we ignore all experience in dealing with members of that group? Could we if we wanted to? Does it make a difference if the number is 30 percent, or even 5 percent, if the harm represented is great? Is it not clear, then, that reasonable fear is a function not only of the risk of harm but also of the quantity of harm if the risk materializes?

Far more discomforting than making judgments based on membership in a self-selected group, of course, is making them based on immutable physical characteristics. But, again, what is the alternative? If the quest for physical security can be thought of as a game—as, in a sense, is the search for truth in our trials—[300] we might at least argue for excluding such information from the deliberative process. But it would be fatuous indeed to suggest that safety is other than a fundamental human need.[301]

Thus, it would seem, we need make no pretense of wanting to disqualify certain kinds of rationally relevant information; railing at their use is just cant. No, worse. Telling individuals to suppress reliable information—and to change the way they see the world—produces no change, only simmering resentment.[302] *E pur si muove.*[303]

If fear of crime, including black crime, is reasonable, to what extent can we properly act upon it? Patricia Williams contextualizes the prob-

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299 Is it inappropriately flip to invoke Staples here? I don't think so. Whatever the differences in our life situations, we were both feared. Being feared is unpleasant; it is not, I suggest, sufficient justification to terrorize people.

300 That is, truth is not the only, or even primary, courtroom goal; evidence that is probative is not infrequently thrown out because improperly obtained.

301 *See* Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCHOL. REV. 370-94 (1943) (In his well-known scale of human needs, Maslow ranks physical safety second (immediately after physiological needs such as food and shelter).).

302 I would argue that a large part of the anger of whites that comes out in settings such as talk radio is the product of the failure of black spokespeople to recognize what whites consider fact. Similar reasons, no doubt, underlie black anger. *See, e.g.*, text accompanying *supra* notes 176-77 (asserting that affirmative action does not hurt whites). It is far better to deal with the problem, as does Christopher Edley, and make arguments supported by facts and statistics.

303 *See* THE MACMILLAN BOOK OF PROVERBS, MAXIMS, AND FAMOUS PHRASES 657 (1948) ("Yet it does move," the words supposedly expressed *sotto voce* by Galileo when forced to recant his position that the earth revolves around the sun rather the reverse.)

lem nicely for us. She tells the story of the time she was visiting the New York University area on a winter day several years ago. She was walking down the street when she spied a sign on a store door: "Sale! Two-dollar overcoats. No bums, no booze."[304] Offended, she turned away only to see a black man in the middle of a busy street who seemed to her to need a coat more than the middle-class student-patrons the shop-owner wanted to attract.[305] The man, an obvious drunk, teetered from side to side, begging from passing cars whose drivers were swerving to avoid him. There were tears in his eyes as no one responded to his pleas. For Williams, the store sign was as segregationist as "whites only" signs had been. Here, writes Williams, "we risk the life-crushing disenfranchisement of an entirely owned world. Permission must be sought to walk the face of the earth."[306] This is the conclusion Williams asks us to draw from "No bums, no booze."

In effect, Williams is arguing that it is acceptable to seek protection *for* the drunk, but not *from* him. The proposition needs to be tested. So let us supppose that the drunk had wanted to enter a lecture hall at Columbia Law School where Williams was about to give a *public* address, say, on modern property law. Would she have welcomed him? If he had begun to harass or otherwise interrupt her, would she have stopped what she was doing to defend his right to do so? We cannot know for sure, of course, but it seems reasonable to suppose that having spent weeks preparing, she would have wanted to give her lecture in peace. And yet, if she were being consistent, would she not have been obliged to defend her heckler? Unless, of course, the merchant's peace of mind is less valuable than hers. In life, as opposed to scholarship, Williams's policy may well be identical to that of the storeowner, only she posts no sign.[307]

In fact, Williams's anecdote describes a situation in which the sensibilities of some people have to take a back seat to the reasonable precau-

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304 ALCHEMY, *supra* note 56, at 42.

305 One wonders whether Williams ever experienced the financial crunch that so many students find themselves in.

306 ALCHEMY, *supra* note 56, at 43.

307 One might argue that the comparison is unfair, that the audience at a public lecture needs to be able to concentrate. The distinction is valid, but only to a point. Customers in a clothing store need to be able to imagine themselves in a garment they contemplate buying; for this, a certain peace of mind is required. More important, the likely crowd at a public lecture—especially one given by Patricia Williams—might help keep an unruly attendee from hurting anyone; that might not be the case in a store, especially a small one. Finally, the worst that can happen at a lecture is that it might have to be rescheduled. One out-of-control customer can put a shop owner out of business. I am not suggesting here that the drunk be left to die in the cold, though some will surely draw that conclusion. I am only suggesting that it is unreasonable to place a greater burden of supporting him on the store owner than on anyone else who happens to be nearby.

tions of others when the latter seek to protect their interests.[308] And the reasonableness, we would have to conclude, is a function of the calculation (however unsystematic) of possible harm.

Which brings us back to my own experience. My mugger was a young black man. And I now understand why I made no effort then to avoid the danger I sensed; I did not want to run the risk of offending a presumably innocent black man by treating him like a criminal. I have also come to understand that this posture leaves something to be desired, that I should have treated him as I would anyone of whom I had reason to be suspicious. I should have gone the other way when I sensed danger ahead.

C. WHERE DO WE GO FROM HERE?

What future do CRATs offer in the face of fear of black men and, more important, in the face of what Cornel West calls the "nihilistic threat to . . . [the] very existence" of the black community, the "monumental eclipse of hope, the unprecedented collapse of meaning, the incredible disregard for human (especially black) life and property"?[309] What can the black community do to narrow the racial divide? We hear

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308 An examination of the now-familiar taxi situation in our metropolitan areas can be helpful here. Michael Dyson and Clarence Page have each spoken on the difficulty African-Americans have in getting cabs in our cities. *See* Dinesh D'Souza, *The Rational Discrimination of Cab Drivers*, WASH. TIMES, Oct. 21, 1996. What decent person can fail to be moved by the frustration of a group of accomplished and proud men who have to dress to the nines to have even a chance at overcoming the resistance of cabdrivers? And yet, one wonders, what can be done? The United States Department of Labor has just ranked cabdriving as the most dangerous of all occupations—with occupational homicide rates higher than those for gas station attendants and police officers, for example. *See id.*

Should the relative dangerousness of customers of color control public policy? *See, e.g.*, KENNEDY, *supra* note 84, at 166. "If cabbies are given a personal safety excuse for failing to abide by anti-discrimination laws," he asks, "why not employers or landlords?" But a distinction in these cases is apparent. The potential employer and landlord have an opportunity to size up the applicant and to examine references. They can defend themselves against charges of discrimination, moreover, by showing that although a given applicant is rejected, others are accepted. The cabdriver has none of these options.

Perhaps more important, it would not seem to make sense to put drivers in the position of undertaking risks greater than those borne by police officers without giving them comparable means of self-protection. In this view, it would be a mistake to allow the anguish of rejected cab-hailers to become the primary basis for our ethical and legal response to the cab problem.

There is yet another aspect to this problem worth mentioning. Minority cabdrivers, who seem to dominate the ranks of urban cabdrivers, express some of the strongest fears of minority passengers. *See* D'Souza, *supra*. And while it is true that minorities are not automatically exempt from racism, it would seem especially risky to attribute their behavior to racism rather than to fear.

Perhaps the bottom line on this subject is that there has been no call for a crackdown on cabdrivers by Dyson or CRATs (to the best knowledge of this author). This is implicit acknowledgment that the problem admits to no satisfactory solution.

309 WEST, *supra* note 30, at 12.

from Regina Austin once again.[310] Instead of the old "politics of distinction"[311] wherein the community rejects the criminal element in an effort to improve social conditions, in the new politics "[t]he 'community' chooses to identify itself with its lawbreakers and does so as an act of defiance. Such an approach might be termed the 'politics of identification.'"[312]

What would a politics of identification accomplish? Though

> the 'quintessential' black community no longer exists[, a] new politics of identification, fueled by critically confronting the question of the positive significance of black lawbreaking, might restore some vitality to what has become a mere figure of speech. [More precisely, d]rawing on lawbreaker culture would add a bit of toughness, resilience, bluntness, and defiance to contemporary mainstream black political discourse, which evidences a marked preoccupation with civility, respectability, sentimentality, and decorum.[313]

Though recognizing that "[b]lack lawbreaking . . . is a form of collective economic suicide," Austin is happy to highlight its benefits.[314] Not only does lawbreaking allow the vicarious release of hostility and anger needed by the *respectable* elements of the black community, but it also brings resources into marginal neighborhoods; provides protection in such neighborhoods against even more ruthless people; justifies

> the existence of anti-crime . . . social programs that employ community residents and otherwise benefit the law-abiding population. . . . Via burglaries, robberies, shoplifting, and associated fencing operations, addicts "provide valued goods and merchandise at a sizable discount to low-income residents who could not otherwise afford them." . . . What about the victims of such undertakings? Not to worry. [They can in turn] redistribute the losses "through theft insurance, higher retail prices and tax deductions."[315]

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310 *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1772 (1992).

311 *Id.* at 1772.

312 *Id.* at 1774.

313 *Id.* at 1782.

314 *Id.*

315 *Id.* at 1779-89 n.55 (BRUCE D. JOHNSON ET AL., TAKING CARE OF BUSINESS: THE ECONOMICS OF CRIME BY HEROIN ABUSERS (1985)). It is not only the practical benefits that lawbreakers provide, but also their style that is worthy of admiration.

> Many of them are as much Ronald Reagan's children, as much 'yuppies,' as the young urban professionals with whom the term is usually associated. Their commit-

Austin assures her readers that women do their part in this area as well in terms of shoplifting, credit card fraud, check forgery, petty larceny, and drug dealing.[316] "[V]ice must have some virtue. . . . [Indeed, a] wellspring of a valuable pedagogy for a vibrant black female community [is available if only] straight black women had more contact with and a better understanding of what motives black women in street life."[317]

Here we come to the crux of Austin's argument. The hardened lawbreaker may provide important psychological and economic services for the black community, but ultimately (paradoxically?) he must be offered opportunities for redemption.[318] The streetpeople, on the other hand, those who participate in the informal economy, are the continuing key to the revitalization of the black community.[319] "Clerks in stores cut their friends a break on merchandise, and pilfering employees spread their contraband around the neighborhood.[320] [This can teach all o]ppressed people when to obey the law and when to ignore it."[321]

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ment to the work ethic is incredible; they endure miserable working conditions, including long hours, exposure to the elements, beatings and shootings, mandatory abstinence from drugs, and low pay relative to their superiors. [And they are tied to mainstream yuppiedom in yet another way; they fully embrace its consumption culture. Yet, b]ecause they do not subscribe to the entire materialist program . . . they get no credit for being at least half right.

Id. at 1786.

316 *Id.* at 1791.

317 *Id.* at 1796 (emphasis in original).

318 *See id.* at 1816. Why "redemption" is desirable under these circumstances is not clear.

319 *See id.*

320 *Id.* at 1801.

321 *Id.* at 1799; *see* Dwight L. Greene, *Naughty by Nature: Black Male Joyriding—Is Everything Gonna be Alright?*, 4 COLUM. J. GENDER & L. 73 (1994) (offering the textbook case in reconstructing lawlessness). Greene's topic is joyriding, the temporary taking of another's car usually for the purpose of public posturing. Greene notes that during the period from 1982 to 1991, arrests of youth involving vehicle theft doubled, and Newark, New Jersey, experienced the highest per capita car theft rate in the nation. *Id.* at 80. Arrest statistics supported the conclusion that there "*may* reflect some shift towards more auto thefts by inner-city poor Blacks," though self-report data from black and white youngsters would be a more reliable method for making this determination. *Id.* However, the media portrayed the perpetrators as black. *See id.* at 81. They seized upon joyjoyriding and treated it as though it were as serious a matter as other car-related crimes, such as car theft and "carjacking." *Id.*

> Television virtually never reports that statistically, the overall problem of stolen cars has leveled off and indeed, has actually declined in the Northeast in recent years. Nor does television mention that car robberies have not been increasing recently in relation to the population, and only rarely result in physical harm to people.

Id. at 76. All television does is flash images before us that create a sense of urgency as these crimes are portrayed as "epidemic." *Id.* at 82; *but see* PHILIP ROTH, AMERICAN PASTORAL 24-26 (1997) (for a less benign, indeed horrific, vision of the joyriding phenomena).

In exaggerating the problem of joyriding, including its racial aspects, the media, Green suggests, have lost sight of the political dimension. "Joyriding" is essentially an abbreviation of the complete term: protest joyriding. *See* Greene, *supra,* at 84. How do we know this? "Conduct is appropriately considered a protest when the acts are openly expressive of an oppo-

What is to be made of Austin's position? Is Austin prescribing for the redemption of the black community or its annihilation? Clearly, she does not want the bridge people to join the mainstream; their role in unsettling the middle class is too important.[322] To ensure the integrity of the former group the latter should keep its distance; "[t]heir incursion should be limited in scope and duration."[323] Lawbreakers on the loose are another story. "They need challenging employment that will contribute to the transformation of their neighborhoods and earn them the respect of 'the community.' They also need to be freed from the material conditions that promote deviance and death."[324] Austin is not the only CRAT to advocate a politics of identification with criminal elements in the black community. Hers, moreover, is only a mild form of racial solidarity compared to that urged by Paul Butler, who wants it to be the basis for subversion of one of our most important institutions.[325]

Unlike his fellow CRATs, Butler openly acknowledges the unfortunate "ugly truth" of disproportionate criminal behavior by blacks.[326] For Butler, however, this is but confirmation of the racism that lies at the heart of American society and that blocks African-Americans from alternative expression through participation in social and economic life.

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sitional social or political point of view." *Id.* at 85. Thus protests need not be verbal in nature. *See id.* Minorities are especially likely to protest through "hidden transcripts" because of the danger of direct communication. *Id.* at 88. But even if protests are more effective when they take the form of speech, we should understand that "cars play a central and defining role in American materialism. A 'car is not just a transport, but a speech act.'" *Id.* at 90 (quoting JOHN FISKE, UNDERSTANDING POPULAR CULTURE 34 (1989)). Driving a car, Greene tells us, stands at the heart of American culture. *See id.*

But this, of course, proves too much; it would justify car theft and vandalism as well as joyriding. So Greene concentrates his attention on joyriding, offering three similarities to the 1989 flagburning case, *Texas v. Johnson*, as justification for viewing joyriding as protest. First, it is relatively minor lawbreaking. *See* Green, *supra*, at 90. (Does this justify all misdemeanors?) Second, it is high-demonstrative, high-profile conduct. *See id.* at 86 (Do joyriders actually want to get caught and go to jail?) Last, "the conduct was reasonably understood as expressive of a social and political protest." *Id.* As a speech act, Greene goes on, joyriding is entitled to certain constitutional protections. *Id.* at 108-10.

What is Greene's remedy for the social problem he identifies? "Black youngsters should be provided what their parents cannot give them: opportunities to learn how to drive and perhaps recreational access to automobiles." *Id.* at 120.

What is absent from Greene's analysis is as significant as what is not. If joyriding is essentially "speech," then why not decriminalize it? Speech, after all, is not generally subject to criminal penalties. If it is decriminalized, should that protection extend to everyone or only to minorities? And what else should be socialized? Meals with friends at three-star restaurants? What can be closer to "speech" than shooting the breeze with one's pals over a good dinner? Perhaps most important, if cars and meals are subsidized, would beneficiaries of the subsidy bother to work?

322 *See* Austin, *supra* note 310, at 1799.

323 *Id.* at 1807.

324 *Id.* at 1816 (footnote omitted).

325 *See generally* Butler, *supra* note 259.

326 *Id.* at 684.

What to do about it? Use the American legal system to force confrontation with the underlying realities.[327] "For nonviolent *malum in se* crimes such as theft and perjury," he writes, "nullification is an option the [black] juror should consider. . . . "[328] The illustrative case he offers is that of a poor black woman who steals from a rich employer. Presumably, nullification should be considered whenever any black person steals from someone who can *afford* the loss. He goes on to urge that in cases of "victimless crimes" such as narcotics offenses, "there should be a presumption in favor of nullification."[329]

What are the practical implications of Austin's and Butler's work? Will they bring lawbreakers the "challenging employment" that Austin seeks for them or otherwise integrate them into the mainstream of American life? For this purpose we need to know something about lawbreakers. Here are some fragments of their stories:

> I didn't do shit in school, my people ain't got no paper. I tried to join the Marines, I couldn't pass their written test. Ain't got no transportation to get a job. So what's a fella to do? You talk all that righteous shit, but you got a job. Got one for me? So I'm going to get with somebody rolling. . . . That's the only job for fellas like me.
>
> [I]t's like this, if we don't sell the shit, someone else will. Nigg[—]s getting paid in full, slinging dope hard every day. So why should we take some bullshit ass

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327 The matter is, finally, starkly put: crime is leverage, perhaps the last best hope for minorities. But let us consider what this might mean. How, for example, should a decrease in crime be evaluated? In Butler's view, it would appear, such a development should probably be lamented, not cheered. That CRATs might in fact feel that way is not as absurd as it sounds. Consider that in all the CRT reading undertaken for this project, I have found not a single reference to the substantial decrease in crime experienced in most American cities over the last five years. For a while I was puzzled; this seemed like too important a piece of information to be ignored. But perhaps there is a ready answer. Since there has been no dramatic event, no modern-day Martin Luther King, to bring about a radical change in racial attitudes, an acknowledgment by CRATs of a decrease in crime might suggest that racism is not the primary cause of crime, a position that would cut the very heart out of CRT. Am I being too cynical? I don't think so. If CRATs do not want to hear Horatio Alger stories because they vitiate white responsibility for problems within the black community, *see supra* note 198 and accompanying text, they will surely be displeased by news that blacks are solving their own problems and forfeiting the best leverage they have in the process.

To be sure, this is an exercise in imagination. But speculation can be helpful if identified as such; it is, moreover, an especially venerable device for CRATs. *See The Space Traders*, *in* BELL, *supra* note 29, at 158-94, where Bell imagines the consequences of a proposal by alien invaders to transfer vast riches to whites in exchange for the transfer of American blacks into the hands of the invaders for transportation back to their planets of origin.

328 Butler, *supra* note 258, at 715.

329 *Id.*; *but see* KENNEDY, *supra* note 84, at 389 ("[S]uch proposals should be openly challenged on the grounds that they fundamentally misperceive the racial realities of American life.").

> minimum wage McDonald's job? F[—], everything is illegal [laughing]. Pork is deadly, bacon can kill nigg[—]s, whiskey, cigarettes, cars, guns, but ain't nobody stopping them companies from selling them![330]

It is surely of kids like this that Timothy Simone says, "[t]hey demand to be viewed as the hunters and 'savages' that the general population, preoccupied with crime and safety, is more than willing to see them as."[331]

And so we ask: Who is going to employ folks who might have few qualms about holding people up at gunpoint, or worse, who are actively encouraged by voices ranging from the academy to the streets to pilfer for themselves or cut their friends breaks on merchandise,[332] and who can expect anything they do to be validated through jury nullification? Will any amount of money keep these people on what used to be called the *right side of the law*? And finally, need the rest of us concern ourselves with their sensibilities if we cross the street when we see these predators coming?

CONCLUSION

> Whites who involve themselves in matters of race will get a sometimes stormy reception. I know this from personal experience. But if one is not always welcome . . . does that mean that the moral call of America's racial problems has become any less urgent, that one should not try to do anything or that nothing can be done?[333]

And so I allow myself a dream, a dream for my troubled country. The dream is simple. It has no pyrotechnics or other special effects. It does not extend the range of American experience. If it were turned into a movie, it would be cropped so as to place the entire focus on the central tendency of our culture. I dream, in short, of a middle-class, even if

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330 Austin, *supra* note 310, at 1777, 1778 (quoting CARL S. TAYLOR, DANGEROUS SOCIETY 66-67 (1990)).

331 TIMOTHY M. SIMONE, ABOUT FACE: RACE IN POSTMODERN AMERICA 25 (1989).

332 The point that trustworthiness may be the most important quality sought in a prospective employee seems lost not only on Austin and Butler. *See, e.g.*, Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURTON L.J. 23, 27-41 (1996) (claiming that African-American male parolees . . . those at homeless shelters and recreational shelters [make] excellent sources for recruitment). In China academics and other professionals used to be sent into the countryside for their basic cultural education. *See* JUNG CHANG, WILD SWANS 379-81 (1991). Perhaps in this country we ought to be dispatched to the cities and forced to start businesses.

333 Nicolas Lemann, *Reply to a letter to the Editor from Morris B. Abram*, N.Y. REV. BOOKS, Mar. 6, 1997, at 53.

somewhat drab and clichéd, America. So far, I am sure, I have said nothing to intrigue you. But stay with me—you may change your mind. For you see, unlike the CRATs who take pleasure in—and profit from—spreading gloom, I believe America, already offering rich possibilities, can be made even a better place.

You could probably fill in the rest of the dream elements yourself. To begin, all you need is a good dictionary. *Middle-class,* as an adjective, connotes such traits as "a desire for stability and a high material standard of living, a respect for convention and the proprieties, and high ideals of education, professional competence and personal ambition."[334] Middle-class people have middle-class values. Can we say more about these values? A search for the key-word term "middle-class values" in an academic library is likely to turn up only one title, a twenty-nine-year-old book by the late James A. Michener.[335] We should not be discouraged. No self-satisfied burgher, Michener's unlimited zest for life led him to write fifty books, the last of which he completed at age eighty-seven. We could do a lot worse than have Michener as our guide.

In *America vs. America* Michener tells us a bit about himself and his family. He was reared in "considerable poverty."[336] He witnessed the devastation wreaked by the Depression, especially on young adults. His wife was the daughter of a Japanese immigrant who worked as a farm laborer for ten years before he could send for his spouse. Later his wife's family was thrown into a concentration camp, their property confiscated.[337] Michener articulates no nostalgia for the old days; after providing the foregoing background, he sets forth the middle-class values that helped him and so many of his generation triumph.

First, education. "Today's dropout has got to be tomorrow's ineffectual."[338] Michener then addresses the black community: "The black who rejects education merely condemns himself to further years of what he today despises."[339] Competence is next. "I find no evidence that in the decades ahead demand for it will diminish." Then, responsibility, "one of the foundation stones of civilized society . . . and the core of middle-class life."[340] "Not only was a man responsible for himself and his family, but groups of families were responsible for their communities."[341] Responsibility is followed by personal and professional growth,

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334 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1430 (1966).

335 JAMES A. MICHENER, AMERICA VS. AMERICA: THE REVOLUTION IN MIDDLE-CLASS VALUES (1969).

336 *Id.* at 58.

337 *See id.* at 57-58.

338 *Id.* at 68.

339 *Id.*

340 *Id.* at 27, 72.

341 *Id.* at 27.

which Michener refers to informally as "making it" or "getting ahead."[342] Finally, and most important, there is that "most ridiculed of middle-class values"—direct from the Enlightenment—the "habit of optimism."[343] Highlighting the importance of this value in his own life, Michener refers to three major airplane crashes he was involved in, one of which stranded him in the Pacific Ocean on a raft.[344]

Michener is not blind to the downside of middle-class values. He strongly objects, for example, to the Puritanism and the drive for unnecessary accumulation that have arisen from those values. He deeply regrets that we have not allowed our sense of responsibility to operate in the area of race relations. But, he insists, such failings do not undermine the basic case for middle-class values.

We should all be able to see what an efflorescence of these values, intelligently and humanely adjusted, would bring. People who live up to these new middle-class values are not so much concerned with doing their own thing as with doing the right thing. If they are critical, they are also self-critical. They do not tell stories in which, as Patricia Williams puts it, "agency and responsibility are hopelessly befuddled."[345] Nor, where these values are operative, do they welcome babies before they can support them or give them their best. They do not mug, maim and kill, and they respect public and private property because, even if they have no property themselves at any given moment, the alternative is the oppression of living in ruins.[346] Above all, people who espouse middle-class values believe that, however trying the circumstances, however great the resistance, they have the resources to prevail.

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342 *Id.* at 22, 74-75. Michener explains his position simply with the story of two boys who started out relatively equal together in his neighborhood. "One educated himself and became a superior court judge. The other wasted every opportunity and became a town bum. . . . I would prefer to be the judge." *Id.*

343 *Id.* at 75. This is not meant as a simplistic call to "Forget your troubles, come on be happy"—on Michener's part or my own. *Id.* If the reader is patient with me, my position will become clear.

344 *Id.*; *see* CROUCH, *supra* note 77, at 10 ("Those given to no more than carping are unprepared to address the tragic optimism at the center of the metaphor that is the Constitution.").

345 ALCHEMY, *supra* note 56, at 11.

346 People with middle-class values in legal education, it hardly need be emphasized, do not write law review articles whose primary function is épater le bourgeois. ("To shock the middle class"). If they are law review editors—whether students or faculty members—they do not publish such articles nor do they perfunctorily dismiss articles that seek to promote such middle-class staples as marriage before children and "thou shalt not steal." *See supra* notes 202-14, 314-20 and accompanying text. Finally, if they are law school administrators, they do not bestow great honor on someone showing contempt for those very values, as the University of Pennsylvania Law School recently did by naming Regina Austin the William A. Schnader Professor of Law.

Is this a privileged white man's dream exclusively? Hardly.[347] During the last ten years, to take but one example, in an effort to gain some control over their lives, tens of thousands of black Americans have selected middle-class lifestyles for themselves. Effectively accepting Robert Browning's advice, to wit, "Look not thou down but up!,"[348] they have set out to build businesses.[349] In so doing they have defied fear, self-pity, plain inertia and, perhaps above all, an anti-commercial ethic ingrained in black culture that holds that money is made only through exploitation, that whites will not let blacks make money anyhow, that money weakens character, and that a steady income is preferable to the open-ended experience of entrepreneurship.[350]

Do these entrepreneurs delude themselves? Is it their obvious destiny to fail? Do CRATs have the right to try to sabotage their dreams by insisting that all the cards are held by whites? Without question, black entrepreneurs will have it harder than their white counterparts. But however much greater the difficulty, however much longer it takes black entrepreneurs to achieve parity with the "general population," is it not clear that entrepreneurship can, among other things, give minorities a stake in the economic system, an opportunity for personal and financial development, and thus hope for the future?[351] Far from being the ruination of the black community, middle-class values would seem to be a key to its salvation[352]—and to that, in turn, of everyone else.

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347 The Million-Man March, it seems, was largely a demonstration for middle-class values.

348 TWILIGHT OF A GOLDEN AGE: SELECTED POEMS OF ABRAHAM IBN EZRA (Leon J. Winberger Trans., 1997) (1864). This motto was explictly adopted by Patricia Williams for herself long before she was in a position to look downward as a tenured faculty member at Columbia Law School. *See* Liber Annalis (1969 Girls' Latin (High) School Yearbook) 69.

349 *See* Carrie Mason-Draffen, *On The Rise*, NEWSDAY, Mar. 4, 1996 (reporting that the number of black-owned businesses grew by 46 percent from 1987 to 1992, to a total of 620,000). Thus, even if no businesses failed during the period, it would mean that virtually 200,000 new businesses were formed.

350 *See* Regina Austin, *"A Nation of Thieves:" Securing Black People's Right to Shop and Sell in White America*, 1994 UTAH L. REV. 147, 168-69. Entrepreneurship, I want to emphasize, is not the only path to independence. The salaried employee with a valuable skill can also achieve a measure of independence.

351 *See* STEELE, *supra* note 93, at 33 (The wise black man "understands that he must keep this [i.e., for his condition] responsibility whether or not society is fair. His purpose is to realize himself, to live the fullest possible life, and he is responsible for this, like all men, regardless of how society treats him."). Tony Brown emphatically rejects the idea that black businesses have failed because of lack of access to bank credit. *See* TONY BROWN, BLACK LIES, WHITE LIES 274, 276 (1995). "Racism is not the primary reason Blacks are at the bottom of the societal ladder. . . . Blacks are subordinated primarily because of their lack of economic organization." *Id.*

352 *See* Brent Staples, *The Trap of Ethnic Identity*, N.Y. TIMES, Jan. 4, 1997, at A4.

> Inner-city black children . . . fail because their families and communities often devalue study and academic achievement. . . . They fail for the same reasons that many

You don't have to be a highly trained, fully-certified academic type to see this. A little experience on Regina Austin's streets is all you need. Consider our final and perhaps most useful story. You will never hear it from a CRAT, but, as we have seen, there are more stories than are dreamt of in their philosophies. It may prove painful, but, as Harlon Dalton has suggested, "[w]e will never achieve racial healing if we do not confront one another, take risks . . . say all the things we are not supposed to say in mixed company."[353] In any event, the story was originally told by a black man.

Picture a brutally hot summer morning in Brooklyn. The air shimmers and the streets appear as if seen through five-and-ten-cent glasses. The only air conditioner anywhere around does not work. With no relief in sight, tempers are beginning to fray. The camera focuses in on Sal's Bedford-Stuyvesant pizza parlor whose walls are adorned with photographs of such Italian-American heroes as Frank Sinatra, Robert DeNiro, and Joe DiMaggio. Mookie arrives, late as usual. Mookie is Sal's African-American delivery man, expert at stretching a ten-minute delivery into an hour. Mookie also serves as Sal's ambassador to the black community. Mookie has a family of his own consisting of a girlfriend and a young child whom he occasionally visits.

Da Mayor, a mild-mannered old man in a sports jacket—someone who, in spite of his fondness for drink, might in another age have been called a gentleman—saunters into a small Korean grocery store and orders a Miller Hi-Life. He is told that the store does not carry that brand. A little later he gives the movie in which all this has occurred its title when he advises Mookie: "Always do the right thing."[354]

A customer now enters the pizzeria, orders a slice and then, examining the wall, inquires as to why there are no brothers among the honorees. Italian-Americans do not eat at the place, he points out; only blacks. Patrons, Sal tells the customer in no uncertain terms, can go hang pictures of their choice in their own establishments.

Hours pass. Men and women from the neighborhood are now out in the streets, playing, drinking, jiving, sweating, and listening to music.

> of them speak so poorly—because standard-English speakers have fled to the suburbs, taking middle-class norms with them.

Id.; *see also* Robert S. Boynton, *The Professor of Connection*, NEW YORKER, Nov. 6, 1995, at 100.

> Our priorities have gotten totally turned around. . . . The test for whether [you have made it] used to be, . . . Can you as a minority group, live up to these bourgeois standards? But *now* the test is, can you, faceless white America, put up with me acting obnoxious and *not* get irritated? Because if you do get irritated, then you're the racist pig I always knew you were.

Id. (quoting Stanley Crouch).

353 *See* DALTON, *supra* note 2, at 97.

354 DO THE RIGHT THING (1989).

More time passes; it is night now. Shortly before closing, a young man will enter the pizza parlor with his boombox blasting and a tragic confrontation will take place. Sal will tell him to turn the volume down and, when he refuses, Sal will level the boombox with a baseball bat. This will start a brawl that will lead to the young man's death in a shocking incident of police brutality. In reaction, Mookie will pick up a garbage can and heave it through the pizzeria window, thus inciting a riot that will end only after the pizzeria has been trashed and torched and the authorities arrive en masse. The owner will lose his business, a black employee his job and the community one of its major institutions. The permanent psychological damage will probably be incalculable.

As if sensing the impending tragedy, a Greek chorus of three old men is trying to sort things out and maybe avert the unhappy decree. Living on the margin, they do not worry about issues of authenticity; no, they are after something more fundamental. Choked with emotion, tears in his eyes, LM, a Caribbean-American, is expressing the pain of the powerless while pointing to the grocer, who in the afternoon heat is straightening out the fruit in the bins outside the store.[355]

> It's a goddamn shame. . . . Look at those Korean motherfuckers across the street. I betcha they haven't been off the boat a year before they opened up their own place . . . in our neighborhood, a good business, occupying a building that had been boarded up for longer than I care to remember and I've been here a long time. . . . It's got to be because we're black, [responds Coconut Sid, another Caribbean-American, who needs to find a reason for his despair.] No other explanation. They don't want the black man to be about shit. [Sweet Dick Willie is not buying it.][356] Tired of that old excuse. Tired of that shit. [LM then interjects the fervent hope that one day community business will be in black hands.] I swear to God, I will be the first in line to spend what little money I got. [At this point Sweet Dick Willie has had enough.] I'm gonna. I'm gonna do this, I'm gonna do that. You ain't gonna do a goddamned thing but sit on your all monkey ass on this corner. . . . When are you gonna get your own business? [pause] Just like I thought. You ain't gonna do a goddamned thing. I'll tell you what *I'm* gonna do. I'm gonna go give them Koreans some more

355 The dialogue that follows is from a personal transcription.

356 Sweet Dick Willie's response to LM that follows must have resulted from eleventh-hour inspiration, as it has no counterpart in the published screenplay. *See supra* note 354, at 173-75.

> of my money. Get the fuck out of my way. It's Miller time. [Half a dozen steps later he turns around:] Coconut, you've got a lot of nerve: you got off the boat too.[357]

Spreading a range of unbaked antiblack conspiracy theories, trying to transform social pathologies into new cultural paradigms, and disseminating despair at every turn—actions that are taken for clinical symptoms[358]—CRATs, I am suggesting, are in the way,[359] and—like Coconut—have a lot of nerve too. A simple question highlights the point. Would it not be better for all concerned, Professors Williams and Austin, if instead of drifting off to buy a beer, the thoughtful Sweet Dick Willie had headed to a bookstore, and when he got there, had found a book of yours that empowered him to set up his own business or otherwise take control of his life?[360]

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357 GATES, *supra* note 103, at 137-38.

> It's so easy to put it on the white man. . . . As long as we can beat up on white people and make the world think that everything that went wrong in the world is due to them and we had nothing to do with this, then we rob ourselves of the impetus, the motivation, the inspiration for personal change and for accepting responsibility. I say to black audiences today . . . . There was a time when you could blame the white man . . . but . . . you can't say that any more.

Id. (quoting Louis Farrakhan).

358 Tied to "symptoms."

359 *See* GLENN LOURY, ONE BY ONE FROM THE INSIDE OUT 236 (1993) ("No people can be genuinely free . . . so long as they look to others for their deliverance.").

360 *See* PAGE, *supra* note 28, at 195 ("[T]he worst problem facing black America today is the failure of so many of us to take advantage of opportunities already available to us.").