# CRT Topic Paper

Contributors in alphabetical order

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## Elevator Pitch

As coaches, we need to take a more active role in cultivating a curriculum for our students that is educational and ethical. Our present understanding of what debate can be, particularly on legal topics, is impoverished by resolutions exclusively centered on prescriptive changes to federal government policy. An alternative resolution can correct these deficiencies. Additionally, exploring Critical Race Theory as legal jurisprudence is both politically timely and salient to the debate community itself.

## A Plea to Debate Coaches

### It’s time for an intervention in our resolutions.

We, as debate coaches, are first and foremost educators. As educators caught within a competitive activity, however, we must reconcile our pedagogy with our coaching. Which is to say: when, in a given moment, there are competing forces between us and our students (one force asking us to teach them, and another asking us to help them win), which will win out? As Frank Lane noted in 1915 (in the inaugural issue of the *Quarterly Journal of Speech*), debate coaches “are working under two ideals: one to win, and the other to educate.”[[1]](#footnote-1) These tensions, and the complications therein, have been noted for over a century[[2]](#footnote-2) and continue into the present.

Today, many have struck an important balance between their roles as teachers and coaches. On aggregate coaches today believe that their job is to help their debaters become the best version of themselves. Let us call this the debater-centered model of coaching. We help them as they craft their arguments, generate conclusions, find better evidence, and advise them on possible strategies that allow them to advocate for the topics they wish to bring into the debate round. In contrast, there are also many tales of debate coaches who force their teams to read certain arguments or conform to certain models of debates. Let us call this the coach driven model. I believe (thankfully) that the general sentiment of our community toward the pedagogical value of the coach driven model is that it unnecessarily stifles the creativity and passions of our students. This is not to say that our students come to us as “blank slates” (for many of them have already been shaped in terms of the arguments they wish to read/research through other coaches and friends by the time they get to college). Nor is it to say that we cannot be a force for change or critical reflection for our debaters. It is to say, however, that the dominating “hands on” practices of the coach-driven model (such as writing whole speeches, producing arguments whole-cloth, and living vicariously through one’s own debaters)—the very thing feared by early debate theorists—are rightly condemned as an anti-educational practice.[[3]](#footnote-3)

There is nothing wrong with the debater-centered model of debate (it’s a good approach!). But it alone will not resolve the significant divide between “New” Debate and “Old” Debate.[[4]](#footnote-4) The exact sticking points of this divide have been numerous, but in the last decade or so they have centralized around the question of topicality, the division of ground, and the role of the resolution in our activity. While there have been some attempts to respond to this controversy scholastically and to engage in conversation coach-to-coach, by and large our approach has been to let our debaters battle it out; to let competition resolve this clash.[[5]](#footnote-5) In other words: we help our debaters perfect the best answer to the dilemma (on either side of it).

However, competition is not resolving the dilemma. In fact, it is creating and perpetuating it. This is not to say that there is not argument innovation on both sides; these innovations are necessary to find competitive success. We must recognize, however, that those innovations have reinforced, rather than shifted, the same stasis point: “what is better: ‘New’ or ‘Old’?” Thus, debaters trained in the paradigm of “Old” debate remain resolutely committed to voting for resolutions that simply do not resolve any of the substantive arguments made by teams that depart from an instrumentalist reading of the topic (outside of the general leftward tilt in topic writing that can be noted in the past decade—a tilt that “Old” debaters believe makes it easier to “beat” the teams that depart from the topic on arguments like the “topical version of the affirmative”). And in response, debaters under the paradigm of “New” debate are incentivized (within the competitive structure of debate) to theorize new and more radical justifications for departing from the topic. If the past decade has been any indication, the conflict seems intractable.

The reason it has become intractable is that we, as coaches and educators, continue to create the conditions for it. We continue to propose, write, vote for, and defend resolutions that support this conflict. And, in so doing, have unnecessarily constrained the creativity of our students. The resolution is the curriculum for our debaters’ season, and if we let competitive goals overdetermine what topics we vote for we should not be surprised that competitive goals fundamentally shape how those topics are debated.

I have spoken to many judges that have complained that framework debates have gotten stale. Although I believe those debates are some of the most valuable debates that can be had in our activity (they answer the question of what this activity means, and why we are here), we need to acknowledge that the reason they are stale is because they are had, year in and year out, on the same type of resolution. A policy platform, proposing what the USFG should do. As Tiffany Dillard-Knox has argued, “the language of the topic has been constructed in ways that reinforce the pedagogical and social values of traditional debate.”[[6]](#footnote-6) As long as our resolutions continue to reinforce those values, there will be an intractable conflict.

To take the critical insights of “New” debate seriously, and to not reduce it to just another argument in the machine of debate, it is important that we—as teachers and coaches—ask the question: what if? What might it mean to make a new kind of resolution, one informed by this seemingly intractable conflict? What might it mean to try a new stasis point that might—at least in the course of a year of debating—connect both “Old” and “New” debate? Where might this take us, and what new argumentative molds might we discover? This is an open question, but it is one we simply cannot know the answer to unless we try something new.

If we do try a new kind of resolution, we are likely to come out of this experiment changed in ways we might not yet anticipate. Consider, for example, what constitutes a “genre” of argument. One problem with modern debate is that, at least on the side of “Old” debate, the genres of argument innovation have dried up. There have not been significant advances in resolution-oriented debate theory in a long time. So it is that we have debated “Disads,” “Counter plans,” and “Kritiks” for my entire career in debate as both a competitor and a coach. I would hazard that for just about everyone under the paradigm of “Old” debate reading this (coach or student) this is all you have known and can presently imagine what policy debate can be.

The reason for this varies, but I think that the central one is that the resolutions we select are conducive to that pre-determined mold. It is in the name of our activity, “policy” debate. Therefore, the horizons of what constitutes clash remain deeply wedded to a paradigm of policy and cost-benefit-analysis. We are so caught in the language of UQ-Link-Impact that our conceptualization of debatable propositions has been unnecessarily impoverished. Debate can be more. Two-sidedness is a constitutive feature of reality. On almost any topic there are sound arguments both for and against it. We engage in arguments and debates all the time (many of us personally, many of us professionally) that exceed the predetermined argumentative mold of “Old” debate. If scholars are able to sustain entire careers advancing knowledge on a controversy, who is to say debaters can’t do it for a semester?

This topic paper is an attempt to make the case for a “New” stasis point. To suggest, educator to educator, coach to coach, that now is the time for us to try something different. We are in a perfect storm, so to speak: our dissatisfaction with the played-out framework debate, the fact that we can now debate a legal topic, and the highly relevant and important controversy over Critical Race Theory playing out before our very eyes. What is needed is that we seize the moment. To not let our desire to win crowd out what else might be possible, and what may be both educational and transformational for our students.[[7]](#footnote-7)

## Why Critical Race Theory, Why Now?

### Timely and Relevant

#### First, it’s a highly relevant and important legal issue today.

Ten years ago, just about the only people who had heard of the term “Critical Race Theory” were college professors, graduate students, (some) undergraduates, and debaters across the country. Still, for the vast majority of them the term described a loose cadre of ideas/people that they only had a vague idea about.

Today, those “vague” understandings of CRT have gone mainstream, and CRT is now a hot-button issue driving legislation, school “reform”, and important policy platforms. If the culture war had a mascot, it would be Critical Race Theory.

And yet nestled within this culture war is a question that demands our community’s attention: what is Critical Race Theory? What is its intellectual lineage, and what does it have to tell us about the past, the present, and our collective future? This is a debate that is happening now, and it is one that has important consequences.

#### Consider, for example, this New Yorker article that explains how CRT has gone mainstream.

Wallace-Wells 21 – (Benjamin, <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>, How a Conservative Activist Invented the Conflict Over Critical Race Theory ) NAR

Remote work turned out to be advantageous for people looking to leak information to reporters. Instructions that once might have been given in conversation now often had to be written down and beamed from one home office to another. Holding a large meeting on Zoom often required e-mailing supporting notes and materials—more documents to leak. Before the pandemic, if you thought that an anti-racism seminar at your workplace had gone awry, you had to be both brave and sneaky to record it. At home, it was so much easier. Zoom allowed you to record and take screenshots, and if you were worried that such actions could be traced you could use your cell phone, or your spouse’s cell phone, or your friend’s. Institutions that had previously seemed impenetrable have been pried open: Amazon, the I.R.S., the U.S. Treasury. But some less obviously tectonic leaks have had a more direct political effect, as was the case in July, 2020, when an employee of the city of Seattle documented an anti-bias training session and sent the evidence to a journalist named Christopher F. Rufo, who read it and recognized a political opportunity. Rufo, thirty-six, was at once an unconventional and a savvy choice for the leaker to select. Raised by Italian immigrants in Sacramento and educated at Georgetown, Rufo had spent his twenties and early thirties working as a documentary filmmaker, largely overseas, making touristic projects such as “Roughing It: Mongolia,” and “Diamond in the Dunes,” about a joint Uyghur-Han baseball team in the Chinese province of Xinjiang. In 2015, Rufo began work on a film for PBS that traced the experience of poverty in three American cities, and in the course of filming Rufo became convinced that poverty was not something that could be alleviated with a policy lever but was deeply embedded in “social, familial, even psychological” dynamics, and his politics became more explicitly conservative. Returning home to Seattle, where his wife worked for Microsoft, Rufo got a small grant from a regional, conservative think tank to report on homelessness, and then ran an unsuccessful campaign for city council, in 2018. His work so outraged Seattle’s homelessness activists that, during his election campaign, someone plastered his photo and home address on utility poles around his neighborhood. When Rufo received the anti-bias documents from the city of Seattle, he knew how to spot political kindling. These days, “I’m a brawler,” Rufo told me cheerfully. Through foia requests, Rufo turned up slideshows and curricula for the Seattle anti-racism seminars. Under the auspices of the city’s Office for Civil Rights, employees across many departments were being divided up by race for implicit-bias training. (“Welcome: Internalized Racial Superiority for White People,” read one introductory slide, over an image of the Seattle skyline.) “What do we do in white people space?” read a second slide. One bullet point suggested that the attendees would be “working through emotions that often come up for white people like sadness, shame, paralysis, confusion, denial.” Another bullet point emphasized “retraining,” learning new “ways of seeing that are hidden from us in white supremacy.” A different slide listed supposed expressions of internalized white supremacy, including perfectionism, objectivity, and individualism. Rufo summarized his findings in an article for the Web site of City Journal, the magazine of the center-right Manhattan Institute: “Under the banner of ‘antiracism,’ Seattle’s Office of Civil Rights is now explicitly endorsing principles of segregationism, group-based guilt, and race essentialism—ugly concepts that should have been left behind a century ago.” The story was a phenomenon and helped to generate more leaks from across the country. Marooned at home, civil servants recorded and photographed their own anti-racism training sessions and sent the evidence to Rufo. Reading through these documents, and others, Rufo noticed that they tended to cite a small set of popular anti-racism books, by authors such as Ibram X. Kendi and Robin DiAngelo. Rufo read the footnotes in those books, and found that they pointed to academic scholarship from the nineteen-nineties, by a group of legal scholars who referred to their work as critical race theory, in particular Kimberlé Crenshaw and Derrick Bell. These scholars argued that the white supremacy of the past lived on in the laws and societal rules of the present. As Crenshaw recently explained, critical race theory found that “the so-called American dilemma was not simply a matter of prejudice but a matter of structured disadvantages that stretched across American society.” This inquiry, into the footnotes and citations in the documents he’d been sent, formed the basis for an idea that has organized cultural politics this spring: that the anti-racism seminars did not just represent a progressive view on race but that they were expressions of a distinct ideology—critical race theory—with radical roots. If people were upset about the seminars, Rufo wanted them also to notice “critical race theory” operating behind the curtain. Following the trail back through the citations in the legal scholars’ texts, Rufo thought that he could detect the seed of their ideas in radical, often explicitly Marxist, critical-theory texts from the generation of 1968. (Crenshaw said that this was a selective, “red-baiting” account of critical race theory’s origins, which overlooked less divisive influences such as Martin Luther King, Jr.) But Rufo believed that he could detect a single lineage, and that the same concepts and terms that organized discussions among white employees of the city of Seattle, or the anti-racism seminars at Sandia National Laboratories, were present a half century ago. “Look at Angela Davis—you see all of the key terms,” Rufo said. Davis had been Herbert Marcuse’s doctoral student, and Rufo had been reading her writing from the late sixties to the mid-seventies. He felt as if he had begun with a branch and discovered the root. If financial regulators in Washington were attending seminars in which they read Kendi’s writing that anti-racism was not possible without anti-capitalism, then maybe that was more than casual talk. As Rufo eventually came to see it, conservatives engaged in the culture war had been fighting against the same progressive racial ideology since late in the Obama years, without ever being able to describe it effectively. “We’ve needed new language for these issues,” Rufo told me, when I first wrote to him, late in May. “ ‘Political correctness’ is a dated term and, more importantly, doesn’t apply anymore. It’s not that elites are enforcing a set of manners and cultural limits, they’re seeking to reengineer the foundation of human psychology and social institutions through the new politics of race, It’s much more invasive than mere ‘correctness,’ which is a mechanism of social control, but not the heart of what’s happening. The other frames are wrong, too: ‘cancel culture’ is a vacuous term and doesn’t translate into a political program; ‘woke’ is a good epithet, but it’s too broad, too terminal, too easily brushed aside. ‘Critical race theory’ is the perfect villain,” Rufo wrote. He thought that the phrase was a better description of what conservatives were opposing, but it also seemed like a promising political weapon. “Its connotations are all negative to most middle-class Americans, including racial minorities, who see the world as ‘creative’ rather than ‘critical,’ ‘individual’ rather than ‘racial,’ ‘practical’ rather than ‘theoretical.’ Strung together, the phrase ‘critical race theory’ connotes hostile, academic, divisive, race-obsessed, poisonous, elitist, anti-American.” Most perfect of all, Rufo continued, critical race theory is not “an externally applied pejorative.” Instead, “it’s the label the critical race theorists chose themselves.” Last summer, Rufo published several more pieces for City Journal, and, on September 2nd, he appeared on “Tucker Carlson Tonight.” Rufo had prepared a three-minute monologue, to be uploaded to a teleprompter at a Seattle studio, and he had practiced carefully enough that when a teleprompter wasn’t available he still remembered what to say. On air, set against the deep-blue background of Fox News, he told Carlson, “It’s absolutely astonishing how critical race theory”—he said those three words slowly, for emphasis—“has pervaded every aspect of the federal government.” Carlson’s face retracted into a familiar pinched squint while Rufo recounted several of his articles. Then he said what he’d come to say: “Conservatives need to wake up. This is an existential threat to the United States. And the bureaucracy, even under Trump, is being weaponized against core American values. And I’d like to make it explicit: The President and the White House—it’s within their authority to immediately issue an executive order to abolish critical-race-theory training from the federal government. And I call on the President to immediately issue this executive order—to stamp out this destructive, divisive, pseudoscientific ideology.” The next morning, Rufo was home with his wife and two sons when he got a phone call from a 202 area code. The man on the other end, Rufo recalled, said, “ ‘Chris, this is Mark Meadows, chief of staff, reaching out on behalf of the President. He saw your segment on ‘Tucker’ last night, and he’s instructed me to take action.” Soon after, Rufo flew to Washington, D.C., to assist in drafting an executive order, issued by the White House in late September, that limited how contractors providing federal diversity seminars could talk about race. “This entire movement came from nothing,” Rufo wrote to me recently, as the conservative campaign against critical race theory consumed Twitter each morning and Fox News each night. But the truth is more specific than that. Really, it came from him. Last Thursday, I travelled to visit Rufo at home in Gig Harbor, Washington, a small city on the Puget Sound with the faint but ineradicable atmosphere of early retirement—of pier-side low-exertion midmorning yoga classes. Rufo has a thin, brown beard and an inquisitive, outdoorsy manner, and when we met for lunch on a local café’s veranda he spoke about his political commitments (to conservatism against critical race theory) loudly enough for those around us to hear. Rufo and his wife, Suphatra, a computer programmer at Amazon Web Services who emigrated from Thailand in elementary school, moved to Gig Harbor last year, in part to get away from the intense political climate that had coalesced around him in Seattle. The move had coincided with his increasing prominence, and so Gig Harbor had not been as professionally isolating as he had at first feared. Wearing a gray flannel shirt and dark jeans, Rufo showed me the soundproofed home studio he’d recently built, with a hookup to send a broadcast-quality signal to Fox News. Since his appearance on “Tucker Carlson Tonight” last fall, Rufo’s rise had matched that of the movement against critical race theory. He’d become a senior fellow at the Manhattan Institute, for which he had written more than two dozen document-based articles—mostly about anti-bias training in the government, schools, and corporations—which, he told me, had together accrued more than two hundred and fifty million impressions online. (“That’s a lot,” he said.) Carlson has been an especially effective ally; he relied on Rufo’s reporting for an hour-long episode this spring on “woke education,” and invited Rufo to join as a segment guest. Conservatives in state legislatures across the country have proposed (and, in some cases, passed) legislation banning or restricting critical-race-theory instruction or seminars; Rufo has advised on the language for more than ten bills. When Ron DeSantis and Tom Cotton have tweeted about critical race theory, they have borrowed Rufo’s phrases. He has travelled to Washington, D.C., to speak to an audience of two dozen members of Congress, and mentioned in passing that earlier in May he’d had drinks with Ted Cruz. In the 2016 Presidential election, Rufo had cast a dissenter’s vote for Gary Johnson. In 2020, he voted to reëlect Trump. Rufo said, “I mean, how can you not? It would have seemed rude and ungrateful.” Rufo’s new position did not give him just a view up, into the world of Republican power, but down, into the mounting outrage at anti-racism programs across the country. Rufo set up a tip line last October, and has so far received thousands of tips, many of which he thought were substantive. (An assistant does the culling.) From among this pile, he’d discovered that third graders in Cupertino, California, were being asked to rank themselves and their classmates according to their privilege; he also learned about a three-day whiteness retreat for white male executives at Lockheed Martin and an initiative at Disney urging executives to “decolonize their bookshelves.” Some of the outrage appeared to have been ginned up by local political actors—a particularly combative and high-profile anti-C.R.T. parents’ group in Loudoun County was organized by a former Trump Justice Department official—but it was nonetheless deeply felt. In Loudoun, one parent had said, “If you spend millions to call people in our community racist, you better be able to prove it.” In Rufo’s living room in Gig Harbor, I asked what he thought constituted the emotional core of the protests against critical race theory—was it simply that white people thought they were being unfairly called racist? “I think that’s a part of it, for sure, ” Rufo said, but he also listed other complaints. He’d spoken to parents in Cupertino, who, he said, “were incredibly pissed off because they were doing, like, race and gender theory during math class.” He’d also spoken to wealthy private-school parents who considered themselves liberals and who were worried, Rufo said, that too much race talk might bring about a form of “mental bulimia” among their children. A member of another group, of conservatives, reported suddenly feeling that “these institutions that I believe in”—the school, the workplace—“are being devoured by an ideology I don’t understand.” Rufo opened his laptop and, after a couple of clicks, showed me a screenshot from the anti-racism training session that white male executives at Lockheed Martin had been required to attend. “Look at these dudes!” Rufo said. A Zoom array of middle-aged white male heads greeted me—a dozen men looking, on the whole, a little apprehensive. The Lockheed training had evidently included an exercise in which the executives had explained in writing what they hoped to get out of the session. Rufo had the responses and read them. One executive had written, “I won’t get replaced by someone who is a better full-diversity partner.” Another had said, “Evolving the white male culture so future generations won’t be stereotyped.” A third: “I’ll have less nagging sense of guilt that I’m the problem.” I thought these sounded less like expressions of outrage than annoyance, of a bunch of powerful people who would have preferred to return to selling bombers to the Air Force. Rufo, who saw these statements as evidence of “humiliation,” said that what he often heard from conservatives in situations like this was that “there’s very heavy psychological stuff happening here at work.” That “heavy psychological stuff” reflected what Rufo thought of as a Marxist strain running through critical race theory: “a really profound pairing of the destructive instinct, a desire to smash society as it’s been known, paired with this very utopian instinct, that once we smash society something will happen that we can’t explain, outline, or predict, and it will elevate humanity—human nature will be different.” He added, “It’s the same stuff. I mean—in Lockheed Martin, it’s kind of bastardized and dumbed down. But that’s the impulse that I feel. It’s the pairing of destruction and utopia.” The next day, I spoke by phone with Kimberlé Crenshaw, a law professor with appointments at Columbia and U.C.L.A., and perhaps the most prominent figure associated with critical race theory—a term she had, long ago, coined. Crenshaw sounded slightly exasperated by how much coverage focussed on the semantic question of what critical race theory meant rather than the political one about the nature of the campaign against it. “It should go without saying that what they are calling critical race theory is a whole range of things, most of which no one would sign on to, and many of the things in it are simply about racism,” she said. When I asked what was new to her about the conservative movement against critical race theory, she said that the main thing was that it had been championed last fall not by conservative academics but by Donald Trump, then the President of the United States, and by many leading conservative political and media figures. But the broader pattern was not new, or surprising. “Reform itself creates its own backlash, which reconstitutes the problem in the first place,” Crenshaw said, noting that she’d made this argument in her first law-review article, in 1988. George Floyd’s murder had led to “so many corporations and opinion-shaping institutions making statements about structural racism”—creating a new, broader anti-racist alignment, or at least the potential for one. “This is a post-George Floyd backlash,” Crenshaw said. “The reason why we’re having this conversation is that the line of scrimmage has moved.” As she saw it, the campaign against critical race theory represented a familiar effort to shift the point of the argument, so that, rather than being about structural racism, post-George Floyd politics were about the seminars that had proliferated to address structural racism. I asked Crenshaw whether she thought that the anti-racism seminars were doing good. “Sure, I’ve been witness to trainings that I thought, Ennnnnh, not quite sure that’s the way I would approach it,” she said. “To be honest, sometimes people want a shortcut. They want the one- to two-hour training that will solve the problem. And it will not solve the problem. And sometimes it creates a backlash.” Many liberals had responded to the conservative campaign against critical race theory by arguing first that those loudly denouncing it often had no idea what they were talking about, and second by suggesting that the supposed grassroots outrage was really the work of Republican operatives. Both responses made sense, but Crenshaw was suggesting a deeper historical pattern, in which the campaign against critical race theory was not an aberration but long-lasting retrenchment. “The fact is there aren’t any easily digestible red pills,” Crenshaw said. “If we’re really going to dig our way out of the hole this country was born into, it’s gonna be a process.” On this, at least, Rufo might not have disagreed too much. His adaptation of the term “critical race theory” was itself an effort to emphasize a deep historical and intellectual pattern to anti-racism, and he, too, found it predictable that people encountering it for the first time would be outraged by it. The rebranding was, in some ways, an excuse for politicians to stage the same old fights over race within different institutions and on new terrain. At my lunch with Rufo, I’d asked what he hoped this movement might achieve. He mentioned two objectives, the first of which was “to politicize the bureaucracy.” Rufo said that the bureaucracy had been dominated by liberals, and he thought that the debates over critical race theory offered a way for conservatives to “take some of these essentially corrupted state agencies and then contest them, and then create rival power centers within them.” I thought of the bills that Rufo had helped draft, which restricted how social-studies teachers could describe current events to millions of public-school children, and the open letter a Kansas Republican legislator had sent to the leaders of public universities in the state, demanding to know which faculty members were teaching critical race theory. Mission accomplished.

#### **That’s worth exploring.**

Many of these policies decried by conservatives may—in some tortured series of connections—owe their instantiation to the insights of CRT. On the other hand, suggesting that CRT has a dominant role in shaping policy or legal appraisals of those policies is misguided to the extent that CRT is a non-hegemonic conceptual framework.

Nevertheless, the controversy does seem to be an opportunity to take the accusation seriously and ask: what might CRT look like as a guiding jurisprudential framework?

#### In her confirmation to the Supreme Court, Justice Jackson faced wave-after-wave of accusations that her jurisprudential philosophy was a smokescreen for CRT. Justice Jackson denied such charges.

Farley 3-24 – (Judge Jackson and Critical Race Theory , Robert, March 24, 2022, <https://www.factcheck.org/2022/03/judge-jackson-and-critical-race-theory/>) NAR

The issue of critical race theory has been raised repeatedly in the Supreme Court confirmation hearings for Judge Ketanji Brown Jackson, specifically her passing mention of it in a 2015 speech on federal criminal sentencing. On the second day of the hearings, Jackson said critical race theory has not been a part of any decisions she has made as a judge. She said her speech seven years ago was about “sentencing policy and all of the different academic disciplines that might relate to it.” Critical race theory is the study of institutional racism as a means to better understand and address racial inequality. It has become a hot-button political issue among Republicans who oppose it being taught in public schools, though as Jackson noted in one of the hearings, it’s typically “an academic theory that’s at the law school level.” The critical race theory issue was first raised by Republican Sen. Marsha Blackburn on the first day of the confirmation hearings, when Blackburn claimed that Jackson had “made clear that you believe judges must consider critical race theory when deciding how to sentence criminal defendants.” “Is it your personal hidden agenda to incorporate critical race theory into our legal system?” Blackburn asked. Jackson didn’t have an opportunity to respond, as that day was for opening statements, but she did when the issue was raised on the second day by Republican Sen. Ted Cruz. Asked to define critical race theory, Jackson said, “Senator, my understanding is that critical race theory is — it is an academic theory that is about the ways in which race interacts with various institutions. It doesn’t come up in my work as a judge. It’s never something that I’ve studied or relied on, and it wouldn’t be something that I would rely on if I was on the Supreme Court.” Cruz said “critical race theory frames all of society as a fundamental and intractable battle between — between the races. It views every conflict as a racial conflict.” He then asked Jackson, “Do you think that’s an accurate way of viewing society and the world we live in?” “Senator, I don’t think so, but I’ve never studied critical race theory, and I’ve never used it,” Jackson responded. “It doesn’t come up in the work that I do as a judge.” Cruz said he found that answer “curious” because “you gave a speech in April of 2015 at the University of Chicago in which you described the job you do as a judge.” Cruz then quoted parts of her speech in which she said, “[s]entencing is just plain interesting … because it melds together myriad types of law, criminal law, of course … constitutional law, critical race theory.” “So you described in a speech to a law school what you were doing as critical race theory,” Cruz said. “And so I guess I would ask, what did you mean by that when you gave that speech?” “With respect, senator, the quote that you are mentioning there was about sentencing policy,” Jackson said. “It was not about sentencing. I was talking about the policy determinations of bodies like the Sentencing Commission when they look at a laundry list of various academic subjects as they consider what the policy should be.” Cruz, who sat in front of a large poster with an abbreviated version of Jackson’s quote, noted that Jackson was the vice chair of the U.S. Sentencing Commission. She served as vice chair of the commission from 2010 to 2014, a year prior to the speech in question. Cruz asked again, “what did you mean by what you were doing was critical race theory?” “What I meant was that there are a number of, that that slide does not show the entire laundry list of different academic disciplines that I said relate to sentencing policy,” Jackson said. “But none of that relates to what I do as a judge.” Jackson’s address to law students at the University of Chicago in April 2015 was titled, “Fairness in Federal Sentencing: An Examination.” A transcript of the speech was included in the materials on Jackson provided by the Senate Judiciary Committee. At the beginning of her 2015 address, Jackson, then serving as a U.S. District Court Judge in Washington, D.C., encouraged students to study criminal sentencing. Here is an excerpt from that speech, with the portion highlighted by Cruz in bold. Jackson, April 3, 2015: In fact, if you were to take my class, you would hear me tout criminal sentencing as among the “don’t-miss” courses and subjects in law school, not just because I teach it, but because I, for one, believe that sentencing law and policy is one of the most important things that any budding lawyer — and for that matter, any seasoned practitioner — can study. Why is that? Well, there is the practical reason that, as you know, no fewer than 97% of the cases in the federal criminal justice system are now resolved by guilty pleas, so in the vast majority of criminal cases, sentencing is really all there is. But even beyond that, learning about sentencing is important for all lawyers, even if criminal law is not your thing, because, at bottom, the sentencing of criminal offenders is the authorized exercise of the power of the government to subjugate the free will of individuals-which in and of itself has enormous implications in a society in which the government derives its power from the will of the people. Dostoevsky put it this way: “you can judge a society by how well it treats its prisoners.” So, as I see it, becoming well-versed in how our government exercises its power over people who breach its commandments is essential to sustaining our very democracy. I also try to convince my students that sentencing is just plain interesting on an intellectual level, in part because it melds together myriad types of law — criminal law, of course, but also administrative law, constitutional law, critical race theory, negotiations, and to some extent, even contracts. And if that’s not enough to prove to them that sentencing is a subject is worth studying, I point out that sentencing policy implicates and intersects with various other intellectual disciplines as well, including philosophy, psychology, history, statistics, economics, and politics. It was her only reference to critical race theory in her speech. Later in the confirmation hearing, Democratic Sen. Cory Booker said he listened to Jackson’s speech and said to Jackson: “You were just listing a list of things that people could say touched the law.” He added, “They weren’t your philosophies at all.” “Correct, senator,” Jackson said. “And that speech was not related to what I do as a judge. That was talking about sentencing policy and all of the different academic disciplines that might relate to it.” Democratic Sen. Chris Coons asked Jackson, “[I]n your nine years on the bench in more than 570 decisions, have you ever used, employed, relied upon critical race theory to determine the outcome of any case or to impose a sentence or as a framework for your decision?” “No, senator,” Jackson replied. None of the Republican senators has attempted to link any of Jackson’s specific judicial decisions to having been influenced by critical race theory. But a press release from Senate Republican Leader Mitch McConnell complained that the Judiciary Committee had not been provided documents from Jackson’s time as vice chair at the Sentencing Commission, which “would shed light on whether she used critical race theory to influence sentencing policy.” On the second day of the confirmation hearings, the Republican National Committee tweeted an image of Jackson with her initials crossed out and replaced with “CRT,” for critical race theory.

#### Justice Jackson is not lying

But her distancing from CRT as a guiding principal for her jurisprudence does raise the question: what might CRT as jurisprudence look like? The present public controversy is marked by a right-wing accusation and liberal evasion. On the right, the accusation looks like this: CRT has dominated the minds of liberal justices. The liberal reply, in contrast, is a two-part gesture. FIRST, CRT is a valuable academic enterprise. SECOND, CRT does not influence justices. What is refused in this “reply” is a throated defense of the theory as jurisprudence. In other words, an affirmative answer to the question: should CRT be used by Justices in their analyses?

#### **Making New Scholarship**

In asking this question, our debaters might find themselves on less than solid ground. CRT is a dynamic theory, and there is not a readily-accessible book one can turn to in order to say: here is what CRT as jurisprudence would, or wouldn’t, look like. But I submit that this is a benefit not a con.

By the year’s end, debaters might put together something looking like a defensible, revisable, legal paper about what form CRT as legal jurisprudence might take—including thinking through relevant rebuttals. This resolution may afford us an opportunity to think of the debate year as a time to construct new arguments about CRT and law—thus adding to this growing field of scholarship. We often have told administrators that debaters produce a master’s thesis worth of research by the end of a season. Imagine if you could go to an administrator and say: not only did they do it, but our teams co-authored a paper that was accepted into a conference or even got published because of that research.

#### Producing new scholarship might be one of the benefits of moving beyond pre-determined molds of plan-focused, policy oriented, resolutions.

Reid-Brinkley 12 – Assistant Professor and Co-Director of Forensics at California State University, Fullerton (Shanara, interviewed by Scott Odekirk, The Dr. Shanara Reid-Brinkley Interview, 4-2-12, <https://puttingthekindebate.wordpress.com/2012/04/02/the-dr-shanara-reid-brinkley/>) NAR

Dr. Reid-Binkley: Now here is the fear. If that was the only answer, the debate community would do research, but it would be just to cut cards and nothing really would change. So it can’t stop at research, but that is literally step one: go do some reading. That would really help you have a language and a vocabulary for talking when you are engaging these teams that will produce very good debates. So when people say that they don’t think that what performance/movement teams are doing is intellectual, it’s because they have already decided that they are anti-intellectual. Whereas they are very much so intellectuals, as a matter of fact they are few of the debaters in our community producing scholarship rather than regurgitating it. Our very frame of reference on how to engage in debate is about the regurgitation of information, rather than the production of it. That is where I think we have gone wrong, which is also why we are not having good – we are not able to advertise to our administrations in a way that makes debate something that administrations really really want to support and fully fund. And the reason is because we made it such this isolated solipsistic game that people who are really interested in knowledge production don’t necessarily see their relationship to it. We are losing tenure stream jobs for debate directors in our community. The reason is because our community is becoming more and more disconnected from the academy. What we can do in terms of how we produce scholarship for debate, in debate rounds, is that we need to change our focus from the regurgitation of information that is already produced in the academy to an engagement with it so that we are producing new knowledge. So rather than saying the only way you can have a plan for what to do different with democracy assistance is to find what the USFG has already defined it as, and get authors who, you have to find a solvency advocate for whatever change you are going to make. So somebody has already produced that idea and gotten it into print. Stupid! Stupid. We are so smart, this community of people, I have never been around smarter people than the people in the debate community. That’s why I find it exciting. Because I’m really smart, so I enjoy talking to other smart people. And, we are just not making use of the intelligence, the intellectual power that is at a debate tournament, especially when you get to the top of the game, it is amazingly powerful. I have met graduate students and professors that are nowhere near as smart as some of our undergraduates their senior year at the height of their ability to compete. Just have not. Odekirk: Amen. Dr. Reid-Brinkley: Given that this is the case, why are we not producing knew knowledge? Rather than coming at a plan as I have to have a solvency advocate who has already defined this, and I have to define this in the context of exactly how the USFG has previously defined it. I think we should be producing new arguments about what democracy assistance should look like and be like through the USFG. So rather than having a solvency advocate you would have evidentiary support to change parts of your argument. Just like writing an academic paper. If all academic papers were was regurgitation of someone else’s argument, it would never get published. The whole point of academic scholarship is for you to identify what’s being said in the field or around a particular issue and what’s missing from that, and then you do something to demonstrate why that thing that’s missing in that scholarship should be there, and you make an argument about how we need to expand our understanding of this situation. Does that make sense to you? So it doesn’t make sense that the ways we in which we engage in policy making is to simply chain it out to what something else someone has already thought of. When we have all this intellectual power, we should be producing new policy. That would be the change. That would change our very way of thinking about what the game is that we are playing, and what its potential connection is to both the academy but also politics. And that would create the space for teams who want to talk about anti-blackness or teams that want to talk about the defining nature of gender and how we engage in policy. It would allow all these different things because our very frame of reference for understanding what the game is that we are engaging in would change, it would open up fields of literature, it would make sense that people are saying we need a three tier methodology where we look at organic intellectuals we look at other scholars and we look at our personal experience, guess what, that’s how you write a [ed] academic paper now.

#### At the same time – there are some places for guidance. A new book has come out in April that begins precisely this process. In it, CRT scholars (established and emergent) re-write important judicial decisions from Supreme Court cases reflecting the insights of CRT. These include: a decision in *Brown v. BoE* authored by Derrick Bell,[[8]](#footnote-8) *Plessy v. Ferguson* by Trina Jones, *Terry v. Ohio* by Paul Butler, *Milliken v. Bradley* by Michelle Adams, and *Regents of the University of California v. Bakke* by Luke Harris. As an exercise in developing what CRT jurisprudence looks like—including whether or not it is preferable to its alternatives—our debaters will be engaged in an emergent and significant legal controversy.

Carbado et al. 22 – (Devon W Carbado, Bennett Capers, R A Lenhardt, Angela Onwuachi-Willig, Critical Race Judgments : Rewritten U.S. Court Opinions on Race and the Law, Cambridge University Press, accessed via Googlebooks, p. 7-9) NAR

Our approach to engaging potential contributors was relatively straightforward. We invited both prominent and emerging CRT scholars to either imagine themselves on the Court or to channel actual Justices tasked with authoring key decisions bearing on race. We instructed them that, in writing their respective opinions, they should consider themselves subject to the same constraints that bind Supreme Court justices and lower court judges. These constraints include basic principles of law, the anticipated consequences of the decision for the parties and society as a whole, judicial ethics, and a judge’s professional and personal experiences. We stressed that each rewritten Opinion would be bound by the precedent in existence at the time of the decision to the same extent that the original opinion would have been. In other words, we emphasized the importance of stare decisis. Moreover, we made clear to the contributors that, while they were free to rely on additional authorities, they should limit themselves to authorities that were in existence at the time of the original decision. Our footnote here, an important one, was that they were nevertheless free to use any reasoning they wished, even reasoning informed by ideas, scholarship, cases or sources that arose after the original decision was issued. At bottom, we encouraged our contributors to be mindful of various forms of presentism, notwithstanding our understanding that a collection such as ours could not avoid (and indeed is predicated on) prescntist thinking. Our commitment was to ensure that the rewritten opinions were contextually intelligible in the sense of reflecting the sensibilities, including the oppositional and dissenting voices, of the day. The final instruction to our contributors pertained to how we advised them to engage with CRT. After considerable discussion, we decided to give the contributors leeway to use CRT as they saw fit. In other words, we did not direct the contributors to engage or emphasize particular themes or frames in their rewritten opinions. Yet, it is hard to read the opinions and not notice some central CRT ideas, including but not limited to: race is a social construction that intersects with and is shaped by other social categories; law produces and legitimizes racial power; the historical dimen- sions of de jure discrimination continue to shape contemporary patterns of racial inequality; formal equality is rarely if ever enough to achieve substantive equality; racial discrimination is not exhausted by conscious racial intentionality; and the juridical deployments of colorblindness have functioned largely to entrench rather than ameliorate extant racial disadvantages.25 While all of these ideas ought to be subject to debate, the fact that some conservatives are seeking to “cancel” them should alarm anyone who takes racial justice and free speech seriously. In advancing these and other CRT themes, most contributors adhered strictly to the guidelines we set out above. However, other contributors, like CRT itself, were a bit oppositional. They requested freer rein in drafting their opinions, and we readily acceded. Our sense was that insisting that every contributor write their chapter in the form of a conventional Supreme Court opinion would unnecessarily undermine the “big tent” ethic on which CRT is based. Our commitment to that “big tent” ethic is also manifested in the different levels of criticality that the rewritten opinions reflect. Our surmise is that the reader will perceive some of the opinions to be more CRT-inflected than others. In addition to deriving from the range of historical and doctrinal constraints under which the contributors wrote, the differential engagement with CRT across the cases also reflects debates in the literature about the work Critical Race Theorists should mobilize CRT to perform. Understood in this way, the rewritten opinions are a productive reminder that the scholars who comprise the CRT community are not monolithic in their thinking about CRT and often have competing conceptions of the field, even as their scholarly contributions help to identify its contours. Our final comment before we describe the structure and organization of the book is this: We will not in this introduction attempt to synthesize all of the various commitments of Critical Race Theory. Other scholars have perfomied that work and in the context of doing so revealed the breadth and depth of the field.26

### Fixing Our Legal Topics

#### Second, it fixes a glaring issue with topic rotation. Our legal topics are not legal.

The 2022 topic guidelines for legal topics are ones that “relates to a controversy within legal jurisprudence, and where the topic wording emphasizes legal research.” The problem (this is absolutely plain for everyone that has debated legal topics in the past) is that our policy making resolutions emphatically do not emphasize that our students do legal research. It is true that they contain legal research, but they absolutely do not emphasize it. Why is that? Because the demand for policy relevance necessitates that legal reasoning takes a back-seat to advantage and disadvantage construction.

When the topic rotation amendment was proposed, it was proposed under the guidance/auspices of Sarah Topp and Brett Bricker’s essay “Supplying a Well-Rounded Education.” The question we as a community need to ask ourselves when selecting a legal topic is to what extent it will encourage debaters to research “relevant think tanks and Lexis-Nexis news sources.” If our legal topics dip—either primarily or significantly—into these archives, then to what extent are we debating a legal topic?

#### A true legal topic might be better served detached from explicit policy concerns.

Topp & Bricker 10 – \*Former Director of debate @ Trinity University, well regarded debate critic and argument coach, \*\*Assistant Director of Debate @ Kansas University (Sarah, Brett, SUPPLYING A WELL-ROUNDED EDUCATION: A CASE FOR MANDATORY TOPIC ROTATION, *Contemporary Argumentation and Debate*, 2010) NAR

First, legal topics teach strong research skills. Kade Olsen (personal communication, February 2011), a law student at New York University and a successful debater during the 2006-2007 season, argues that the most recent legal topic offered uniquely important education: The court topic was invaluable for legal research in law school. It taught me to closely read judicial opinions, chase footnotes, and apply judicial reasoning to difficult fact patterns. More importantly, I learned to approach judicial opinions as tools to apply in argumentation instead of absolute answers to questions. Andrew Jennings (personal communication, February 2011), a law student at the University of Kansas, agrees that the court topic “helped with making sense of complex legal databases and put me a step ahead of my peers in terms of research and preparation.” These research skills are unique to legal topics. While other topic teach debaters to navigate relevant think tanks and Lexis-Nexis news sources, legal topics teach debaters to effectively utilize distinct legal databases such as WestLaw, HeinOnline, and Lexis Law reviews. Second, legal topics facilitate an education that is useful in law school. The most recent legal topic provided Olsen the “background knowledge of everything we have/ will discuss in constitutional law this semester.” Brenton Culpepper (2010), a former law student at Vanderbilt University, utilized information researched for the Morrison area (his affirmative on the topic) to publish in the Vanderbilt Journal of Transnational Law. Given the large number of debaters that go on to law school, the community does itself a disservice by avoiding topics that are explicitly legal in nature. Finally, the objection to asking affirmative’s to overrule a previous court decision has merit. This mechanism made the affirmative defend an action by the Supreme Court that was only sparingly supported in affirmative solvency advocates. Fortunately, we don’t have to make this mistake again. A recurring legal resolution allows the community to reflexively learn from our mistakes, and write better resolutions. For example, future legal topics may choose not to ask the affirmative to overrule a decision as the mechanism of the resolution. Or, the committee may choose case areas that demand that the affirmative overrule a decision, allowing the mechanism to guide the choice of topic areas. Incorporating a legal topic into a four-year mandatory rotation helps streamline the resolution writing process, because the pitfalls are immediately memorable.

#### A true legal topic, instead, would study the law – this is why CRT is a great opportunity for our students.

The benefit of studying CRT and the law—and tasking our students to think through a speculative jurisprudence—is that it will encourage them to put an established conceptual framework in conversation with existing theories of law. What does CRT do to conceptions of: precedent, stare decisis, standards of evidence, weight, and testimony? What new questions or analytics does CRT raise when it comes to guiding a Judge’s decision in court? These are absolutely open questions that will require deep engagement with established precedent and the broader ethical/political commitments of CRT.

In tinkering with the topic and rendering CRT a legible and workable theory of jurisprudence, our students will be doing much more than regurgitating policy briefs and reading advantages and internal-link chains they have read year-in-and-out for most of their debate career. They will be acting as legal scholars, charting and exploring an uncertain future.

# Potential Wordings

### Wording #1 –Jurisprudence Centered

#### Resolved: As a theory of legal jurisprudence, Critical Race Theory is preferable to its alternatives.

This is the preferred resolution wording. It tasks the affirmative to begin the process of imagining CRT *as* jurisprudence.

#### Jurisprudence implies general principals guiding legal interpretation.

LegalDesire 20 – (<https://legaldesire.com/concept-of-law-and-schools-of-jurisprudence/>) NAR

The word ‘jurisprudence’ derived from the Latin word ‘jurisprudentia’ which means knowledge of law. The Latin word ‘juris’ means law and ‘prudentia’ means skill or knowledge. Thus the term jurisprudence signifies knowledge of law and its application. Jurisprudence means the interpretation of the general principles based on which actual rules of law are recognised. Jurisprudence is concerned with the rules of external conduct which people are forced to obey. Some of the notable definitions of jurisprudence as expounded by jurists are as follow: As per Cicero, “Jurisprudence is the philosophical aspect of knowledge of law.” According to Salmond, “Jurisprudence is the science of the first principles of civil law.” According to John Austin, “Jurisprudence is the philosophy of positive law.” In the views of Holland, “Jurisprudence as the formal science of positive law.” As per H.L.A. Hart, “Jurisprudence is the science of law in a broader perspective by co-relating law and morality.” Rosco Pound defines Jurisprudence as “the science of law denoting the body of principles recognised or enforced by public and regular tribunals in the administration of justice”.[1]

#### This means defending a “habit of law” rather than a one-and-done case.

Oglinda 15 – (Basil, “The jurisprudence. Formal law source,” Societatea de Stiinte Juridice si Administrative (the Society of Juridical and Administrative Sciences) , Jun 2015 , 120-129 ) NAR

Jurisprudence as source of law, implies a narrower sense of this term, namely, the entirety of decisions issued in a certain subject (not in general), but we bear in mind a constant and generalized praxis, without being limited to the isolated praxis of one or several law courts.4 The basic characterstics of jurisprudence are the continuity and consistency in interpreting and applying the law in a certain field, thus being formed a "habit of law courts of interpreting and applying the law."5 Thus, jurisprudency is defined by repetition. 6 An essential concept for the theme analized is the predictability of the judicial praxis. On the strength of it, anyone who will have a similar test case will have to benefit from the solution already established by the jurisprudence. It is estimated that the development of such mecanism will lead to the relief of law courts, because citizens, before referring to the law court, will inquire and will refer to resort only in the situations in which they see chances of success. Whereas, in this context, the predictability of judicial praxis is important, as it offers citizens the possibility to get informed. 7

#### As a form of jurisprudence, critical race theory would imply a new analytic of knowledge.

Delgado & Stefanic 7 – Married team @ University of Pittsburgh Law School // \*One of the founding figures of the CRT movement,\*\*Frequent contributor to Critical Race Theory scholarship (Richard, Jean, Critical race theory and criminal justice." Humanity & Society 31, no. 2-3 (2007): 133-145.) NAR

TOWARD A CRITICAL JURISPRUDENCE OF CRIME AND CRIMINAL JUSTICE What does this body of scholarship have to say about criminal justice? In the remainder of this essay, we revisit some of the main themes established by crits and suggest what they might mean for a program of criminal justice. We will also describe the relatively small body of critical race theory work that does actually consider criminal justice. Recall the first theme of critical race theory mentioned earlier, the ordinariness of race and racism. A critically minded person might question why our country tolerates a criminal justice system that results in a prison population that is seventy percent Black and Brown. Most people do not see that situation as problematic; they might say, "Well, each of them is in there because he or she committed a crime and was convicted." And then they go on to other issues, such as whether the jury was fair or the lawyer adequately schooled and prepared— issues of process and procedure. Fewer people will ask about the racial cast of the system as a whole and what purposes it might serve. An article authored by Richard Delgado entitled Black Crime, White Fears: On the Social Construction of Threat pointed out that dangerously antisocial behavior is, in fact, unevenly distributed by race but that it is Whites who are more dangerous than Blacks or Latinos, so that the average citizen is much more likely to be killed as a result of undeclared wars (which are illegal) or dangerous consumer products, and much more likely to suffer a loss of property due to white collar crime than to street crime. Yet the way we have defined certain behavior as threatening and have made certain acts criminal or noncriminal convinces most of us incorrectly that Blacks and Latinos are, on average, more dangerous than Whites. More work on broad structural considerations like these would seem to be useful directions for scholarship and investigation. A second theme, interest convergence, would seem an appropriate avenue for exploring a number of criminal justice issues, including the war on drugs. That war, which has seriously disparate racial effects, appears on its face to be economically senseless. Rehabilitation is much cheaper and more effective than harsh punishment, just as needle-exchange programs are much safer for addicts than borrowing needles from other users at the point of use. Many addicts borrow needles from one another simply because they hesitate to carry needles around and risk running afoul of the paraphernalia laws. In fact, complete legalization of at least some of the milder drugs would seem to be far preferable to criminalization. Yet, society insists on increasingly harsh sentences for drug offenders. What could underlie this attitude? Does morality-based legislation strengthen White solidarity, helping draw the lines between us and them—the saved and the unsaved? Do the enormous profits in the privatized prisonbuilding industry provide a partial reason? Do felony conviction and disenfranchisement benefit the Republican Party by taking Black voters off the rolls? Does Black imprisonment allow for manipulation of the labor pool so that when the job market is weak and Whites fear competition, they can reduce some of it? Differential racialization theory could look at how society has constructed and stereotyped the typical Black offender, Latino offender, Asian offender, and Indian offender and assigned each group a different role in the national imagination: one the sneak, another the mugger, another the drunk and so on. It could look at how police officers engage in different forms of profiling for the different groups. If, in the past, we racialized groups differently based on what we wanted from each—from the Indians, land; from the Blacks, labor; from the Asians, railroad building and mining technology, and so on, it stands to reason that we might be racializing them differently now in terms of what we do not want from them in the way of pushy behavior. We might be treating them differently in the way defense attorneys interact with—or "construct"—them as client: in whether attorneys accept plea bargains from them, and what kind of bargains, and in how attorneys supervise them when they are on probation or parole. As mentioned, critical race scholars are deeply suspicious of liberalism, holding that it places almost as many impediments in the way of achieving racial justice as does its opposite, conservatism. In the area of criminal justice, this suspicion might lead to a searching examination of certain liberal mainstays, such as faith in the adversary system as a way of achieving justice in criminal trials; the role of the jury as a guarantor of racial fairness; the ability of voir dire to root out jurors who harbor racial prejudices; and the very idea of rehabilitation and its underlying norms. Conservatives lately have been arguing that racism and statistical suspicion are reasonable; Jody Armour wrote a book about Negrophobia and the reasonable racist. How reasonable, he asked, is it to fear an entire group merely because some of its members commit crimes? A recent book by Paula Johnson, Joyce Logan and Angela Davis, titled Inner Lives: Voices of African American Women in Prison, exemplifies a further critical theme, storytelling. Johnson tells the stories of Black women prisoners. Before she and her co-author wrote it, few people knew these stories. But what about gay prisoners, Latino gang members, or Hmong immigrants imprisoned because they kill and eat songbirds or ducks and swans from the public park, unaware that they are protected in the United States? What about the stories of Black police officers or of innocent defendants convicted because the witnesses thought all Black men looked alike or the district attorney needed to close the books on a notorious crime? These stories need telling, and not just in an op-ed column or two. Some recent work proposes that Black jurors should acquit Black defendants if they conclude that the defendant, usually a young male accused of a malum prohibitum offense—a victimless crime of some kind—is more useful to the Black community free than he is behind bars. Paul Butler's provocative article on jury nullification and his subsequent piece in the Stanford Law Review on a hip-hop theory of criminal punishment explore the bounds of Black separatism and nationalism. Regina Austin carries this further in her work on a politics of difference and a politics of identification. Federal judge Nancy Gertner applied a milder version of Butler's theory of jury nullification when she refused to apply a three-strikes-and-you're-out sentencing law to a Black defendant in Massachusetts who had just been convicted of a third offense. Because his two prior convictions had been automobile-related, and taking judicial notice of how Black motorists are frequently subjected to police profiling and suspicion and that therefore those two prior convictions may well have been products of racism, Judge Gertner refused to apply the recidivist law and sentenced him, instead, to the shorter sentence of a first or second offender. Imaginative research might turn up other ways a minority community might be able, as former federal prosecutor Paul Butler prosecutor put it, to use the master's tools to dismantle the master's house. Important work by David Harris and others traces the consequences of racial stereotyping in such an offense as "driving while Black." But what about other forms of profiling: traveling while Latino, congregating on street corners while young and non-suburban, showing oneself, almost anywhere, as Middle-Eastern looking? Vagrancy statutes, anti-panhandling laws, and anti-gang statutes may tell us much about how society regards leisure, loafing, and who is allowed to hang out with whom on street corners and in front of stores. The role of discretion in the criminal justice system and the way thousands of seemingly unconnected acts may add up to glaring racial unfairness needs to be traced in detail, as does our structure of punishment, which includes rehabilitation for people like us but harsh retribution for all the rest. Many legal rules, especially criminal defenses, seem normed on what White, propertied males would do in a given situation—for example, subjected to a threat. Cynthia Lee's book, Murder and the Reasonable Man, explains how this works in the area of self-defense and other defenses that turn out to be much more helpful to straight White males who, for example, shoot and kill another man in a homosexual panic than they are to a gay or lesbian person. She also recounts the story of an innocent Asian teenager, Yoshihiro Hattori, who went to the wrong suburban house in Louisiana with a friend looking for a Halloween party. The homeowner, believing he was about to be attacked by a terrifying Asian martial arts expert, shot and killed him. At the trial, a suburban jury acquitted the homeowner, finding that his fear was reasonable although Hattori had done nothing that most readers of this article would consider threatening. Cynthia Lee's pioneering exploration of White normativity needs to be extended to a host of other areas, criminal as well as civil. Scholars need to do more studies like the one David Baldus and his associates at University of Iowa conducted that showed that Blacks who killed Whites were executed many times more often than Whites who killed Blacks. In what other areas of the civil and criminal justice systems do we value Black or Brown lives, fingers, children, or limbs less than White ones? Where else could we use empirical or statistical studies? More attention needs to be paid to minorities who are victims of crime. The murder of Vincent Chin is just one example of crime with a racial motivation. During a period when the American automobile industry was declining and factories closing, throwing many White workers out of jobs, two White autoworkers accosted a young Chinese American man in Detroit. Blaming him for their troubles, they saw his Asian face as a symbol of their despised Japanese auto-making rivals and beat him to death. A jury let them off lightly. The current wave of nativism and border-enforcement by vigilantes seems likely to generate many more victims as desperate Mexicans and Central Americans come into their sights. Morris Dees' Southern Poverty Law Center recently won a large judgment against two ranch owners who had been in the practice of inflicting vigilante justice on immigrants passing through their property. When the defendants could not pay the judgment, the plaintiffs, who were undocumented immigrants, took title to their ranch. American Indians are almost twice as likely as the average American to be the victim of a crime. And now in the wake of 9/11 and the war in Iraq, Arab-looking people are subjected to profiling, suspicion, and violence. Recall the Sikh gas station attendant in Arizona who just did not look right to a group of locals and paid with his life. What can be done about these crimes motivated by hatred? We need to be clear on whether the minority community needs more policing, as Randall Kennedy and others argue, or less. We need to understand what styles of policing and what types of community oversight are in order. We need to pay attention to the low salaries of many police forces and the low standards for acceptance on some of them. We also need to increase the very small number of lawyers, judges, law professors, and grand jury members of color. Slavery, Jim Crow, lynching, Operation Wetback, and theft of Indian and Mexican American lands in the Southwest were great crimes, most of which have gone unredressed. What does society now owe the victims' descendants in the way of reparations and an apology? Critical race theorists like Charles Ogletree are working with top Civil Rights attorneys to call some of these crimes to our attention, but many more remain to be addressed. International law scholars ask whether human rights law might find an application to these and similar situations in the United States. U.S. courts have been trying international torturers, drug cartel kingpins, and brutal Latin American henchmen under an ancient statute that allows tort victims to gain civil redress if they can locate their torturers or their bank accounts in this country. What about trying U.S. corporations that profited from slavery, or forcing the U.S. Forest Service to return land stolen from Mexican farm owners in the Southwest a century-and-a half ago after the war with Mexico and a treaty that granted Mexicans the supposed right to own and live on their lands? Hate speech regulations and hate crime laws would seem to be some of the few measures aimed at bringing relief to minorities subjected to various forms of harassment and vituperation. Are they working out that way? Are they constitutional? Would imposing a restriction on the First Amendment backfire on minorities, as the ACLU has been urging? Critical race theorists, including the two of us, have been in the forefront of these issues, but more work remains to be done. Jeannine Bell has written a book showing how enforcement of hate crime laws has played out on ground. Jonathan Gould, a non-crit, has done the same with campus hate speech rules. Does domestic violence have a different meaning in the minority community from its meaning among its White counterparts? Do police get away with brutality committed on Blacks that the White community would never tolerate, say, with Whites picked up drunk outside a suburban saloon? Are African American males an endangered species as some argue, and if so, what might international law have to say about this? And why is crack cocaine treated nearly one hundred times more severely than the powder variety? If human beings form societies in order to enforce a social contract, one of whose prime terms is that each person should receive equal protection from illegitimate force and violence, what are we to make of a society that imprisons nearly 30 percent of young Black men, more than the number who attend college? Is that contract still in force, and if not, what follows from that? These, then, are some issues that critical race theory might look at if it were to initiate a systematic analysis of crime and punishment. Some readers of Humanity & Society are undoubtedly addressing them now. Critical race theory merely provides a new and different lens and way of systematizing the search for knowledge. It helps avoid the search for easy answers, focuses attention on social construction and mindset, asks us to attend to the material factors underlying race and racism, and challenges us to go beyond the ordinariness of racist action and treatment. We very much hope our two disciplines, law and sociology, work together in the future and that, in the words of that Humphrey Bogart movie, this is the beginning of a beautiful friendship.

### Wording #2 – Jurisprudence Centered / Case Focused

#### Resolved: Critical Race Theory, as a theory of legal jurisprudence, is preferable to its alternatives in one or more of the following cases:

#### [~4 Cases]

This resolution captures the spirit of resolution #1 but focusses the debate on specific court cases. The benefit of this wording (for those concerned about an overly broad topic) is that it centralizes CRT jurisprudence as workable on specific historical examples. The other benefit is that it would encourage deep historical engagement with the particularities of selected cases. One significant drawback is that it might unnecessarily restrict our students from investigating the diverse ways CRT can transform legal jurisprudence for the present/future.

#### Possible Cases

These cases are mostly suggestions. If this resolution is selected, different permutations of the cases can be included on the ballot to satisfy folks. Possible cases are arranged in the order of their decisions. This is not an exhaustive list, but merely a suggestion for the topic committee.

\*Johnson v. M'Intosh

\*Korematsu v. United States

\*Brown v. Board of Education

\*Terry v. Ohio

\*Milliken v. Bradley

\*Regents of the University of California v. Bakke

\*Shelby County v. Holder

### Wording #3 – Interpretive Framework

#### Resolved: As a framework for judicial interpretation, Critical Race Theory is preferable to its alternatives.

This wording is similar to wording #1, but the main difference is that it highlights “judicial interpretation” rather than jurisprudence. In other words: aff teams will posit that CRT provides certain insights into how to read/translate/decide on law. Functionally, this may make the debate into a more conventional yes/no question on if CRT is accurate/ethical/good.

#### Judicial interpretation implies reconciling political considerations with a law’s established meaning.

Brennan 85 – Former Supreme Court Justice (Justice William J. Brennan, Jr. Speech given at the Text and Teaching Symposium, Georgetown University October 12, 1985, Washington, D.C., <https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html>.) NAR

These three defining characteristics of my relation to the constitutional text-its public nature, obligatory character, and consequentialist aspect-cannot help but influence the way I read that text. When Justices interpret the Constitution they speak for their community, not for themselves alone. The act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought. Justices are not platonic guardians appointed to wield authority according to their personal moral predilections. Precisely because coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must render constitutional interpretations that are received as legitimate. The source of legitimacy is, of course, a wellspring of controversy in legal and political circles. At the core of the debate is what the late Yale Law School professor Alexander Bickel labeled "the counter-majoritarian difficulty." Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law. Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation. There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant-that of the drafters, the congressional disputants, or the ratifiers in the states?-or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states. And apart from the problematic nature of the sources, our distance of two centuries cannot but work as a prism refracting all we perceive. One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to "original intention"-and proposing nullification of interpretations that fail this quick litmus test-must inevitably come from persons who have no familiarity with the historical record. Perhaps most importantly, while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice. A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation-if there is such a thing as the "nature" of interpretation- commands such a passive approach to ambiguity. This is a choice no less political than any other; it expresses antipathy to claims of the minority rights against the majority. Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance. Another, perhaps more sophisticated, response to the potential power of judicial interpretation stresses democratic theory: because ours is a government of the people's elected representatives, substantive value choices should by and large be left to them. This view emphasizes not the transcendent historical authority of the framers but the predominant contemporary authority of the elected branches of government. Yet it has similar consequences for the nature of proper judicial interpretation. Faith in the majoritarian process counsels restraint. Even under more expansive formulations of this approach, judicial review is appropriate only to the extent of ensuring that our democratic process functions smoothly. Thus, for example, we would protect freedom of speech merely to ensure that the people are heard by their representatives, rather than as a separate, substantive value. When, by contrast, society tosses up to the Supreme Court a dispute that would require invalidation of a legislature's substantive policy choice, the Court generally would stay its hand because the Constitution was meant as a plan of government and not as an embodiment of fundamental substantive values. The view that all matters of substantive policy should be resolved through the majoritarian process has appeal under some circumstances, but I think it ultimately will not do. Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved. Our Constitution could not abide such a situation. It is the very purpose of a Constitution-and particularly of the Bill of Rights-to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority right that arise as a response to the outcomes of that very majoritarian process. As James Madison put it: The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. (I Annals 437). Faith in democracy is one thing, blind faith quite another. Those who drafted our Constitution understood the difference. One cannot read the text without admitting that it embodies substantive value choices; it places certain values beyond the power of any legislature. Obvious are the separation of powers; the privilege of the Writ of Habeas Corpus; prohibition of Bills of Attainder and ex post facto laws; prohibition of cruel and unusual punishments; the requirement of just compensation for official taking of property; the prohibition of laws tending to establish religion or enjoining the free exercise of religion; and, since the Civil War, the banishment of slavery and official race discrimination. With respect to at least such principles, we simply have not constituted ourselves as strict utilitarians. While the Constitution may be amended, such amendments require an immense effort by the People as a whole. To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices, and must accept the ambiguity inherent in the effort to apply them to modern circumstances. The Framers discerned fundamental principles through struggles against particular malefactions of the Crown; the struggle shapes the particular contours of the articulated principles. But our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours. Successive generations of Americans have continued to respect these fundamental choices and adopt them as their own guide to evaluating quite different historical practices. Each generation has the choice to overrule or add to the fundamental principles enunciated by the Framers; the Constitution can be amended or it can be ignored. Yet with respect to its fundamental principles, the text has suffered neither fate. Thus, if I may borrow the words of an esteemed predecessor, Justice Robert Jackson, the burden of judicial interpretation is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century." Board of Education v. Barnette, [319 U.S. 624, 639 (1943),] We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time. Similarly, what those fundamentals mean for us, our descendants will learn, cannot be the measure to the vision of their time. This realization is not, I assure you, a novel one of my own creation. Permit me to quote from one of the opinions of our Court, Weems v. United States, [217 U.S. 349,] written nearly a century ago: Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice John Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision or events of good and bad tendencies of which no prophesy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter-abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote-we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste.

#### As an interpretive framework, CRT defies existing norms and pushes for societal transformation.

Crenshaw 2 – American civil rights advocate and a leading scholar of critical race theory. She is a professor at the UCLA School of Law and Columbia Law School, (Kimberle Williams Crenshaw, "The First Decade: Critical Reflections, or A Foot in the Closing Door," UCLA Law Review 49, no. 5 (June 2002): 1343-1373) NAR

That there were others-dozens of others-who believed one could think meaningfully and legitimately as a legal "scholar" while remaining committed to progressive racial transformation gave us the liberty to think creatively and to write boldly. Perhaps as a consequence of this inception, CRT has been able to eschew and transcend racial convention. For many of us who later became Critical Race Theorists, the Alternative Course made possible a sustained interaction with one another while foregrounding a text and an interpretive framework on civil rights law that was as different from the norm in legal education as was Smith's and Carlos's symbolic salute at the 1968 Olympics. Although we scattered after the course, the momentum continued. Some participants in the Alternative Course-including its instructors, organizers, students, and sponsors-would come together in various venues over the next few years, many at CLS conferences and summer camps. Students at Stanford, Berkeley, Columbia, and other law schools took up the demands to desegregate the faculty and curriculum, some drawing inspiration from the events at Harvard." z Lawrence, Gotanda, Delgado, and others continued to expand the parameters of race scholarship, and, by so doing, opened the terrain to subsequent scholars, some of whom included students exposed to these openings through these very desegregation struggles. Mari Matsuda, for example, returned to Hawaii to become the first Asian American woman to teach at the University of Hawaii Law School and there began to shape a path-breaking career in legal education. Several other participants in the course wound up in legal education, including the late Muhammad Kenyatta (SUNY Buffalo), Tony Thompson (New York University), George Bisharat (U.C. Hastings), Glenn Morris (University of Colorado), Ibrahim Gassama (University of Oregon), and W. Burlette Carter (George Washington University Law School). For me, the Alternative Course confirmed that there was an answer to the question the dean had put before us. There was indeed substantive content and pedagogical value to be derived from a focused study on the relationship between race and law. Neither could be appreciated by any course on constitutional law, any placement with legal aid, or even a three-week seminar on civil rights litigation. This much was clear. What was not clear, however, was the sometimes contentious relationship between the emerging perspectives of scholars of color and those of our progressive allies in CLS. The limitations of traditional liberal discourses on race that we encountered at Harvard had firmly convinced me that we weren't fish, but it also seemed to me from some of the emerging rhetoric on race within CLS that perhaps we weren't fowl, either. I left Harvard and headed for the University of Wisconsin-some would say the "official" birthplace of CLS-with a goal of thinking more about this double marginality.

### Wording #4 – Interpretive Framework / Case Focused

#### Resolved: Critical Race Theory, as a framework for judicial interpretation, is preferable to its alternatives in one or more of the following cases:

#### [~4 Cases]

Same point re: the difference between Rez #1 and Rez #2.

#### Possible Cases

These cases are mostly suggestions. If this resolution is selected, different permutations of the cases can be included on the ballot to satisfy folks. Possible cases are arranged in the order of their decisions. This is not an exhaustive list, but merely a suggestion for the topic committee.

\*Johnson v. M'Intosh

\*Korematsu v. United States

\*Brown v. Board of Education

\*Terry v. Ohio

\*Milliken v. Bradley

\*Regents of the University of California v. Bakke

\*Shelby County v. Holder

# Possible Affirmative Arguments/Controversies

### Top-Level

#### This is not an exhaustive list in the slightest. What it is, instead, is an attempt to get the ball rolling on the ideas. A LOT has been written about CRT and its critique of dominant frameworks for judicial interpretations. A great place for aff teams to start is:

#### Delgado, Richard, and Jean Stefancic. "Critical race theory: An annotated bibliography." Virginia law review (1993): 461-516.

#### Affirmatives would channel those critiques into advocating for, and developing, what a CRT-inflected alternative to those frameworks might look like. These could include discussions of:

### 1) The “Subordination” Question

#### Considering a subordination question may involve a 2-step judicial procedure.

Brooks 2 – Warren Distinguished Professor of Law @ University of San Diego (Roy, “Chapter 10: Structure of Critical Process,” in *Structures of Judicial Decision-Making from Legal Formalism to Critical Theory,* Carolina Academic Press, Durham, North Carolina, 2002, p. 248-9, transcribed by hand—excuse mistakes) NAR

With the above limitations in mind, critical process can be structured as a two-step process of judicial analysis. Step 1 asks the subordination question. Step 2 applies the internal critique. Step 1 (Subordination Question). The judge asks the subordination question—to wit, does the socio-legal arrangement (a case or specific legal doctrine) sub judice subordinate outsiders or an outsider group (deconstruction) and, if so, how can such subordination be effectively redressed (reconstruction)? If a judge does not find subordination, she must still contextualize. She must explain how the matter under consideration validates relevant outsider values.17 In this way law formally and unambiguously embraces outsider norms. Judicial acceptance of outsider norms is, indeed, the central mission of critical process. Applying the symmetrical equality model,18 the judge finds subordination if the matter under consideration is insider- or outsider-conscious. Thus, subordination exists if a socio-legal arrangement involves an explicit outsider/insider classification or otherwise fails to validate or enforce the value of neutrality that inheres in all outsider communities. Such subordination is more likely to arise in cases involving homosexuals than in cases involving other outsiders.19 Having found subordination, the judge then prescribes a facially neutral law to redress the identified subordination. Proceeding under the more complex asymmetrical equality model,20 the judge deconstructs by asking whether the law or legal problem under consideration adversely affects outsiders or an outsider group in such a way to suggest insiderism—mainly unconcious bias or insider privilege. Note the two elements of this test: (1) subordinating effects and (2) subordinating state of mind.21 The latter element, insiderism, can be determined in several ways.

#### Brooks has a 2022 book called ‘Diversity Judgements’ where he applies this mode of ‘critical process’ to a number of real court cases. This would be a great place for aff (and neg teams) teams to look to understand what the ‘subordination question’ might look like in practice.

Brooks 22 – Warren Distinguished Professor of Law @ University of San Diego (Roy, *Diversity judgments : democratizing judicial legitimacy*, Cambridge University Press, March 2022 , 9781108333894, <https://doi.org/10.1017/9781108333894>, p.2-4) NAR

As discussed in greater detail in the “Traditional Process” section, all sides of the debate have validated the sociolegal power of insiders while at the same time subordinating the values and aspirations of outsiders. Consciously or subconsciously, the internal debate (a debate played out within traditional process) has imbibed the habits and sensibilities of insiders all the while ignoring or discounting questions and concerns of great importance to outsiders. Thus, the traditional conceptualization of judicial legitimacy, the thing that drives the most important part of the opinion – judicial reasoning – routinely indulged categories or values immanent in the insider’s experience. It effectively undercuts the salus populi suprema lex esto maxim Americans have expressed as civic republicanism. This does not mean that traditionalist jurists today approach cases with an invidious animus. They are not necessarily racist, sexist, or homophobic as some legal scholars would argue.5 Some have, in fact, rendered judgments in favor of outsiders. The problem, however, lies less in the judgment than in the reasoning employed to sustain the judgment. Proceeding from the logical method or the policy method, jurists do not self-consciously recognize, let alone validate, the values or life experiences of outsiders. They are invisible even when they are part of the party structure. This omission is consequential. As the cases analyzed in this book demonstrate so dramatically, the absence of judicial recognition of the outsider perspective or worldview militates against empowering outsiders in the sociolegal order. A court’s imprimatur maintains, strengthens, or changes the relationship between identity (race, gender, sexual orientation, or gender nonconformity) and power in our society. This important observation goes to the practical significance of, say, race in our culture. The philosopher Alain Locke broached this point in a 1916 lecture titled, “The Political and Practical Conception of Race.” Informed by Franz Boas’s anthropological research, Locke, the first African American selected as a Rhodes scholar, argued that “race mainly defined one’s relationship to power.” 6 By protecting or perpetuating the current relationship between identity and power in our society, the traditionalist view of judicial legitimacy reinforces an undemocratic allocation of power in the sociolegal order that no lapse of time or respectable array of people can justify. In my view, the antidote to the problem of judicial legitimacy is to link our understanding of judicial legitimacy to shared values. Today our society has felt a need to enhance cultural diversity and inclusion. Like all other major institutions in our society, the Supreme Court must operate in deference to our national commitment to diversity and inclusion. The diversity-and-inclusion norm must become the foundation on which all socially significant judicial conflicts are resolved, all emotions soothed. It must be self-consciously brought into the Court’s process of judicial decision-making. Diversity and inclusion must be integral to the Supreme Court’s interpretative process. The framework I propose in this book endeavors to point the Court in the right direction. It begins by respecting both traditional process and critical process. Both processes differ significantly in that they operate on the basis of antithetical sociolegal assumptions rather than shared assumptions. Traditional process assumes that American law is fundamentally neutral or objective when dealing with matters of keen importance to outsiders; hence, there is no reason for judges to tinker with the fundamental relationship between insiders and outsiders, identity and power in our society. Even if a jurist were to concede that the sociolegal order was slanted, his, her, or their (singular) sense of judicial propriety or fealty to the existing order would prevent any attempt to correct the matter or to even say anything about it from the bench. (Chief Justice Cheri Beasley is the exception that proves the rule.) That responsibility belongs to the legislative branch however much it might be in the hands of special interests. In contrast, critical process proceeds from the position that American law is not neutral or objective as to matters involving outsiders and insiders. Not unlike the social environment in which it operates, law is “antiobjective.” Law slants, often sub silento, in favor of insiders. Law can, however, be made more objective through conscious judicial effort.7 Rather than preferring traditional process or critical process, my framework attempts to settle differences between the two processes based on the common identity of today’s society – our shared value of diversity and inclusion.

#### Applying this test has been advocated for in a variety of legal domains

Lawrence 21 – Associate Professor of Law, Emory Law; Affiliate Faculty, Harvard Law School, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics (Matthew B. Lawrence, "Subordination and Separation of Powers," Yale Law Journal 131, no. 1 (October 2021): 78-174 ) NAR

10. The "subordination question" asks whether "a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns" of racial minorities, women, or other marginalized groups. Roy L. Brooks, Critical Race Theory: A Proposed Structure and Application to Federal Pleading, 11 HARv. BLACKILETTERL.J. 85, 88 (1994) [hereinafter Brooks, Critical Race Theory]; see also MARTHA CHAMALLAS &JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAw 27 (2010) (applying the "race subordination question" to tort law); Gil Gott, The Devil We Know: Racial Subordination and National Security Law, 5o VILL. L. REV. 1073, 1073 (2005) (applying the "subordination question" to national security); Roy L. Brooks, Feminist Jurisdiction: Toward an Understanding of Feminist Procedure, 43 U. K AN. L. REV. 317, 340 (1995) [hereinafter Brooks, Feminist Jurisdiction] (applying the subordination question to civil procedure).

#### Lawrence suggests that considering it might have entailments for Separation of Power questions.

Lawrence 21 – Associate Professor of Law, Emory Law; Affiliate Faculty, Harvard Law School, Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics (Matthew B. Lawrence, "Subordination and Separation of Powers," Yale Law Journal 131, no. 1 (October 2021): 78-174 ) NAR

A B ST RA CT. This Article calls for the incorporation of antisubordination into separation-ofpowers analysis. Scholars analyzing separation-of-powers tools-laws and norms that divide power among government actors - consider a long list of values ranging from protecting liberty to promoting efficiency. Absent from this list are questions of equity: questions of racism, sexism, and classism. This Article problematizes this omission and begins to rectify it. For the first time, this Article applies critical-race and feminist theorists' subordination question-are marginalized groups disproportionately burdened?-to three important separation-of-powers tools: legislative appropriations, executive conditions, and constitutional entrenchment. In doing so, it reveals that each tool entails subordination by creating generalized benefits at the expense of marginalized groups. It illustrates this skewed distribution through novel case studies tracing harm to Native peoples to the use of appropriations to empower Congress, harm to residents of Puerto Rico to the use of executive conditions to empower the President, and disparate coronavirus harms to Black communities to the use of nonentrenchment to empower the future and disempower the "dead hand" of the past. The Article's descriptive insight that separation-of-powers tools can and do entail subordination motivates its call for the incorporation of antisubordination into both institutional and doctrinal separation-of-powers analysis. The antisubordination movement's rights-focused approach has stagnated. The separation of powers offers a desirable, upstream means through which to pursue the goal of antisubordination by shifting attention beyond the courts and toward other political actors. Moreover, considering antisubordination in separation-of-powers analysis has historical precedent, is consistent with the aspiration for "neutral principles," and advances already established separation-of-powers values such as liberty and accountability. Incorporating antisubordination alters institutional analysis, doctrinal analysis, and the agenda of separation-of-powers theory. The subordination question ("who pays?") should be as familiar to institutional analysis of separation-of-powers questions as is the legal-process question ("who decides?"). This question might be used to interrogate particular separation-of-powers tools, categories of such tools, or overarching doctrinal and conceptual approaches. Antisubordination should also change doctrinal analysis, where courts should at the very least include antisubordination among the structural values they consider in resolving ambiguities, weighing interpretive tools, and conceptualizing constitutional questions. In this context, antisubordination's greatest impact may be as a counterweight to courts' use of historical gloss. Finally, antisubordination requires a new, creative agenda for separation-of-powers theory that focuses not on evaluating existing arrangements or the relative power of the branches, but instead on developing alternative arrangements that maintain the balance of power without imposing skewed costs. The Article illustrates these interventions with novel prescriptions for ongoing legal controversies about the debt ceiling, foreign affairs, legislative standing, and government shutdowns.

### 2) FEO (Formal Equal Opportunity)

#### A major point of contention is CRT is the extent to which FEO (Formal Equal Opportunity) is an ideal/realizable concept. Affirmatives might indicate that a CRT-infused legal jurisprudence must conclude that FEO needs to be abandoned, rather than reformed, and replaced with something other. This is, at present, less than clearly theorized, and therefore affirmatives would be on interesting and exciting new grounds as they propose their alternative theoretical concept for civil rights jurisprudence.

Brooks & Newborn 94 – (Brooks, R. L., & Newborn, M. (1994). Critical race theory and classical-liberal civil rights scholarship: distinction without difference. California Law Review, 82(4), 787-846. ) NAR

Reformists argue that the persistence of racial inequalities decades after Brown is partially due to the faulty manner in which traditionalist courts and legislatures have applied the FEO principle.41 Since Brown, the reformists claim, FEO has been implemented in ways that subordinate African Americans and other racial minorities.42 Thus, since they believe that FEO is conceptually sound but operationally flawed, reformists emphasize the need to execute FEO more effectively by giving greater deference to the civil rights of racial minorities.43 Like reformists, race crits are also greatly concerned about the rate of racial progress decades after Brown. Unlike reformists, however, race crits believe that the conceptual framework of FEO is at least partially responsible for the lack of substantial progress on racial matters. Accordingly, race crits argue that the principle of FEO, particularly its symmetrical model of racial equality, must be rejected altogether. We elaborate on this civil rights perspective next. II MACROTHEORETICAL DIFFERENCES: CRT AND CLASSICALLIBERALiSM A. CRT's Criticisms of FEO Leading race crits have been highly critical of both the "traditionalist" and "reformist" varieties of classical-liberal scholarship. Not surprisingly, race crits dispute the traditionalists' claim that FEO has adequately protected racial minorities' civil rights since Brown. More radically, however, race crits also criticize reformist scholars, who are willing to concede that FEO has been applied ineffectively, for defending the conceptual validity of FEO. Professor Richard Delgado, one of the most prolific legal scholars in the nation and a leading race crit, comments: "[Reformist] writing, generally highly normative and rights-based in nature but cautiously incremental in scope and ambition . . . accepts the dominant paradigm of civil rights scholarship and activism, and urges that we work harder.., within that paradigm."' Thus, race crits attack reformists for advocating piecemeal social reform and continued loyalty to the FEO principle instead of radical social transformation. The reformists' approach is inadequate, race crits insist, because FEO inevitably makes for bad civil rights policy.45 Arguing that FEO is conceptually flawed, race crits emphasize that the liberals' policy reacts only to the most obvious and grotesque forms of racism, whereas most forms of racism are deeply embedded in the framework of our society. According to race crits, racism is "normal science" in American society, and most forms of racism go unnoticed under FEO. As Professor Delgado states: Formal conceptions of equality treat racism as an anomaly, an illness, a sort of cancer on an otherwise healthy body. They are aimed at deviations from a status quo or baseline assumed to represent equality. If we spot such a deviation, we punish it. But most racism is not a deviation. As a number of Critical writers have been pointing out, racial subordination is an ordinary, "normal" feature of our social landscape. It is "normal science"-the ordinary state of affairs. Because racism is an ingrained feature of our cultural landscape, it looks ordinary and natural to everyone in that culture. It is "the way things are." Formal equal opportunity is thus calculated to remedy at most the more extreme and shocking forms of racial treat ment; it can do little about the business-as-usual types of racism that people of color confront every day and that account for much of our subordination, poverty, and despair.46 As this passage suggests, the race crits' conception of "racism" is crucial to an understanding of CRT in general and of CRT's rejection of FEO in particular. The race crits' conception of racism is evident in a famous statement made by Anthony Downs while appearing before the United States Civil Rights Commission: Racism is one of those words that many people use, and feel strongly about, but cannot define very clearly. Those who suffer from racism usually interpret the word one way while others interpret it quite differently.... Perhaps the best definition of racism is an operational one. This means that it must be based upon the way people actually behave, rather than upon logical consistency or purely scientific ideas. Therefore, racism may be viewed as any attitude, action, or institutional structure which subordinates a person or group because of his or their color. Even though "race" and "color" refer to two different kinds of human characteristics, in America it is the visibility of skin color-and of other physical traits associated with particular color or groups-that marks individuals as "targets" for subordination by members of the white majority. This is true of Negroes, Puerto Ricans, Mexican Americans, Japanese Americans, Chinese Americans, and American Indians. Specifically, white racism subordinates members of all these other groups primarily because they are not white in color, even though some are technically considered to be members of the "white race" and even view themselves as "whites." 47 Thus, the race crits define racism in both "substantive" and "procedural" terms.4 " It is not simply attitudes or traditional racism (the belief in white superiority)49 that draws the race crits' attention; it is also individual or institutionalized behavior that has the effect of subordinating persons of color to whites. For example, racism is not so much overt racial hatred as it is the subconscious assumption made by some whites that an African American man walking in a white neighborhood is a dangerous criminal or is otherwise up to no good. Race crits believe that classical-liberals and their FEO policy fail to address these subtle aspects of racism. They believe FEO has a fundamental conceptual flaw above and beyond its operational problems. FEO, the race crits argue, has only a philosophical attachment to equal opportunity and, as a result, it does not go far enough to redress the day-to-day problems of racial minorities. It is not enough, in other words, to simply alter the legal status of African Americans or to otherwise enjoin future racial discrimination; these approaches ignore the damage caused by past and lingering racism. A commitment to redress such damage must be built permanently into any modem civil rights policy. FEO has failed and will continue to fail because it lacks this commitment. Race crits also attack FEO for erroneously assuming the possibility and desirability of racial sameness, or equal legal treatment, and for ignoring legally significant differences between African Americans and whites. It is wrong, CRT emphasizes, to treat the races as if they are symmetrically situated with regard to a legal rule, doctrine, policy, or practice when in fact they are not. African Americans, for example, are burdened by a history and continuing reality of racial oppression and subordination that whites do not share.50 Finally, race crits argue that FEO privileges white values over African American or other "outsider" values. For example, African American children are bussed to white schools and not vice versa because it is automatically assumed that white schools are "better" than African American schools."1 Equal treatment as envisioned by FEO also means that minorities are to be subjected, albeit in the "same" manner as whites, to terms and conditions that were established long ago by whites. Thus, under FEO, a law school can legally dismiss an African American tenured professor who remains on leave beyond a certain period of time-determined by whites in accordance with their own values-to protest the law school's "racist" hiring practices.52 Even though protest and self-help are deeply held values among African Americans, FEO deems them "irrelevant" to the law school's decision. In principle, then, FEO requires only that the African American faculty member be treated the "same" way the law school would treat a white faculty member under "similar" circumstances. However, because such rules, which must now be applied "equally," were originally created by whites, FEO's symmetrical conception of racial equality merely perpetuates an existing pro-white bias. Given these criticisms of the classical-liberals' FEO policy, the questions then become: What type of fundamental civil rights policy would CRT prefer? What is CRT's alternative vision of racial equality? We address these questions next. B. Racial Empowerment: CRT's Conception of Equality Race crits have been concerned far more with deconstruction than reconstruction.53 For example, they have been far more vocal in criticizing the hidden racial biases of seemingly neutral laws than in articulating a program for reforming those laws. Likewise, CRT has failed to develop or describe its own conception of racial equality. This relative lack of reconstructive proposals may be attributable to the race crits' belief that meaningful legal reform will not happen in the foreseeable future.54 But this would not justify complete abandonment of the reconstructive project.55 Perhaps, then, CRT's silence stems from a belief that racial equality will never be achieved through the law. 56 This explanation also seems inadequate, how ever, since most race crits still seem to be committed to some manner of legal reform (or they have chosen a strange audience-law review readers). The most plausible explanation would seem to be that race crits have been so busy attacking on the deconstructive front, which is, after all, a main focus of "critical" race theory, that they have focused less on developing reconstructive proposals. Regardless of the reasons for the race crits' relative reconstructive silence, it is clear that CRT is an incomplete theory without an articulated vision of racial equality. We shall, in this Section, attempt to fill that void by describing a conception of racial equality that is consistent with CRT scholarship. Given their criticism of FEO, race crits necessarily must favor an "asymmetrical" conception of racial equality. Unlike symmetrical models of racial equality, which require that the races be treated the same no matter what,57 asymmetrical models assume the possibility and desirability of racial differences. Parallelling their deployment in theories of sexual equality, asymmetrical models of racial equality hold that the races are "often asymmetrically located in society" and reject "the notion that all [racial] differences are likely to disappear, or even that they should."58 Asymmetrical equality refuses to condition the success of racial minorities on their adopting the behaviors, values, and appearances of white Americans. Another basic feature of asymmetrical equality is its focus on creating a society in which social burdens and advantages are ultimately distributed proportionately between the races. Implicit in this is a recognition that a degree of racial imbalance-that is, racial empowerment-must be tolerated in order to reach this state of racial balance. Without racial empower ment, there will always be an unnatural and unhealthy racial differential.5 9 Racial empowerment is the only way to neutralize unconscious racial discrimination in American culture. By encouraging us to respect racial differences, racial empowerment validates the life experiences of minorities. The preceding analysis indicates that CRT contributes a unique macrotheoretical perspective to civil rights law. Unlike traditionalists and reformists, CRT rejects FEO at the normative level in favor of a civil rights policy that is more cognizant of the current and, according to CRT, future unequal distribution of societal advantages and disadvantages between whites and racial minorities and, more generally, between "in-groups" and "out-groups." Thus, unlike traditionalists and reformists, race crits would embrace the "empowerment" conception of racial equality described above as a necessary response to contemporary social realities. Given that CRT offers a unique macrotheoretical perspective, 60 the question arises whether this perspective translates into concrete microtheoretical differences. That is, when it comes to the analysis of specific rules of law or the articulation of legal reforms, are there differences between CRT and classical-liberalism? We shall examine this question within the context of two important areas of civil rights law: equal protection (Part I) and Title VII (Part IV).

### 3) Colorblindness

#### Affirmatives might draw attention to the goal of “colorblindness” or “undifferentiatedness” as an idealized vision of law. They might lean on CRT to suggest that law ought not be “colorblind” and that Justices should explicitly include considerations of race in writing their decisions and making policy.

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Moment III, CRT and TWAIL expose and contest various iterations of colorblindness, including the idea that race no longer matters in structuring society and lived experience. In this moment, the analytical and normative fight is about both the speakability of race and racism and whether the real and pressing issues of inequality are somewhere (anywhere) beyond the boundaries of race and racism-think class, think religion, think nationalism, think culture. On the CRT front, there are at least two salient ways in which colorblindness functions in constitutional law-the complete elision of race from the doctrinal analysis at hand and the explicit treatment of race as a suspect basis for governmental decisionmaking, whether or not that decisionmaking is designed to mitigate racial inequality. Consider first the elision of race with reference to Fourth Amendment jurisprudence. The Fourth Amendment, which is supposed to protect us from "unreasonable searches and seizures,"" is arguably the most important constitutional provision for regulating police conduct. Part of the Bill of Rights (the original ten amendments added to the U.S. Constitution in 1791), the Fourth Amendment is part of a larger body of constitutional criminal procedure that was promulgated to impose constraints on police power. Debates about excessive force, stop-and-frisk, and Driving While Black all implicate Fourth Amendment law. Yet, in virtually none of the cases in which the Supreme Court adjudicates Fourth Amendment issues does one see a robust-or, indeed, much of anyengagement with race.5 4 A perfect example of what we mean is manifested in the Court's "seizure" jurisprudence. Because, as previously mentioned, the Fourth Amendment protects us from unreasonable searches and seizures, a preliminary or threshold question in Fourth Amendment law is whether governmental conduct amounts to a search or seizure. If, for example, a police officer interacts with a person and that interaction is not a search or a seizure, the Fourth Amendment has nothing to say about it. In other words, nonsearches and nonseizures reside beyond the regulatory reach of the Fourth Amendment. We should add, parenthetically, that if the police conduct in question does amount to a search or a seizure, that conduct is not necessarily unconstitutional. The question would then become whether that search or seizure was reasonable.55 It turns out that lots of searches and seizures are reasonable, even ones that are racially motivated.56 With respect to what counts as a seizure, the Supreme Court has said that the inquiry is whether a "reasonable person feels free to leave or otherwise terminate the encounter." To flip that inquiry around, if a reasonable person would not feel free to leave or terminate the encounter, then that person is seized. To appreciate how the Court has elided race in its seizure jurisprudence, imagine that an officer observes Marcia on the street corner. He has no reason to believe she has done anything wrong. Nevertheless, he proceeds to: Follow her; Question her along the following lines: What's your name? Where are you going? Where have you been? Where do you live? He then asks Marcia for her identification. Because Franita has a Jamaican accent, he asks her questions about her immigration status. Those questions are followed by a request to search Marcia's bag. After searching the bag, the officer asks Marcia whether she would mind accompanying him to the station for additional questioning. At the station, the officer continues to question Marcia about a range of matters.5 7 None of the foregoing would trigger the Fourth Amendment in the sense of constituting a seizure.58 The Court would rule that, throughout the entire encounter, Marcia was free to leave. Was the officer required to inform Marcia of her right in that respect? No. Does it matter whether Marcia knows she has that right? No. What about the fact that Marcia was questioned at the police station? Was she still free to leave? Yes-or, at least, she should have felt free to leave. What ifMarcia subjectively did not feel free to leave? Does that matter? No. The test is (supposedly) an objective one, not a subjective one. You are probably now wondering about Marcia's race and gender. She is, after all, a Black woman. Surely that matters. It does not. Nor, in the context of applying the Fourth Amendment's seizure doctrine, would the Court take note of the historical and contemporary manifestations of overpolicing and police violence in the Black community. The Court's colorblind approach to the seizure analysis communicates two troubling ideas. First, that the so-called reasonable person has no race (or would not be invested in paying attention to race); and second, that taking race into account in the context of determining whether a person is seized would be jurisprudentially unreasonable. Both ideas obscure what ought to travel in Fourth Amendment law as uncontestable social realities-namely, that race could inform a police officer's decision to target an African American for questioning and that being an African American could shape how one experiences and negotiates an interaction with the police.59 Our broader point is that, consistent with one of the imperatives of colorblindness, the Supreme Court's seizure analysis almost entirely elides the ways in which race intersects with policing. Another way in which colorblindness works in constitutional law is to treat any reference to race as constitutionally suspect. Perhaps the clearest example of this dimension of colorblindness is the Supreme Court's equal protection jurisprudence. In a series of equal protection cases, the Court has explicitly stated that any use of race on the part of the government is constitutionally suspect.60 To illustrate the implications of this jurisprudential approach, stipulate that the federal government has decided to racially target members of the Black Lives Matter (BLM) movement and incarcerate them on the view that they are a radical group whose political agenda threatens the very nature of the country's democracy.61 Assume, meanwhile, that the state of California is concerned about the displacement of African Americans via gentrification 2 and creates a housing voucher for which only African Americans living in the parts of Los Angeles undergoing gentrification may apply. The Supreme Court would employ the same constitutional standard to determine the constitutionality of both decisions. Which is to say, in both instances, the Court would apply "strict scrutiny," the most rigorous form of judicial review.63 The Court would treat California's effort to mitigate the racialized housing displacement gentrification effectuates, and not just the federal government's effort to incarcerate BLM members, as presumptively constitutionally suspect because both violate the constitutional norms of colorblindness.64 "Colorblindness" as an umbrella term of art for critiquing legal and jurisprudential elisions of race is arguably a term more commonly used in CRT than in TWAIL. Yet from TWAIL's founding, TWAIL scholars have variously interrogated international law's role in racialized subordination, including through carefully crafted legal and judicial techniques shorn of any explicit reference to race. 65 In other words, even without explicit reference to colorblindness, TWAIL scholars have critiqued means of racial subordination that variously obscure or disavow the racial nature of the respective interventions. TWAIL scholars have analyzed, for example, the reliance of international legal doctrine on purported cultural differences that Europeans used to establish themselves as morally and legally superior to non-European peoples they colonized, exploited, and exterminated, cloaking imperial projects of racial subordination in the language of distinctions between the "civilized" and the "uncivilized." 66 In this Symposium Issue, Christopher Gevers traces a colorblindness of sorts within mainstream international legal scholarship,67 even among critical international legal scholars who otherwise spotlight the colonial trappings of the discipline. For example, some scholars in the field have been unwilling to name and confront the ways in which race has operated on the international landscape. Other scholars insufficiently distinguish between (and sometimes conflate) racial and cultural difference in ways that obfuscates how race has structured the global order and the treatment of nations and peoples within it.68 Still other scholars "in effect, minimize the role that race plays in international law,"69 elide the "sociopolitical system of Global White Supremacy," and reduce their conceptualization of racism to the individual prejudices of a small number of aberrant international law scholars and practitioners." Each of the preceding scholarly approaches reflects a particular technique of colorblindness in the sense of avoiding or marginalizing concerns about race and racism or disappearing them altogether.

### 4) E-CRT / QuantCrit

#### One strand of CRT attempts to reconcile the goals of CRT with the insights of empirical methods. In affirming empirical critical race theory (E-CRT, also called “QuantCrit”) these affirmatives might discuss how empirical research methods can inform CRT jurisprudence.

Paul-Emile 15 – Associate Professor of Law, Fordham University School of Law (Kimani Paul-Emile, "Critical Race Theory and Empirical Methods Conference," Fordham Law Review 83, no. 6 (May 2015): 2953-2960) NAR

This is, therefore, a particularly opportune time for the Fordham Law Review to publish this Critical Race Theory and Empirical Methods Symposium, which brings together scholars from the law, humanities, and social sciences to engage critically and articulate innovative analytical frameworks for the examination of race and identity. Critical race theory and empirical methods ("eCRT"), as an area of academic inquiry, was born five years ago at a convening of scholars who believed that scholarship on race could benefit from the melding of sophisticated social science research methods with the analytical elegance and political power of critical race theory.6 As distinct and independent fields of study, CRT and the social sciences each have contributed much to the analysis of race and identity. Social scientists-particularly in sociology and social psychology of implicit bias-have conducted groundbreaking research that distinguishes the impact of race from that of other variables affecting individuals' social experiences to demonstrate the ways in which race has a significant, and often negative, independent effect. Thus, in the face of claims that socioeconomic class has become a more meaningful predictor of social mobility than race, these scholars have used statistical analysis to demonstrate that: law enforcement officers are more likely to erroneously identify as criminal faces with features suggestive of black or African American heritage than faces with features suggestive of white ancestry; 7 when sent emails requesting opportunities to discuss research, university professors across disciplines are more likely to respond to the emails sent by students with stereotypically white names than students with stereotypically black, Latino, or Asian names; 8 among job applicants with similar qualifications and criminal histories, whites receive job offers at higher rates than blacks and Latinos;9 and whites with a purported recent felony conviction are more likely to receive a job offer than blacks and Latinos without criminal records. 10 These are but a few examples of the ways social scientists have succeeded in using empirical research methods to challenge deeply held assumptions about race and inequality The other side of the eCRT equation, CRT, rose to prominence during the 1980s and since has become a tremendously influential intellectual force in legal academia."I As a theory and practice, CRT aims to illuminate and address the ways in which legal arrangements and social ordering can occlude, and often subvert, efforts to achieve racial justice. Thus, CRT challenges the dominant notion of race as an unfortunate relic of U.S. history that has been largely overcome because of legal developments and social policies intended to increase racial equality. In so doing, CRT posits that racial hierarchies and white privilege are embedded within these laws, policies, and practices such that they reify the very inequities they seek to eliminate. 12 CRT recognizes that the building of coalitions among groups is an integral part of achieving racial justice and endorses the use of narrative or storytelling in legal scholarship as a means of "looking to the bottom" 13 to acknowledge the experiences of subordinated communities. 14 Among CRT's many contributions is the acclaimed concept of "intersectionality," or the idea that various forms of identity (e.g., race, gender, sexual orientation, disability status, etc.) do not exist in isolation, but rather combine to form shifting vectors of privilege and subordination that are historically and contextually contingent. 15 CRT also originated the widely noted theory of "interest convergence," which asserts that white elites historically have supported efforts to attain racial justice only when such efforts benefit them. 16 Thus, progress in achieving racial equality has been limited to moments when their interests "converge" with those of marginalized racial groups.' 7 The significant impact of CRT scholarship has been felt both inside and outside the academy. However, as a theory-based field of academic inquiry, CRT has not always sought to provide evidentiary support for its central claims, focusing instead on refraining the debate on race and inequality. In contrast, the methods employed by social scientists enable them to prove their claims by calculating and quantifying the depth and breadth of a problem or harm. However, the frames of analysis typically employed by social scientists are often anemic at best. Thus, in many ways, the social sciences and CRT would appear to be balancing forces, natural allies, and a sure fit: both congruent and complementary. Yet, forming a productive alliance between the two fields has not been without its challenges. For example, the social sciences' implicit claims of "objectivity" and embrace of "neutrality" in knowledge production stand in contrast to CRT's contention that these claims mask hierarchies of power that often cleave along racial lines. 18 Also at odds with CRT organizing principles is the way social science research frequently ignores or fails to capture the structural aspects of racism, focusing instead on the behavior of individuals. 19 Conversely, for some in the social sciences, the ability to isolate the effects of race from that of other variables may be jeopardized by the adoption of a critical orientation or normative frameworks of analysis, which are constitutive features of CRT scholarship. 20 Plus, the use of narrative is perceived by some quantitative social scientists as akin to reliance on anecdote and dismissed as an inappropriate source of evidence. 2 1 eCRT scholars, while acknowledging these tensions, have gone forward to produce a new, sophisticated, and generative form of scholarship that is self-reflexively attentive to these concerns, but not constrained or inhibited by them. Thus, eCRT begins with the premise that the significant issues raised by CRT could be strengthened by increased reliance on social science research methods that quantitatively and qualitatively measure the structural inequities exposed through CRT analysis. Likewise, eCRT scholars contend that social scientific research on race and identity could profit from the adoption of theoretical frameworks that are more sophisticated than those that currently animate empirical methods. As a field, eCRT scholarship is as broad as it is deep and has included scholars working at the nexus of CRT and sociology, social psychology, anthropology, economics, law, psychology, business, and political science. The ever-expanding group of scholars who engage in eCRT scholarship approach the endeavor in several ways, including the marshalling of empirical evidence to support theoretical, doctrinal, or normative claims 22 and the production of qualitative or quantitative empirical data informed by CRT insights. 23 This symposium showcases the incredible diversity of this literature. The articles that follow are but a snapshot of the remarkable range of substantive issues addressed in this field. In Police Racial Violence: Lessons from Social Psychology, L. Song Richardson intervenes in the debate about the use of aggressive policing tactics by law enforcement in minority communities by employing social psychological data to demonstrate the predictability of the excessive use of force by police against people of color.24 Rather than focusing on individual police-citizen interactions, Professor Richardson addresses the way certain policing practices and aspects of policing culture subordinate racial minorities and increase the chance of racial violence, even in the absence of conscious racial animus among police officers. In "I Do for My Kids": Negotiating Race and Racial Inequality in Family Court, Tonya L. Brito, David J. Pate, Jr., and Jia-Hui Stefanie Wong draw masterfully from broad-based quantitative studies of the way legal assistance impacts civil court proceedings for lowincome litigants. This fresh approach enables them to more clearly illuminate how economically disadvantaged parties in child support enforcement actions "negotiate" race and gender in these proceedings. 25 This symposium also includes several articles that exemplify the melding of empirical research with the rich intersectional approach forged by CRT. In When Is Fear for One's Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals's In re A-R-C-G- Decision, AngeMarie Hancock skillfully employs a "paradigm intersectionality" approach to examine a breakthrough legal case allowing immigrant women to claim home country abuse as a gendered form of persecution and thus grounds for asylum in the United States. In so doing, she investigates the decision's effect on immigrant women of color escaping domestic violence, and its ramifications for future asylum litigation and advocacy. 26 Ifeoma Ajunwa's article, The Modern Day Scarlet Letter, examines the effects of criminal convictions on formerly incarcerated women of color, focusing on the legal penalties that attach once one has been released from prison.27 She argues persuasively that those in this demographic suffer a compound harm due to their status as women and racial minorities and proposes a model of reentry that is sensitive to their needs. Using food oppression as a framework, in "First Food" Justice: Racial Disparities in Infant Feeding As Food Oppression, Andrea Freeman provides a powerful analysis of the structural limitations on African American women's ability to breastfeed and the negative consequences for both mother and child.28 The author demonstrates how health disparities between African American women and other groups are not the result of personal decisions, but rather a consequence of state policies and legal choices. Among the many pieces in this symposium are articles that illustrate the complex and sophisticated ways in which eCRT scholars produce and leverage quantitative data to buttress their claims regarding the operation of racial categories in social life. In Race in the Life Sciences: An Empirical Assessment, 1950-2000, Osagie K. Obasogie, Julie N. Harris-Wai, Katherine Darling, Carolyn Keagy, and Michael Levesque offer an unprecedented and large-scale quantitative evaluation of articles published in peer-reviewed biological and life sciences journals to investigate whether and to what extent race is deployed as a social construct or, more dangerously, as a biological category.29 The authors show that the idea that race reflects inherent biological differences persists in modern scientific research despite the common assumption that the life sciences had disavowed biological theories of race after the horrors of eugenics and the Holocaust were revealed in the mid-twentieth-century. In Faculty Insights on Educational Diversity, Meera E. Deo marshals data from the groundbreaking Diversity in Legal Education Project and argues that, in light of the fact that educational diversity remains the last non-remedial justification for affirmative action as a compelling state interest, jurists and lawmakers would be well served by relying upon faculty perspectives on education diversity rather than simply looking at numerical diversity among law students when making decisions regarding higher education admissions. 30 Finally, a number of articles in this symposium offer a sampling of new and captivating possibilities for engagement by eCRT scholars. Paul Gowder, in Critical Race Science and Critical Race Philosophy of Science, advances the hypothesis that race, as an observable phenomenon in the social world, calls out for a "critical race philosophy of science" or "critical race science studies," and lays the foundation for such an endeavor, as well as its benefits for critical race empiricism, social science research, policy making, and other state practices. 31 By blending narrative methodology with quantitative data analysis, Mario L. Barnes's article, Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws, presents a pioneering approach to investigating how so-called "stand your ground" laws differently affect whites, blacks, and members of other racial groups, with the goal of informing lawmakers about the potential racial consequences of adopting such laws. 32 Borrowing cost benefit analysis methodology from the discipline of economics, Aya Gruber, in When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing, evaluates punitive law reform proposals to counter the all-too-common "punitive impulse" in criminal lawmaking. 33 In so doing, she proposes the adoption of a distributional method for progressive criminal law scholarship and demonstrates how it can enable scholars and lawmakers to see more clearly the racial and gender effects of legal change. eCRT is fast becoming an important intellectual movement in legal academia and not a moment too soon. The current sociopolitical climate makes clear the necessity of this work, not simply as an academic matter, but as an important means of providing lawmakers with the data and analytical lens necessary to make sound policy decisions that address institutional structures of inequality and allow for meaningful racial equality. This interdisciplinary symposium provides a unique opportunity to explore empirical, doctrinal, and critical work in this dynamic, far30. Meera E. Deo, Faculty Insights on Educational Diversity, 83 FoRDHAM L. REV. 3115 reaching, and exciting field of scholarship. To be sure, this is only the beginning.

### 5) Standards of evidence

#### Affirmatives might draw attention to the use and weighing of evidence for racial discrimination in the law, and utilize CRT to suggest that lower burdens for proving racial injustice would be preferable to higher burdens (either in the specific cases outlined above, or more generally). These affs would entail complex discussions about situatedness and power, and ask to what extent there is a generic “reason” that can be deployed to resolve cases.

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In courtrooms across the United States, certain evidence receives racially disparate admissibility treatment. Evidence of the "racialized reality" 3 -the lived experience of racial differentiation and hierarchy-of white people is too often submitted to juries with little to no evidentiary scrutiny, while the racialized reality of people of color is routinely excluded, even when supported by evidence-based social science. When the racialized reality of minorities is admitted into evidence, it often comes in only through expert witnesses' white or "insider" voices.4 This amounts to a dual-race' evidentiary system reminiscent of antiquated laws that allowed whites to testify against anyone but barred people of color from testifying against whites. However, unlike these outdated race-based witness competency rules, today's evidentiary racial disparities appear race-neutral. This Article applies-and, more importantly, calls for increased application of-Critical Race Theory (CRT) to the law of evidence. Critical race evidentiary inquiry is valuable because it exposes how the law of evidence can insidiously operate to perpetuate racial subordination. Though scholars have applied CRT to other fields of law, including tax, contracts, and property,9 too few have applied it to evidence law.10 Antidiscrimination scholarship on the intersection of evidence law and race is sparse and often overlooks the institutionalized manner in which evidence law replicates and perpetuates societal discrimination in the courtroom. Evidentiary rulings ultimately determine substantive outcomes. Thus, those concerned about justice in the legal process should pause to consider how the application of evidence law might subordinate racial minorities and could undergo reform to increase fairness. This Article proceeds in three parts. Part I argues that CRT is a useful lens to uncover racial subordination imbedded in evidence law. Specifically, this segment looks at historical race-based witness competency statutes and outlines the critical race theoretical precepts needed to expose their present day vestiges. Part II applies a critical race evidentiary inquiry to stand-your-ground defenses, flight from racially targeted police profiling and violence, and cross-racial witness identifications. The examination of stand-your-ground defenses explores how racial character evidence is considered by fact-finders even though it is not formally introduced or admissible. The investigation of the relevance of flight introduces the concept of "racialized reality evidence" and demonstrates how evidence of people of color's lived experiences of systemic racism are regularly excluded at trial, while evidence of white norms and beliefs receives "implicit judicial notice." Critical scrutiny of crossracial witness identifications provides examples of the evidentiary barriers criminal defendants of color face when they seek to introduce evidence countering systemic racism. Part III examines the structural causes of the modern dual-race evidentiary system and offers suggestions about how critical evidentiary analysis by the bench, bar, and academy-including a reinterpretation of Federal Rule of Evidence 403-could make evidence law more equitable.

### 6) “Outsider Jurisprudence” and “Postsubordination”

#### These affirmatives might view CRT as in collaboration with numerous other “outsider jurisprudences” and seek to cultivate/demonstrate what postsubordination, informed by an Outcrit Perspective, might look like as a jurisprudential theory. This method might entail, for instance, the creation of the analytic of “Euroheteropatriarchy” against which legal reasoning should oppose (either generally or in reference to the specific cases outlined in the resolution)

Valdes 2k – Professor of Law & Dean's Distinguished Scholar @ University of Miami (Francisco Valdes, Outsider Scholars, Legal Theory & (and) Outcrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DEPAUL L. REV. 831 (2000).) NAR

The cumulative experience and record of outsider jurisprudence illustrates how CRT, Feminist, Queer, and LatCrit experiments in critical legal theory converge and diverge in numerous significant ways, both substantively and structurally.7 In different ways and to different degrees, these outsider discourses strive similarly to: represent certain marginalized viewpoints; espouse critical, egalitarian, progressive, and diverse antisubordination projects; accept discursive subjectivity, political consciousness, and social responsibility; recognize postmodernism; favor praxis; and seek community.8 In addition, these outsider discourses have imagined and alluded to, but have not explicitly described, their vision of a postsubordination order to orient our collective antisubordination work.9 The rhetorics and ambitions of outsider scholars indicate that we are striving collectively toward a sociolegal alternative to the Euroheteropatriarchal status quo, 10 which, by definition, must entail some vision of a postsubordination alternative. Yet no such vision has been expressly denoted in CRT or similar outsider venues. Accordingly, among the pending and interrelated queries for all OutCrit scholars and activists are: How does the post-homophobic society appear from today's QueerCrit perspective? . . . How does the postwhite supremacy society appear from today's RaceCrit and LatCrit positions? ... How does the post-patriarchal society appear from today's FemCrit viewpoint? How do these visions overlap?... How can legal theory and praxis help to engineer such transformation? Clearly, these questions of vision implicate at the threshold issues of "sameness" and "difference" in outsider jurisprudence. II. SAMENESS AND DIFFERENCE: TOWARD CRITICAL COALITIONS In part to address intergroup issues of perceived or actual sameness and difference, CRT and other OutCrit legal scholars have turned in recent years to a critical and crossdisciplinary re/evaluation of historic group experiences with, and struggles against, varied but similar forms of privilege and prejudice. Focused to date primarily on race and gender, the turn to group experience and struggle arose to help transcend the disabling essentialisms of historical analyses rooted in single-axis conceptions or perceptions of current "identities" and related communities. In linking past and present, this turn to group experience and struggle has helped to bring forth the now-perennial conversation among outgroup scholars about the antisubordination relevance of "sameness" and "difference" in and across various contemporary identity categories.'1 This focus on experience and struggle is salutary because it helps to historicize current sociolegal or socioeconomic arrangements. This history reminds all OutCrits that today's antisubordination struggles, like yesterday's, are important, regardless of the odds that confront us l 2 because resistance always makes some difference, even if not readily discernible. As process, the dialogue that this turn has brought forth is useful and necessary, in part because it forces legal scholars of all stripes to listen, read, and learn about the varied experiences and struggles of our (putative?) sisters and brothers. Substantively, this sameness/difference dialogue is useful and necessary because it can help to expand our understanding of subordinationist structures and systems, both quantitatively and qualitatively. This dialogue is useful and necessary because mapping difference can help to promote egalitarian pluralism in and through our ongoing struggles for a just social order. This effort to transcend through the experience and history of struggle the limitations of conventional outgroup identity politics in turn has initiated a tentative, ongoing shift toward substantive justice commitments (and away from essentializing identity markers, like race or gender) as platforms for antisubordination communities and critical coalitions. Producing calls to move from "essential" to "political" identities and interests,1 3 this shift challenges the parameters and purposes of pre-existing outsider jurisprudential formations, including CRT. This shift honors CRT's commitment to postmodern multidimensional analyses of injustice and concentrates CRT's political pragmatism on actual social transformation. This shift and call are valuable because they can help animate crossgroup affinities in the service of antiessentialist community and antisubordination solidarity. In fact, some of the foundational insights produced during CRT's first decade are associated with this exploration of sameness and difference. Concepts like intersectionality, multiplicity, antiessentialism, and multiple consciousness arise from issues of sameness and difference in critical legal analysis, antisubordination discourse, and contemporary identity politics. 14 These concepts have provided strong foundations, helping CRT and other OutCrit scholars to elucidate multidimensional analyses that foster interconnection of antisubordination insights and projects. 15 Thus, this turn to outgroup experience and struggle no doubt has helped to illuminate important issues and mediate some sameness/difference tensions. Indeed, this potential utility explains why OutCrit scholars must continue to learn lessons from self-critical assessments of our collective jurisprudential experience.1 6 But, the focus on experience and struggle in effect has asked: How can outsider scholars join forces and share consciousness now due mainly to our historic experiences with and struggles against past and/ or present oppression? With this historical focus, CRT and other OutCrit scholars basically have queried how experience and struggle around the structure of victimhood can bring together varied groups or persons. Analytically, this focus calls for resolution of sameness/ difference issues to help decide whether OutCrit experiences and struggles are sufficiently the "same" or "different" to justify or not collaborative antisubordination exertions. In part because this inquiry is necessarily backward-focused, this approach inadvertently has invited the inconclusive sameness/difference debates along various identity axes. Though this discourse usefully has reminded critical legal theorists that outgroup commonality cannot be assumed or claimed cavalierly in antisubordination analyses, this debate must be understood as ultimately limited. One limitation comes about because this approach tends to isolate and highlight for comparison's sake single-axis identity markers, like "gender" versus "race" versus "sexual orientation." This comparison in effect questions whether the histories and positions of "women" and "people of color" and "sexual minorities" are the "same" or "different." Given this framing, they, of course, always will be "different" in various and sundry respects. Ironically, the net effect of single-axis categorical comparison to delineate "sameness" and "difference" may be to recycle various essentialisms within outsider discourse and praxis based on these and similar identity constructs. Additionally, and perhaps more importantly, this focus necessarily looks to past and/or present circumstances as the principal fountainhead of coalitional possibilities. While antisubordination criticality requires us collectively to learn from the past, the danger with this approach is in permitting sameness/difference "dilemmas" to become a comparative quagmire or to instill a sense of impasse. If so, this historical focus ultimately cannot satisfy OutCrits' need for expansive multidimensional analyses that recognize the holistic, cosynthetic, and interconnected character of subordination 17 analyses that can provide strong but flexible frames for critical coalitions capable of dismantling Euroheteropatriarchy in law and society and delivering substantive security to the traditionally subordinated among us. If outsider scholars are serious about using critical legal theory to catalyze social transformation, this potentially powerful dialogue about identity and dis/continuity cannot become an impediment to, nor a substitution for, acts of solidarity through theory in the service of antisubordination community and action. Depending on its use, this dialogue can be, but is neither automatically nor always, a form of progressive or effective jurisprudential method. Thus, sameness/difference dialogue is empowering only if deployed to ensure substantive security for the socially and/or legally subordinated. III. POSTSUBORDINATION VISION AND EUROHETEROPATRIARCHY: SUBSTANTIVE SECURITY FOR ALL Postsubordination vision expands the prevailing focus of OutCrit inquiry beyond experience and struggle to include aspiration and hope' 8 as another way of approaching and assessing the efficacy and design of critical coalitions. But this method also can help OutCrit scholars begin to delineate as concretely as possible the substance of critical coalitions grounded in the pursuit of substantive security for all. Postsubordination vision can help to provide the principles and purposes of intergroup cooperation and coalescence. And, by providing a fundamentally different point of entry for coalitional enterprise, vision as method may activate political analyses and dynamics that may aid intergroup collaboration where history and experience might not. This expanded, forward-looking focus asks: While keeping mindful of where we have been, where do we want to go? ... Have we arrived at similar conclusions and aspirations even though we may have traveled different routes to these conclusions and aspirations? Though our perceptions, priorities, hopes, and aims partially may be shaped by past and present circumstances, this expanded focus provides a different entry point toward critical coalitions because it asks OutCrits a different question: whether we can join forces now due to the principles and aspirations that we harbor and perhaps share. This focus thus asks not whether OutCrit scholars and outgroup communities can travel together based first and foremost on present or past positions, but whether overlapping yet distinct outgroups can work together to arrive at a common destination based on shared goals. Rather than prompting outsiders to determine whether our past and present are sufficiently alike to create a common path toward social justice and substantive security, postsubordination vision prompts us to determine first and foremost whether our destination coordinates are compatible-whether our critical conceptions of substantive social justice match, or can be made to. By shifting the focus to goals, agendas, and projects, postsubordination vision may help coalition-building where backward-looking assessments of sameness and difference may not. By emphasizing a forward-looking basis for intergroup coalescence toward substantive security, the shift from victimhood to vision can advance mutual recognition and accommodation of dis/ continuities within and across multiply diverse outgroups. Postsubordination vision, therefore, is best viewed as a complement to, not a substitute for, constructive and progressive sameness/difference dialogue. Postsubordination vision also may be useful as OutCrit method because it sometimes is helpful to begin a project by first envisioning as concretely as possible where one wants to be at its end, and then to work back from that vision to plan the journey. And it sometimes is useful to imagine and spell out for one's self (and others) not only what the project is "against" but also what it is "for." This utility is magnified when the project or journey is long, controversial, complex, or arduous. Because coalitional antisubordination projects and journeys are each of these, and more, critical legal scholars from varied subject positions constructively can begin coalitional OutCrit theorizing by imagining and articulating the substantive end-goal of our respective yet collective antisubordination activities and communities. The move to progressive postsubordination vision thereby may occasion another possibility for theoretical and political advancement: postsubordination vision pushes for the continual linkage of identities to ideas and ideals, and supports the move from reactive to proactive antisubordination theory and praxis. Plainly, the attainment of a postsubordination society requires RaceCrits, FemCrits, QueerCrits, LatCrits, and other "crits" to expose and dismantle entrenched rules, structures, and conditions that breed injustice and inequality. But the composition of postsubordination vision goes beyond critique, beyond unpacking and deconstructing. Postsubordination discourse entails a positive articulation of substantive visions about reconstructed social relations and legal fields. By focusing attention on the specific sociolegal character of a postsubordination era, this move encourages identity critiques to go beyond oppositional criticism and to set forth the alternative(s) to the status quo that motivate our work. Postsubordination vision as jurisprudential method, therefore, calls for some hard-thinking and honest-talking about the type of postsubordination society that "we" are struggling toward. This concreteness might reveal differences of vision and produce conflict, as our collective record of comparative jurisprudential experience already il lustrates. 19 But, as ongoing outsider experiments in critical legal theory also illustrate, this engagement is precisely the crucible that forges progress. 20 To transcend as well as test the limits of past injustices and present practices, antisubordination theory and praxis must in part be organized around the need to join other and varied OutCrit scholars in imaginative and productive ways to successfully articulate, and materially produce, a postsubordination order that actually delivers substantive social justice across the many troubled categories of life and hope that law and policy daily affect. 21 Postsubordination vision as jurisprudential method thus calls for OutCrit scholars to focus on an omnipresent sociolegal formation that appropriately might be called "Euroheteropatriarchy. ' '22 This term signifies the commingling and conflation of various supremacies: white supremacy, Anglo supremacy, male supremacy, and straight supremacy. This term, therefore, seeks to capture the interlocking operation of dominant forms of racism, ethnocentrism, androsexism, and heterocentrism-all of which operate in tandem in the United States and beyond it to produce identity hierarchies that subordinate people of color, women, and sexual minorities in different yet similar and familiar ways. In this way, Euroheteropatriarchy also encompasses issues of language, religion, and other features of "culture" and community that help to produce and sustain hierarchical social and legal relations. 23 Euroheteropatriarchy therefore denotes a specific form of subordination in a specific context, which encompasses and enforces white racism and Anglo ethnocentrism, as well as androsexism and heterosexism, normatively, politically, and legally. Precisely because Euroheteropatriarchy is a system of interlocking rules, traditions, and structures that jointly legitimate and perpetuate today's sociolegal status quo, its dismantlement is a prerequisite common to the postsubordination hopes and visions of all OutCrits and outgroups. Only through this dismantlement of Euroheteropatriarchy will society be ready to restructure itself substantively, and be able to embrace transformative policies and practices to secure social justice for "people of color," "women," "sexual minorities," and other overlapping outgroups. Only after Euroheteropatriarchy's dismantlement is a postsubordination order possible because Euroheteropatriachy, by definition, demands and imposes unjust hierarchies based on race/ ethnicity, sex/gender, sexuality/sexual orientation, and other identity fault lines. Only then will this nation's traditionally subordinated outgroups move in significant numbers and in structural ways from the neglected and impoverished margins of law and society created for us by Euroheteropatriarchal elites, and toward the realization of substantive security for all regardless of race, ethnicity, gender, sexuality, class, and other target identities. But to get from here to there-to get from oppressive Euroheteropatriarchal realities to egalitarian postsubordination ideals-OutCrit scholars must help to foster a difference-friendly approach to social and legal relations. We must use the gains achieved through sameness/difference dialogue not only to map historic or current sources of difference and learn antisubordination lessons from that effort, but also to bring into existence a culture of affinity and understanding among us in relationship to the past and present, as represented by the dominance of Euroheteropatriarchal imperatives, as well as in relationship to the future, as represented by the postsubordination visions and goals we articulate. By focusing on Euroheteropatriarchy as an integrated phenomena or formation, and by underscoring the interconnectivity of the myriad oppressions that it represents historically and presently, an OutCrit lesson of central importance to the cultiva tion of critical coalitions and to the attainment of substantive security comes to the fore: Euroheteropatriarchy produces and polices the lines between ingroups and outgroups; although in different ways, all outgroups are defined by and in relation to Euroheteropatriarchy. Outcrits must recognize this structural and substantive fact. We must embrace and marshal the enduring fact of human difference and diversity to strengthen, and not only question, antisubordination collaboration. To that end, the vision I pursue here and elsewhere is a society where "difference" is not only tolerated and accepted but cultivated and celebrated, a society where legal principles and cultural practices accommodate and affirm, rather than burden or disdain, the public performance of difference across multiple axes of social and legal personhood. Rather than utopian, this vision seeks to reclaim and apply the demand for human agency and dignity proclaimed stirringly at the founding of this nation, but betrayed since then by the many acts of de jure or de facto domination and exploitation that have wracked the nation's soul, and that still do.24 Thus, for legal scholars of whatever affiliation willing to share and toil for this progressive postsubordination vision, the pressing question is: How do we help to theorize and materialize this vision of a multiply diverse and socially just inter/national community? The means are several, if not numerous, as suggested both by the gains and limits of CRT's first decade: CRT, and outsider jurisprudence more generally, teaches that OutCrits must move beyond single-axis projects, we must rise above essentialist habits, we must blend theory with practice, we must come together periodically for intellectual and human sustenance, we must engage in careful but caring selfcritique, and we must remain dedicated to pushing beyond hardfought gains, despite daunting limits. 25 Yet, another concrete and immediate step toward our collective creation of an egalitarian postsubordination culture is our proactive nurturing of critical coalitions among all OutCrit scholars and throughout our larger communities. By and through critical coalitions, OutCrits can dedicate ourselves jointly not only to the dismantlement of Euroheteropatriarchy as an interlocking scheme that (still) oppresses us all, even if differently, but also to the process of learning about both the continuities and discontinuities of our multiple identities. Critical coalitions can help bring together OutCrits who identify principally with "different" communities or struggles in a process of convocation, exchange, accommodation, and collaboration that can aid us mutually to learn both about the histories of struggles as well as the substance of visions. Indeed, through convocation and communication, critical coalitions can help OutCrits not only to learn about experience and aspiration but also about the antisubordination insights of "different" perspectives as applied critically to varying sociolegal contexts. Critical coalitions thereby can help us to map the interconnections of the particular with the universal within and throughout Euroheteropatriarchy, helping us collaboratively and perhaps synergistically to theorize, strategize, and realize the establishment of a postsubordination society. 26 By bringing us together in antisubordination criticality and discourse, this type of coalition can help multiply diverse OutCrit scholars and outgroup communities to understand and accept the differences that both define and delineate our respective yet multiple positions, perspectives, experiences, and identities. By bringing us together in a critical yet collaborative setting, critical coalitions can help all OutCrits to better see the interconnection of "different" oppressions. Critical coalitions thereby can be the vehicles that enable us to learn from and reinforce various antisubordination drives, to celebrate and activate "difference" as a source of insight, accommodation, and collaboration. Critical coalitions in this way can help to transport us to a postsubordination order under which all outgroups can claim and enjoy the fruits of substantive security. Even while helping to map and marshal "difference" as antisubordination praxis, critical coalitions also can help bring into sharp relief a crucial and often neglected link in CRT's array of insights: to get there from here, every one of us must own the struggle against white and Anglo supremacies, as well as against male and straight supremacies. In time, and ideally, critical coalitions can help us all to see that, to realize a progressive vision of social justice for all, I personally must resist oppression in all its permutations and on multiple fronts and levels at once; I personally must resist a single-axis conflation of identity, conviction, and community. And so must you. And so must every OutCrit committed to social justice for all persons and groups. Consequently, and in conjunction with critical coalitions, progressive vision can help to bring into sharp relief the relational and interdependent present operation of "different" histories, identities, and hierarchies, highlighting the importance of practicing intersectionality, multiplicity, interconnectivity, and multidimensionality in consistent and expansive ways to produce antiessentialist communities and antisubordination coalitions. Critical coalitions supported by postsubordination vision may generate an intergroup "blueprint" of sorts that espouses and pursues social justice and substantive security for all. Vision as method thereby can help outsider scholars to join forces and synergistically build OutCrit solidarity around outgroup struggles that otherwise we might not appreciate as personal-or, at minimum, as linked to our own. Over time, vision as method can help to place a premium on a widescale recognition that all of us personally must own the struggles against all forms of unjust privilege-a premium that over time can help to address and overcome the lingering effects of CRT's historic ambivalence toward multidimensional antisubordination collaboration. 27 This personal commitment to and expansive vision of postsubordination life is the touchstone of OutCrit positionality, as well as the baseline of critical coalitions devoted to substantive security for all. Our common and everyday project must be "fighting for a world where we all have seats at the table. ' 28 By using vision to animate critical coalitions and unite antisubordination projects, this forwardlooking approach can help to ground, consolidate, and advance antisubordination theory and praxis. Progressive postsubordination vision can help OutCrits imagine and animate critical coalitions by underscoring how "different" forms of hegemony or supremacy may combine to produce mutually reinforcing vectors of oppression that mutate in myriad ways time and again to oppose or co-opt any effort toward material transformation on any single front. In this way, postsubordination vision may help to interconnect the historic quests for substantive security that many OutCrits and outgroups continue today still to pursue. If OutCrit scholars practice critical legal theory in this way, and if we do so responsibly, insistently, collectively, and mutually, our respective and shared visions of a progressive postsubordination order just may help bring us together during CRT's second decade to build a common table of justice, dignity, and prosperity for all. CONCLUSION CRT, like outsider jurisprudence generally, is a product of its time and context. But times and contexts always change. So must jurispru dential movements that, like CRT, are in search of substantive social justice. As we mark and celebrate the Tenth Anniversary, we must theorize and retheorize CRT in both structure and substance as the pre-eminent genre of OutCrit jurisprudence to ensure that CRT's first decade also will not be its best. Ensuring a second decade of evergreater relevance and potency is the challenge that awaits us all. To help meet this challenge, this essay urges outsider scholars to embrace "OutCrit" identification and articulate postsubordination vision as part of the larger antisubordination project that CRT has helped to pioneer during the past decade. As OutCrits, we can take up the serious business of defining and committing ourselves to an egalitarian vision of a postsubordination society, an undertaking that effectively requires all OutCrits personally to embrace the struggle against all forms of oppression under today's Euroheteropatriarchal status quo. By expanding the focus of outgroup coalitions beyond sameness/difference issues with forward-looking assessments of hopes and aspirations, postsubordination vision as jurisprudential method can help OutCrits to organize critical coalitions chiefly around the progressive principles and policies that will ensure social justice and substantive security for all.

## Possible Negative Arguments/Controversies

### Top-Level

#### Outside of the obvious rebuttals (explicit replies to the aff’s contention about the workability of CRT for jurisprudence) there are a number of critical and practical critiques that the resolution opens itself up to.

### 1) What is “Critical Race Theory”? / What is Critical Race Theory as “legal jurisprudence”?

#### These debates seem closest to what we called topicality debates, and they may be a part of this topic. However, they are likely to be more philosophically grounded rather than exclusively revolving around the question of limits or ground. Most of the proposed resolutions task the affirmative to consider and defend two things: (1) what specific core tenants of Critical Race Theory is/are, and (2) how those tenants might translate into jurisprudence. Insofar as affirmatives might be encouraged to lean toward answering the second question without an appreciation for the first, then they may impute certain meanings or interpretations to CRT that do not belong.

#### In this sense, “topicality” debates may be an intrinsic critical discussion of the topic as debaters get to the bottom of both what critical race theory is and what a jurisprudence informed by critical race theory might look like. We are likely to find arguments grounded in the matter-of-fact point that what the affirmative \*thinks\* is CRT is, in fact, an incorrect characterization—be it from the right, or the left.

#### “Critical Race Theory,” for example, refers to a specific set of scholarship.

Hatch 9 – (Hatch, Anthony Ryan. "Critical Race Theory." Blackwell Encyclopedia of Sociology. Ritzer, George (Ed). Blackwell Publishing, 2007. Blackwell Reference Online. 12 January 2009) NAR

Critical race theory refers to a historical and contemporary body of scholarship that aims to interrogate the discourses, ideologies, and social structures that produce and maintain conditions of racial injustice. Critical race theory analyzes how race and racism are foundational elements in historical and contemporary social structures and social experiences. In defining critical race theory, it is important to make a distinction between the deep historical tradition of critical theorizing about race and racism and a specific body of American legal scholarship that emerged in the 1970s and 1980s in response to the successes and failures of the Civil Rights Movement struggles for the freedom and liberation of people of color of the 1950s and 1960s. While this new school of legal thought coined the phrase “critical race theory” to signal a new critical analysis of the role of the law in propagating and maintaining racism, this movement is part of a broader intellectual tradition of critical theories of race and anti-racist struggle that has political roots in the work of pioneering scholar-activists like Frederick Douglass, Ida Wells-Barnett, and W. E. B. Du Bois. Using this broader framework, critical race theory can be viewed as a diagnostic body of “intellectual activism” scholarship that seeks to identify the pressure points for anti-racist struggle. Given the historical scope of critical race theories, this essay highlights several core themes that tie together this eclectic body of explicitly political theorizing. The first core theme deals with how critical race theories frame their two focal objects of study: race and racism. First, critical race theory understands the concept of race as a social construction that is produced as a result of the cultural and political meanings ascribed to it through social interactions and relationships across multiple levels of social organization. Since the 1600s, race has been a constitutive feature of global social, political, economic, and cultural organization. Critical race theories have demonstrated how race concepts and their accompanying racisms were foundational to the administration of colonial social systems, the rise and expansion of global capitalism, and the emergence of the human biological sciences and medicine of the eighteenth, nineteenth, and twentieth centuries. Second, critical race theorists have rejected the notion that racism is limited to malign individual prejudice and have embraced a more structural understanding of racism. An organizing theme of critical race theory is that there is not, and has never been, one monolithic and universal form of racism. In 1967, black radicals Stokely Carmichael and Charles V. Hamilton coined the term “institutional racism” to identify how racism is embedded in social structures and multiple institutions. In highlighting the structural dynamics of racism, critical race theorists challenge the idea that people of color are solely responsible for their own oppression. Drawing on these formulations, contemporary critical race theories understand racism as a vast and complicated system of institutionalized practices that structure the allocation of social, economic, and political power in unjust and racially coded ways. The second core theme is that critical race theories are grounded in the lived experiences, unique experiential knowledge, and narrative voice of racialized and subordinated communities. Strongly influenced by prior freedom movements against colonialism, segregation, and racial violence, critical race theorists engage pragmatist engagement in “intellectual activism” that aimed not only to theorize, but also to resist these conditions of racial oppression. These lived experiences are not always reflected in the activities of scholars located in professional academia. Critical race theorists have help to spawn and have drawn upon social and intellectual movements for liberation and empowerment in the United States and elsewhere such as the Harlem Renaissance, Black Nationalism, and Afrocentrism. Not only have critical race theorists tended to emerge from subordinated social groups, their theories attempt to use the voices and experiences of people of color in the pursuit of social and economic justice. The third core theme is that critical race theory has traditionally used and continues to represent an interdisciplinary approach to the study of race and racism. The interdisciplinary and, indeed, extra-disciplinary nature of critical race theory enables the analysis of a wide range of social, economic, and political phenomena that shape race and racism as social structures. Critical race theory draws upon an interdisciplinary body of scholarship that has intellectual roots and practitioners in sociology (Brown et al. 2003), critical legal studies (Bell 2004; Matsuda et al. 1993), political theory and philosophy (Goldberg 1993, 2002), neo-Marxist British cultural studies (CCCS 1982; Hall 1992), African American literary criticism (Carby 1998; Murray 1970), history (Fredrickson 2002; Marable 2000), and philosophy (Harding 1993; Outlaw 1996; West 1999). Inside of sociology, critical race theories draw heavily upon the theoretical and philosophical orientations of Marxism, pragmatism, and poststructuralism. Drawing on psychoanalytic and literary theories, critical race theorists have analyzed the relationships between forms of cultural racism and colonial domination. Critical race theorists have also documented and critiqued the role of nation-states in the formation of racial categories in the enactment of different forms of political oppressions. From these various disciplinary locations, critical race theories entail the illumination and critique of these discursive and institutional relationships between social constructions of race and the social practices of racism in terms that make opposition to these racial discourses and racist practices possible. A fourth core theme is that critical race theories embrace and deploy quantitative, qualitative, and discursive methodologies to illuminate different aspects of race and racism as social structural phenomena. Critical race theorists have used quantitative methodologies to map the contours of economic and spatial segregation, racist attitudes and ideologies, and racially coded health disparities. They have also deployed qualitative methodologies to understand the lived experiences and narratives of racially designated peoples and discursive approaches to investigate the relationships between racial discourses and the construction of racial subjects. As will be discussed later, critical race theories also draw heavily upon historical and comparative frameworks that allow for the analysis of race and racism as historically embedded social phenomena. This methodological pluralism, partly a consequence of the interdisciplinary scope of critical race theory, has enabled critical race theory to respond to the dominant social, political, and scientific practices and ideas that constitute race and racism in different historical periods. Fifth, critical racial theories have long recognized and opposed the centrality of science to the construction of racial meanings and practices. In fact, in what might be considered the first treatise of critical race theory, W. E. B. Du Bois's detailed analysis in The Philadelphia Negro was intended to refute the claims that rates of poverty and destitution among the city's black population were the result of inherent biological and cultural inferiorities (Du Bois 1899). Scientific racism consists of ideas of race based on presumed physiological, biological, and/or genetic differences and the practices of deploying such ideas as essentialist explanations for racial stratification and oppression. Critical race theory has long contested these scientific claims that upheld racial hierarchies and justified ideologies of white supremacy. Whereas science had long been a tool of racial oppression, it emerged as the spearhead and epistemic foundation of the critical race theories of the post-World War II era. While critical race theories have relied on a wide range of theoretical approaches, a core theoretical framework embraced by many contemporary critical race theorists is that of racial formation, which emerged in the 1990s as an explicitly historical and political approach to analyzing race as an organizing system of knowledge and power that combines both discursive and institutional elements (Omi & Winant 1994; Winant 2001). The racial formation framework stands in stark contrast to demographic approaches to race that conceptualize race as a quantitative variable trait in population studies, biological approaches that view race as something rooted in biology and/or genetics, and colorblind approaches that wish to abandon the study of race concepts altogether. The racial formation understands the construct of race as “a concept that signifies and symbolizes sociopolitical conflicts and interests in reference to different types of human bodies” (Omi & Winant 1994). Analytically, this means always interpreting the meaning of race in relation to the discursive practices that produce the idea of race, the social processes through which racial categories are created, embodied, transformed, and destroyed, and the institutionalized power relations that are brought to bear in shaping racial conflicts and interests (Omi & Winant 1994). These discursive and institutional elements form what are called “racial projects” in which social and political conflicts and interests are waged over raced bodies and racialized groups. The idea of racial projects is central to the racial formation approach because it draws the discursive and institutional elements of race and racism together into a single analytic framework. Omi and Winant define racial projects as the discursive and institutional deployments of race that are both an interpretation, representation, or explanation of racial dynamics and/or an effort to organize and distribute resources using racial categories (Omi & Winant 1994: 56). Racial projects combine what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized based upon that meaning (Winant 2001, 2004). Some critical race theorists, particularly black feminist theorists, have also articulated an intersectional theoretical approach to analyzing the ways in which systems of gender, sexuality, and nationalism are implicated in the production and maintenance of racial subordinations (Collins 1990, 1998; Matsuda et al. 1993). Drawing on this earlier work, critical race theorists continued to turn their attention to the ways in which the formulation, production, and dissemination of cultural images and representations are placed in the service of white supremacy (Collins 2005; hooks 1981, 1990). In the post-civil rights era, critical race theorists have exposed and criticized the ways that the myths of American democracy, meritocracy, and progress and the ideology of individualism function to justify changing forms of racial domination. In particular, critical race theorists have analyzed new forms of colorblind racism that enable and conceal the reproduction of racial inequality without direct reference to social constructions of race (Bonilla-Silva 2003; Williams 1997). Colorblind racisms assume that racial inequalities are the outcome of natural, economic, and/or cultural differences between racialized groups, and advocate that not using constructions of “race” is necessary for the principled end of racism. A major trajectory in this analysis of colorblind racism is the analysis of the law and legal institutions as crucial sites for the production of colorblind policies and practices. Legal scholar Derrick Bell, considered to be the intellectual inspiration for the consolidation of critical race theories of the law, has demonstrated that conditions of racial segregation have ideological and pragmatic foundations in the speech about socially denigrated groups (Bell 2004). Bell's primary target of critique is the absolutist position on the First Amendment protection of free speech and how this strong position allows racist speech ideology to ripple throughout society, especially in universities. Bell and his followers have also targeted the assumption that racial progress has been achieved in the post-civil rights era. Bell illuminates the partial truths of racial progress in the American society by a close rereading of American political and legal history armed with the notion of silent covenant, a backdoor agreement among white elites to advance black interests and civil rights if and only if they will also benefit whites. The implication of his analysis is that political freedom for oppressed racial groups is only achieved when it can be accomplished in the context of furthering white political domination. Bell recounts key moments in American social history that illustrate this relationship: the signing of the Constitution, the Emancipation Proclamation, and, most importantly, the Brown decision. Bell argues that conditions of racial injustice are so entrenched in the United States that when modest gains for racial equality are achieved, they are too often interpreted as evidence that the struggle for racial equality is complete. A final theme is illustrated in a recent exemplar of contemporary critical race theory. Many critical race theories go beyond diagnosis and critique to offer arguments and proposals for specific social policies that, if implemented, can work to undo the systemic disadvantages that impair the life chances and conditions of people of color in the United States. These theories continue to challenge entrenched racial inequalities in health, education, criminal injustice, political representation, and economic opportunity (Brown et al. 2003; Guiner & Torres 2002; Shapiro 2004). In a recent exemplar of contemporary critical race theory, a group of prominent sociologists attack racial realism, a variant of colorblind ideology in which it is claimed that racism is largely over and the racial inequalities that remain are the result of the natural proclivities and cultural pathologies of people of color (Brown et al. 2003).

#### Some scholars, like Tommy Curry for example, have argued against a “big tent” approach to CRT, and might argue that affirmatives who expand the bounds of CRT beyond this specific set of scholarship may be guilty of engaging in a project of erasure and epistemic violence.

Curry 9 – At time of Publication, Post Doctoral Fellow at Penn State University (Tommy J. Curry, "Will the Real CRT Please Stand Up - The Dangers of Philosophical Contributions to CRT," The Crit: A Critical Studies Journal 2, no. 1 (Winter 2009): 1-47) NAR

The recent pop culture iconography of the Critical Race Theory (CRT) label has attracted more devoted (white) fans than a 90s boy band. In philosophy, this trend is evidenced by the growing number of white feminists who extend their work in gender analogically to questions of race and identity. The trend is further evidenced by the unchecked use of the CRT label to describe (1) any work dealing with postcolonial authors like W.E.B. Du Bois and Frantz Fanon or (2) the role postcolonial themes like power, discourse, and the unconscious play in the social constructionist era. While this misnomer may seem practically insignificant, the artifice formerly known as CRT in philosophy-more adequately labeled "critical theories of race"- has been axiomatically driven by the political ideals of integration and by a revisionist commentary that seeks to expand traditional philosophical ideas, such as reason, history, and humanity, which were previously closed off by racial borders, to people of color. This "revision in the name of inclusion," however, is not without its consequences. In order to incorporate the experiences of those who suffer under the weight of modernity and are marred by the burdens of racism into the narration of Continental and American philosophy, the theoretical perspectives in Critical Race Theory that deny the legitimacy of philosophy's diversity agenda must necessarily be excluded In particular, this recent move to recognize the study of race as a category of philosophical relevance has resulted in the outright denial of the nationalist and revolutionary fervor contained in the intellectual history specific to the Critical Race Theory movement started by the works of Derrick Bell.2 Instead, this new movement favors narratives that inculcate the ideals of a post-racial humanity and racial amelioration between compassionate (Black and white) philosophical thinkers dedicated to solving America's race problem. As an endemic American perspective on race, CRT deserves to have its authors, its theoretical roots, and its presence recognized in the fields that continue to utilize its name. The particularity of CRT's development, and the specific difficulties that arose in trying to define the movement, have bred a unique disciplinary perspective to which few studies of race can relate. While race-crits are well aware that "the name Critical Race Theory... [is] now used as interchangeably for race scholarship as Kleenex is used for tissue," 3 there is still a need to preserve and articulate the distinction between general studies of race and CRT. Failing to point out the inaccurate appropriation of the CRT title not only represents a skewing of the field, but in philosophy specifically, it results in an erasure of a prominent tradition started by people of color. Despite the various anthologies and scholarly archives that document the intellectual contributions of Critical Race Theorists like Derrick Bell, Kimberle Crenshaw, Cheryl Harris, and Richard Delgado, philosophy, in its attempt to market Blackness, continues not to engage the literature or ideas proposed by these legal theorists' social commentaries. Instead, philosophy prefers to continue engaging in critical commentaries on white thinkers like Kant, Hegel and Sartre through seemingly radical intersections with the work of W.E.B. Du Bois and Frantz Fanon. Whereas many works in philosophy seek to expand the number of race projects described by Critical Race Theory, this article discusses the theoretical and disciplinary risks involved in the philosophical utilization of the term beyond its racial realist and structural critiques of American racism.

#### The more affs twist and pervert what ‘CRT’ means to suit their competitive goals, the more they may be said to contribute to the gentrification of CRT.

Curry 17 – (Tommy J, Canonizing the Critical Race Artifice: An Analysis of Philosophy ’ s Gentrification of Critical Race Theory. , The Routledge Companion to the Philosophy of Race, eds. Paul Taylor, Linda Alcoff, & Luvell Anderson (Routledge: New York, 2017) ) NAR

As a discipline, philosophy has established its character through an obdurateness dedicated to preserving the truth of its authors, the eficacy of its logic, and the legacy of its theoretical schools. However, when engaging black theory little effort is made to maintain the heritage of black schools of thought. To the contrary, black theory is canonized by the extent to which its founding authors are displaced, and the particularity of its methods and concepts assimilated within the disciplinary narratives of the larger canon (Curry, 2011a; Curry, 2011b; Curry 2010). Critical Race Theory (CRT) is perhaps the clearest example of this anti-black dynamic within the academic discipline of philosophy. Richard Delgado’s “Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race” argues that the popularization of CRT and its adoption by predominately white institutions and academic departments have hastened the deradicalization of the material analyses formulated by the original race-critics across multiple disciplines (Delgado 2004). The adoption of Continental philosophy and post-structuralism as the methods of analyzing problems of racism and other social inequalities has allowed many disciplines to embrace CRT as a general label designating any number of inquiries into questions concerning race generally without any attention to the methodological and theoretical commitments of Critical Race Theory in its original formulation. The initial formulation of CRT was racial realist, meaning it focused on the empirical and historically deined differences in economic status and political power, and made its concern the social stratiications which had emerged throughout America as the foundation of its analysis into not only the law but the routine function of white supremacist ideology more generally. The present-day interpretation and popular understanding of CRT however, is quite different, and imagined only to exist as a conceptual and discursive engagement with issues of identity, or privilege. This chapter aims to articulate two major deiciencies in the adoption of Critical Race Theory within the discipline of philosophy—speciically how philosophers understand Bell’s thinking about racism and CRT’s methodological assumptions. The irst section will discuss the idealist shift in Critical Race Theory as well as the thinking that came to replace its initial racial realist orientation. The second section will address the lack of engagement with the foundational works of Derrick Bell. Because many scholars associate Derrick Bell’s work with one statement, “racism is permanent,” there is not an exploration of his analyses of economics, history, and institutional power which are common themes throughout his corpus. In an attempt to correct the reductionism of Bell, which caricaturizes black radicals, I will analyze some of his lesser known works and contextualize them to his larger project and method. Finally, I will end with a brief relection on the recent creation of Critical Philosophies of Race within the discipline of philosophy and its relationship to the misrepresentation of CRT. This comparative approach will highlight what I take to be a reinvention/rearticulating of arguments made over 30 years ago within a disciplinary tradition which altogether erases and ignores the substantive contributions of black, brown, and Indigenous authors for a disciplinary invention aimed at incorporating white voices and white authorship over black theory

#### Such critiques, perhaps, may even go further and argue that the resolutional question is, itself, a bankrupt claim that imagines CRT “as” jurisprudence, rather than a way to think about the failures of jurisprudence.

Curry 11 – At time of Publication, Assistant Professor of Philosophy and Affiliate Professor of Africana Studies at Texas A&M University, College Station, TX. (Tommy J. Curry, "Shut Your Mouth When You're Talking to Me: Silencing the Idealist School of Critical Race Theory through a Culturalogical Turn in Jurisprudence," Georgetown Journal of Law & Modern Critical Race Perspectives 3, no. 1 (Spring 2011): 1-38 ) NAR

No intellectual historian can deny the impact of Critical Race Theory (CRT) on the discourse of race and racism in the later part of the 2 0 th century. Critical Race Theory began in the late 1960s, in the aftermath of the civil rights movement, with a series of writings by Derrick Bell. These writings focused specifically on the arrest of civil rights era gains thought to be won in 1964 and the roll back of the political guarantees of desegregation set forth in Brown v. Board of Education (1954).1 In its inception, CRT offered a withering critique of integrationism and exposed the hope of racial equality for Blacks in America as nothing more than a mere illusion. Largely inspired by the Black Nationalist movements of pre-integrationist America and revolutionary Black authors like W.E.B. Dubois and Frantz Fanon, Bell developed two theories which laid the theoretical foundations of the CRT movement. The first, racial realism, recognized the onerous racial reality of the United States and held that "Black Americans are by no means equal... and that racial equality is in fact not a realistic goal." 2 For Bell, the law is an instrument that Whites use to preserve and perpetuate a racial caste system. Under a racial realist account, law only periodically served to protect oppressed peoples, and only then when minority gains aligned themselves with dominant White interests. Interest convergence, Bell's second foundational theory of CRT, explained not only the futility of Blacks' efforts to gain legal rights through the law, but also the slow-paced social and political reforms dictated by legal doctrine in the name of racial progress. From the theoretical groundwork laid by Bell and others, CRT became a pioneering critical perspective in jurisprudence. It maintained that both race, as a social construct made by the history of European domination, and racism, "which translates into a societal vulnerability of black people.., in which the 'racial bonding' of whites would always commit to the practice of using Blacks as scapegoats for failed economic, political policies," 3 were permanent features of the American landscape. For Bell and the racial realists that followed, the historical contingency of the social construction of race did not change the sempiternal reality of anti-Black racism in America. Unfortunately, the tide of CRT soon turned. Though the philosophical perspectives that eventually came to define CRT as a movement were well-developed and debated among scholars of color in the early 1980s, it was not until 1989 at the first CRT conference in Madison, Wisconsin that Kimberle Crenshaw officially named the work started by her Harvard mentor, Derrick Bell, Critical Race Theory. The Madison Conference, consisting of 24 legal scholars of color dissatisfied with the distortion of race discourse in traditional legal scholarship and the absence of discourse about racism in the emerging field of Critical Legal Studies, was the first organized attempt to define the movement. Ironically, however, this conference would also popularize what until that point had largely been underground and nationalist movements in law schools, and create new disciplinary challenges in legal scholarship. Because CRT exhibited mordant polemics against and an earnest disregard toward White standards of merit, reason and legal education, it quickly became the target of a major academic campaign to de-radicalize the movement. What had been merely a mild discomfort caused by CRT's popularization in the legal academy had progressed by the mid-i 990s into a full-fledged allergic reaction against the movement's theoretical perspectives. This reaction to CRT took the form of an ideologically charged backlash in intentionally well publicized forums over the intellectual integrity and legitimacy of the movement. A further difficulty arose when Critical Race Theory's notoriety led to attempts by various disciplines to incorporate CRT as a "cutting edge" perspective without fully embracing CRT's fundamental suppositions. For example, the notoriety of CRT caused many educators to accept that race was an issue that deserved greater attention, but those educators ignored the role that White privilege and the social reification of individual White identities played in maintaining White supremacy when speaking about and analogizing race. By the mid- 1990s, it was apparent that CRT had started to abandon its racial realist roots leaving structural critiques of American racism and its grounding pessimism of automatic progress under American liberal democracy by the wayside. A new, younger, (more moderate) generation of scholars, amicable to Ivy League deans and tenure committees, began writing works that "carried into the study of race, habits of speech and analysis that they had learned elsewhere [in their undergraduate and graduate studies] and that placed texts, narratives, scripts, stereotypes, and Freudian entities at the center of analysis." 4 This idealist turn, in no small part influenced by the charges against CRT a decade earlier, was largely the result of CRT's cooptation by White elite institutions and resulted in the ideological thinning of Critical Race Theory, both in jurisprudence and areas outside legal institutions, such as philosophy. The realist school holds a colonial perspective of race, according to which "racism is a means by which our system allocates privilege, status and wealth," and acknowledges that the "West did not demonize black or native populations until it determined to conquer and exploit them and that media images in every period shift to accommodate the interests of the majority group." 5 The idealist school holds that: Race and discrimination are largely functions of attitude and social formation. For these thinkers, race is a social construction created out of words, symbols, stereotypes and categories. As such, we may purge discrimination by ridding ourselves of the texts, narrative, ideas, and meanings that give rise to it and that convey the message that people of other racial groups are unworthy, lazy, and dangerous. 6 This division in CRT created a tension in the study of law and the socio-political contexts that give rise to it. Unfortunately, the resolution of this tension has not progressed from Angela P. Harris's The Jurisprudence of Reconstruction, which sought to carve out a theory of possibility that would lay to rest the charges from "critics of Critical Race Theory" that CRT is more concerned with deconstruction than reconstruction. This debate prompted Harris to acknowledge, "A tension ... exists within CRT ... that, properly understood, is a source of strength. The success," says Harris, "of what I call a 'jurisprudence of reconstruction' lies in CRT's ability to recognize this tension and use it in ways that are creative rather than paralyzing."7 Sadly, the choice to inhabit what Harris calls the tension between modernity and postmodernity only results in a sequestrated vision of Black subjectivity; a vision that will inevitably be thrown back on the autonomous White rationalizations of modern philosophers, who think about race in such a way that it demands Black subjectivity be replaced by the free thinking reason of White humanity. While the idealist school is aware of the danger in appealing to "reason," these theorists have nonetheless assumed that "universal reason," rooted in the anthropos of the European persona and reared on the bosom of modernity, can, in expressing its postmodern discontent with itself through deconstruction, be a critical instrument in distancing "reason" from its White imperial past-a past driven by the very racialized reasoning CRT seeks to combat. What is at stake in this analysis is not the concept of reason itself, but rather the constructions of the world to which the cultural manifestations of "reason" are committed. This essay is an attempt to resolve the tensions that arise in CRT, from its conversation with Continental Philosophy and Critical Legal Studies (CLS), over the "problem of the subject." In an attempt to respond both to Angela P. Harris's call for a "jurisprudence of reconstruction" and her reliance on inadequate Eurocentric conceptualizations of subjectivity that lay between a modern and postmodern racial schizophrenia, I argue that CRT, while skeptical of "reason," fails to take seriously the role that Eurocentric anthropology plays in determining the inclinations of the thinking individual. By failing to acknowledge the inextricable cultural determinism of "reason," CRT commits itself to the same modern dispositions of European thought it seeks to criticize, effectually reducing Black subjectivity to "polemics of discontent," instead of supporting the movement as a sustainable critique against Euro-centrism. The acknowledgment that reason is nothing more than a particular reflection upon the world rather than an innate universal human faculty can potentially help CRT recognize the possible theoretical contributions of Derrick Bell's Robesonian view of culture. Both Bell and Paul Robeson believe that Black self-reliance and African cultural continuity should form the epistemic basis of Blacks' worldview. Bell's recognition that one's process of thinking about the world cannot be separated from the racial interest one has in constructing it is a valuable philosophical insight ignored by many racial idealists. In an attempt to develop a plausible notion of cultural subjectivity in the racial realist tradition that initially grounded CRT, I propose a theory of culturalogics which argues that constructs, like race, law, and the alleged transcendental values that sustain them, are modified- contoured-through infusions of cultural meaning. By creating a conversation between the metaphysical possibilities of cultural constructivism and the structural analysis of American racism, so prominent in the realist tradition of CRT, I hope to sustain both a radical social theory and culturalogical perspective that will invigorate the realist contribution to CRT.

#### Aff teams might reply that such questions/accusations are themselves reminiscent of modes of judicial reasoning that they want to avoid.

Carbado 11 – (Devon W. Carbado, "Critical What What," Connecticut Law Review 43, no. 5 (July 2011): 1593-1644) NAR

In marking these various domains to which portions of King's speech have travelled, I do not mean to be normative. I present them to raise a set of questions about travelling theory. Are King's words being lost in translation as they move across the foregoing civil rights contexts? Should King be able to restrict the ways in which his ideas circulate? In thinking about the applicability of King's ideas outside of the precise context in which King articulated them, should we try to figure out what King himself would have wanted? If King appeared before us today and said: "I do not support the application of my 'I Have a Dream' speech to gay rights," should that be authoritative of the relevance of his words to that struggle? Is there some principle of "fair use," not in the strict intellectual property sense but in a normative sense, that should govern how we think about any of this? If so, what principles should guide our thinking? Each of the preceding questions might be engaged with respect to how CRT has travelled to other disciplines. How should we assess the work CRT has performed across the disciplines? Should we adopt a kind-of Critical Race originalism-that is, examine the burgeoning CRT literature outside of law in light of what our CRT Foremothers and Forefathers might have wanted-and might still want? When CRT travels to other disciplines, should we be concerned about what it carries back? While neither Gloria Ladson-Billings's nor Glenn Adams and Phia Salter's contributions directly engage all of these questions, their essays provide an opportunity to reflect on the interdisciplinary travels of CRT

### 2) Alternatives to CRT

#### The resolution explicitly suggests that “alternatives” to CRT are fair game. Neg teams will be able to provide and defend alternative theories of legal jurisprudence and explain why they are preferable. Some of these alternative jurisprudences might accept the standards the aff presupposes, others might call into question the relevance/importance of the questions aff teams claim CRT jurisprudence would resolve. This is a partial list, but I hope one that begins to get the ball rolling on the kind of options available:

#### a) “Originalism”

#### Much ink has been spilled modifying existing theories of judicial interpretation and inflecting them, substantively, with concerns involving justice and redistribution. To that extent that aff teams posit CRT as an alternative to existing theories of law, negative teams might suggest that those theories—originalism for instance—are preferable frameworks of interpretation.

#### In the context of transgender rights, for instance, there might be much to gain by acknowledging CRT’s critique of interest convergence but then departing from it to endorse, nevertheless, Originalism as a jurisprudence for equality.

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I fully acknowledge that originalism and transgender rights seem like unlikely bedfellows, at least politically speaking. Today’s Republican party has made transgender people into political pawns in outrageous ways over the last decade in particular. Simultaneously, Republicans claim absolute loyalty to originalist methodology. So it goes, seemingly, that originalism is a natural opponent of transgender rights. But maybe not quite. This Part proffers that politically, methodological originalists and transgender rights proponents have a common interest in accommodating the former in the latter. It begins by framing this common interest as a kind of interest convergence that, while precarious, is nonetheless sufficient to sustain a strong coalition that benefits transgender persons and originalists. It goes on to flesh out the stakes for transgender persons and originalists in accepting and sustaining a coalition in the current political moment. A. Interest Convergence Explained Critical Race Theory has made some significant and much needed contributions to the legal academe, a position that feels necessary to uplift in light of the ongoing efforts in dozens of state legislatures to outlaw CRT. One particularly useful descriptive tool is interest convergence, a phenomena where two or more groups coalescing to a joint position despite having different interests and the outcome carrying wildly different stakes. I will begin by fleshing out interest convergence a bit, then move on to explain why I think there’s potential interest convergence uniting originalists and transgender rights advocates. Derrick Bell9 first articulated the concept of interest convergence four decades ago in Brown v. Board of Education and the Interest-Convergence Dilemma. 10 There, Bell argues that Brown v. Board does not signal the Supreme Court’s commitment to racial equality, but rather a confluence of interests between Blacks and whites that just so happened to support the same outcome. Bell termed this phenomena interest convergence, outlined the conditions that make it possible, and went on to argue it was not a stable platform from which to build the foundation of a robust racial justice project. Bell was writing nearly three decades after Brown was decided. By the early 1980s it was abundantly apparent that the Supreme Court was unwilling to aggressively enforce its desegregation mandate let alone take meaningful steps to dismantle other remnants of Jim Crow. Despite that, at the time critiques of Brown were few and far between. Brown was such an important racial justice victory that it was thought untoward to question the opinion’s substance let alone the Court’s motivations. Common wisdom being what it was, it also seemed foolhardy to even suggest that the Court would have stepped up in Brown for any reason other than promoting racial equality. Ultimately, Bell introduces interest convergence to describe the conditions that give rise to what appear to be major progressive wins but are instead the produce of accidental agreement on outcome, rather than substance. Bell, of course, saw Brown quite differently and his key insight has complicated how generations of law students and lawyers have come to understand it. While Bell acknowledged that Brown was of seminal import to Black Americans, he saw the opinion’s explicit racial justice promoting holding was motivated by multiple interests, several of which had nothing to do with justice. Bell explained that Brown “cannot be understood without some consideration of the decision’s value to whites, not simply those concerned about the immortality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow the abandonment of segregation.” In that vein, Bell urged that in addition to the Court responding to Black Americans’ call for racial equality, it took account of three complementary but distinct white interests: the desire to bolster America’s international credibility as a country committed to freedom and democracy amidst the Cold War, an interest in acknowledging Black American’s sacrifices fighting for freedom and equality during World War II, and to help the South transition from a rural, plantation society towards industrialization. On Bell’s view, the Court’s decision to abolish Plessy v. Ferguson’s “separate but equal” doctrine came about not because the Court singularly desired to begin the work of dismantling American apartheid, but because myriad white interests converged with Black interests. Bell’s interest convergence theory has another, important wrinkle. He argued that converging interests were a necessary but not sufficient explanation for Brown. One other element was necessary—that there was a marked power imbalance between Black and white Americans, and Blacks presented their plea for desegregation in a way that complemented white interests. As Bell explained, this power imbalance was not incidental—Brown was only possible because a subordinated group was willing to frame its demand in a way that complemented the privileged group’s interests. If whites had nothing to gain from desegregation, the outcome would have been different. As Patience Crowder so succinctly explains, interest convergence only arises where “there are power dynamics and divergent interests between parties with unequal bargaining power [and] the subordinate party’s interests will not advance unless that interest does not offend the status quo of the majority party.”11 Bell did not see interest convergence as a viable strategy for winning racial justice in the United States. Indeed, he urged that while interest convergence could produce cases like Brown, it was too precarious to give us much more. That is, interest convergence could give us one-off and seemingly unexpected wins, but would not aid the dismantling of pervasive and systemic discrimination in the long-run since it was improbable that privileged interests would always coalesce with those of the subordinated group. Later in his life, Bell doubled-down on his condemnation of interest convergence as a political strategy for racial justice. In the wake of Grutter v. Bollinger, 12 which narrowly affirmed the University of Michigan Law School’s race conscious affirmative action admissions program, Bell asserted that this was no true victory for racial justice. As he saw it, Grutter’s key holding—that race conscious admissions are only constitutional insofar as diversity enhances institutions irrespective of the benefits they give to historically marginalized groups13—evidenced that a racial justice victory is only possible where it promotes white interests. Pointedly, Bell argued that “no matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern.”14 Bell’s condemnation of interest convergence as social justice strategy continues to echo in Critical Race Theory literature and beyond. It is fairly common for commentators insist that interest convergence’s value is quite limited—while it may support sporadic and even unlikely coalitions for one-off cases, it cannot sustain efforts to dismantle systemic discrimination because these coalitions are both precarious and premised on inherently problematic priors. And yet I think there is more to be said about interest convergence. B. A Modification of Bell’s Theory I take to heart the warning Bell intends interest convergence to signal. Interest convergence coalitions are indeed quite precarious. These coalitions are also, in many respects, problematic. That the possibility of convergence only exists in a state of inequality and depends upon the subordinated group’s willingness to appeal to the interests of a more powerful and privileged group, something only possible where the privileged group locates an interest that in many cases will, in the immediate moment, reify the power differential between the groups. That said, there are two critical things Bell’s version of interest convergence misses. One limit of Bell’s descriptive project is that while it accurately describes the conditions that make interest convergence possible, his proscriptive directive does not follow from his mapping of the problem. Bell claims a problem exists, describes its contours, and goes on to conclude that so long as tactics designed to function in a state of power imbalance are pursued, the power imbalance will continue to exist. While this is a possible outcome, it’s not necessarily the only one.15 What Bell overlooked is that interest convergence coalitions can, even if they do not always, shift social mores overtime by building buy-in to social justice projects from both privileged groups and other subordinated groups that do not singularly have the power to shift the status quo but can, in coalition, secure meaningful and sustainable social change. I recognize that it is deeply frustrating and problematic that privileged groups so often refuse to outright cede their privilege for the greater good, coalition building can, even if not intended by the privileged group, alter conditions such that privilege is ultimately disrupted albeit in a protracted and often piecemeal manner. Interest convergence sets the stage for this disruption. And as Brad Areheart observes, major social justice wins do not succeed without social buy-in and support.16 (I also think it foolhardy to insist that true social change can only be won where the privileged outright and all times going forward acknowledge their privilege. Even the best amongst us, “[t]he good-natured humanitarian who listens attentively to the first claim of social injustice will become as impatient curmudgeon after multiple similar admonishments.”17\_ Another problem with Bell’s version of interest convergence is that he rules it out entirely on the premise that interest converegence alone cannot sustain social change. I agree that in and of itself, interest convergence cannot forge sustained commitment to social justice projects. But that does not necessarily mean that interest convergence fails the same way when coupled with other intervention tools. Anyone who has spent time in politics or nonprofits knows all too well that social issue campaigns and projects are propelled by a wide array of tools. Few issues are universally popular without considerable investment in drawing attention to the issue and winning buy-in from groups without a clear and direct interest in the outcome. Community education, impact litigation, coalition building, among other strategies are usually necessary to move the needle on major issues. Interest convergence as one of many other tools may very well not only help bridge important buy-in in specifical social justice projects, but also be part of a larger campaign effort to shore up wider and more ongoing coalitions promoting the same interests. In such a campaign, initial buy-in may be simple interest convergence, but subsequent moments of convergence may be rightly considered the product of true shifts from groups that once only wanted a particular outcome, not a larger project, into stalwart supports of the overarching cause. C. Positive Interest Convergence Possible for Originalists and Transgender Rights Advocates 1. Originalist Stakes While I ultimately conclude that methodological originalism does support some transgender rights claims, I realize a not insignificant number of originalists may recoil at the idea or simply think it too improbable to seriously consider. I do not mean to suggest originalists are especially prone to harbor antitransgender bias. Instead, as I have observed elsewhere, I am simply acknowledge that in a society that has long subordinated transgender persons, it can seem only natural to presume that we are exceptional legal subjects and, consequently, that our laws necessarily protect us less than nontransgender persons.18 That is to say, anti-transgender bias is baked into how many of us think about the world around us and consequently how many of us came to form opinions as to how our interpretive methodologies should treat transgender subjects. Uncovering that baseline is all but impossible short of drawing attention to how the assumption of transgender exceptionalism is itself bias. Paradoxically, calling out transgender bias, while, admittedly, sometimes viscerally satisfying, is not a fruitful strategy. Building from points of consensus is, however, quite effective. Regardless of originalists’ baseline familiarity let alone support for transgender rights, there are at least two reasons why they should buy-in to my overarching project none of which, at least initially, require upfront commitment to transgender rights for its own sake. First, originalist methodology’s popularity in our federal courts is a double-edged sword. Republicans used the flag of originalism to seat a large number of judges over the last few decades all on the premise that originalism is a good and proper modality to interpret our Constitution. Those judges are all relatively young and the vast majority will have long careers on the bench. However, life tenure does not necessarily connote power. These judges’ influence is tempered by both their non-originalist colleagues’ and broader public opinion as to the legitimacy of originalist methodology.19 While it is most certainly true that lone wolf judges can do tremendous harm in discrete cases, the multi-level system of review in our federal courts and necessity of the judiciary, as an institution, to maintain a basic level of legitimacy in the public’s eyes compels originalists on and off the bench to ensure that the methodology continues to be, at some level, deemed popularly legitimate.20 Put more succinctly—Republicans succeeded in turning the federal Judiciary into an originalist machine, but so coupled, the Judiciary’s legitimacy will suffer if originalism is widely believed to lead to opinions that are not deserving of respect or obedience.21 Second, originalists also have a vested interest in taking a critical eye at historic wrongs. This is, in a sense, a redemption project. While originalists claim that history is a guide to solving today’s problems most insist that original meaning promotes contemporary popular commitments to justice. Among other issues, originalists have argued that the methodology supports construing slavery as unconstitutional prior to the ratification of the Thirteenth Amendment,22 that Dred Scott v. Sanford23 was wrong when decided because the Court “eschewed an originalist form of interpretation,”24 as well as pathbreaking civil rights wins like desegregation of public schools,25 striking down miscegenation laws,26 sex discrimination,27 marriage equality,28 and abortion.29 The overarching principle undergirding those efforts is that originalism’s commitment to fixed meaning doesn’t preclude new applications, including those that would not have been anticipated or even fathomable to previous generations.30 (There are, of course, some originalists that resist embracing progressive wins.31) I think that most die-hard advocates of any given methodological school hope that their camp gets the big legal questions right. Originalists seem particularly sensitive to accusations that the methodology is nothing more than a cloak to further marginalize historically subordinated groups.32 There are countless examples of right-wing jurists doing exactly that—insisting past bias locks them into perpetuating bias today and claiming originalism compels as much.33 Whether that brand of originalism is, in fact, methodological originalism, I address later. For now, I can say that this phenomenon puts considerable pressure on originalists to respond to charges that bias is baked into the methodology. In other contexts, prominent standard-bearers admit as much, and in turn urge originalists to ensure the methodology proactively corrects against untoward bias against marginalized groups. This is no less a problem when it comes to transgender people. If originalism’s true aim is to answer pressing contemporary problems by looking back at the original meaning of authoritative legal texts, it is incumbent that originalists are sensitive to how contemporary political discourse can, at times, warp perceptions of the past. 2. Transgender Stakes One of my missions as a litigator was, and now as a scholar is to help bring transgender rights issues to the masses. By this, I mean, helping decision-makers and scholars who are not already die-hard allies to the cause see the value in embracing transgender people. Sometimes this means I need to translate or thread the needle for progressives who share common ideological and political commitments. Much of the time it necessitates convincing ideologically conservative folks to see how and why many of their own first principles align with pro-transgender outcomes. I acknowledge and recognize the institutional and structural barriers and biases that have relegated transgender people and other historically marginalized minorities to the margins. I think one means of helping to turn the tide is for our communities to proactively engage in meaning making projects. In the United States, for a variety of reasons, a lot of that work can and should be done in constitutional discourse. Sadly, for a long time, many transgender advocates have missed something important about our constitutional discourse. We know what we want to get out of constitutional engagement—some affirmation of our basic dignity and protection from the government and bigoted private actors. But how exactly we go about achieving this has been unclear. For a long time, litigators and scholars alike have fixated on searching for the right subject or issue to promote our overarching interests. Bathrooms. Kids. Employment. Military service. Religious exemptions. And so on. I do not think that strategy is quite right. The issue matters much less than the way we try to intervene. Among other things, I think we need to proactively develop interventions that translate transgender rights claims into the terms of popular methodologies of constitutional interpretation. Courts, scholars, and everyday Americans use the various interpretative methodologies as narrative frames to shape debates both about outcomes in particular cases and, more broadly, the metes and bounds of historically marginalized communities’ accommodation into broader society. At the end of the day, there is not really much difference between the various methodologies. As Richard Fallon writes, while the various methodologies claim to have different first-order principles, they are not static. They shift over time as a consequence of contestations between methodologies, and it is those contestations that produce meaning. Originalism shapes living constitutionalism, and vice versa.34 Given this, it is imperative that we at least attempt to translate trans rights claims into the terms of popular interpretive methodologies so that, when contestations erupt, a pro-transgender argument is articulatable in every methodology. ORIGINALIST METHODOLOGY AND IDEOLOGY Two originalisms travel in the United States today—one is a methodology the other an ideology.35 These orginalisms were both birthed as a reaction to the left-ward tilt of the Warren Court and similarly celebrate the Founding generation. But originalist methodology and ideology have different limits, aims, and possibilities. This Part begins by uplifting their common origins. It goes on to sketch out how the two originalisms travel today in our courts, the legal academe, and politics. A. Origins The 1980s gave us MTV and originalism. Fittingly enough, it is unclear whether originalism was first a joke in a law review article or a serious run at scaling back Warren Court advances by the Reagan administration. We need not take a position in that debate to trace where originalism has traveled over the years and how, in time, it split into a methodology and ideology that other than their close association with American conservatism have little in common with one another substantively. It's relatively unsurprising that the 80s birthed originalism given the decade’s overarching swing back to conservative legal and political interests after a few decades of relatively progressive if not modest progress. For the most part the 1950s, 60s, and 70s dramatically shifted the legal terrain in the United States. During this period the Warren Court and its successors led a constitutional revolution from the Left fueled by two key innovations— the notion of a living Constitution that evolves according to changing values and circumstances and a reemergence of rights as a dominant constitutional mode.36 The Warren Court issued some of the most seminal constitutional law cases of the twentieth century including Brown v. Board of Education, 37 which helped desegregate state institutions, Yates v. United States, 38 which struck down laws designed to suppress communists and many credit as ultimately leading to the decline of McCarthyism, Griswold v. Connecticut, 39 which struck down a state law designed to restrict access to contraception, Heart of Atlanta Motel, Inc. v. United States, 40 which upheld the constitutionality of the Civil Rights Act of 1964, Loving v. Virginia, 41 which deemed anti-miscegenation laws unconstitutional, Baker v. Carr, 42 which held that redistricting qualifies as a justiciable question, ultimately enabling federal courts to hear these cases, and a series of cases that furthered the work of incorporating the Bill of Rights.43 he Warren revolution reverberated into the Berger Court.44 But over time, was met by conservative resistance both in the judiciary and in the academe. Conservatives criticized the Warren Court’s crowning achievements as being untethered from constitutional text and otherwise inappropriately expanding the role of the judiciary. That said, while critical of the Warren Court, for a time, conservatives lacked a coherent response to the perceived excesses. That is, until originalism emerged in the early 1980s. There’s some evidence that originalism started as a lark. The term was first used by Paul Brest in a 1980 law review article to describe attempts to interpret legal texts in accordance with so-called “original meaning.”45 Brest’s article lampoons the notion that it is possible to objectively divine original meaning let alone that this would be a methodologically sound approach to legal interpretation.46 To this day, its debated whether Brest actually meant to take up and critique originalism as it would later be explained and deployed by legal conservatives years later. For my part, Brest’s piece appears to gesture more generally at the overreliance on history as a tool of interpretation, a critique could reasonably arise without regard to what we call originalism today given that appeals to history have been common (and regularly criticized) throughout the Supreme Court’s existence. Some commentators claim instead that originalism was developed inside or in parallel with President Reagan’s Justice Department in the early 1980s. 47 This brand of originalism drew on the work of conservative academics like Robert Bork48 and Raoul Berger.49 Overtime, originalism became a central organizing principle for the Regan Justice Department’s assault on what it perceived as the liberal federal judiciary.50 Conservatives on the Supreme Court, including Justice William Rehnquist,51 Antonin Scalia,52 and Clarence Thomas53 aggressively took up the mantel. By the time of Chief Justice John Roberts and Associate Justice Samuel Alito’s nominations in the early aughts, steadfast commitment to originalism had become a necessary qualification for conservative nominees to the high court. Today, the vast majority of conservative jurists and legal commentators hold themselves out as originalists. B. Distinguishing Methodology from Ideology I recognize that the originalist banner has been used to promote politically conservative causes and has also been invoked by some judges to reach conservative results that do not actually flow from methodological originalism’s first principles. Nevertheless, I do not believe methodological originalism is the problem. The issue is not that originalism fails to be methodological, rather, it is that there are two distinct originalisms circulating in the United States and we too often, on both the Left and Right, fail to recognize that they are different creatures that, while sometimes in conversation with each other, have different aims and constraints and also travel and operate in different ways. 1. Originalist Methodology Originalist methodology is fairly straight forward. As Lawrence Solum explains, “[a]n originalist methodology describes the practices by which the original meaning of the constitutional text can be discovered. Ideally, an originalist methodology will provide a set of best practices that yield results that can be replicated and verified.”54 It is guided by two key principles. First, that the meaning of legal texts is fixed.55 Second, that historical meaning of text has legal significance and is authoritative in most circumstances.56 While many nonoriginalists see a legal text’s historical meaning as pertinent to the overarching interpretive project,57 originalists see it as a “hard constraint.”58 There are different strands of originalism—the main difference between them is how they define and divine original meaning.59 Public meaning originalists urge that original meaning is best divined by looking at the original public’s understanding of the pertinent text at the time it was framed and enacted.60 This is divined by examining the text’s communicative content—ostensibly the content communicated to the public by the text and the publicly available context of the communication.61 This strand of originalism is built on a “conventions-based understanding of language”—meaning is regulated by publicly shared conventions and the only meaning with legal force is the conventional one.62 Some originalists take an intentionalist approach, believing that original meaning is best determined by the communicative intentions of the text’s authors.63 Others hew to so-called original methods originalism, which teaches that the original meaning of text is that which would have been given at the time of framing and adoption using the original methods of interpretation prevalent at the time.64 A close cousin is original law originalism, which holds that the original law as opposed to the original meaning of the text is binding unless it has been properly changed by procedures authorized by the original law itself.65 For the most part, originalists affirm the interpretation-construction distinction.66 They see interpretation as the activity of discovering the meaning of text. Whereas they see construction as the activity that determines the legal effect given to that meaning. For most originalists, where the text is determinate with respect to a particular issue or case—the work stops at the interpretation stage. But if the text is underdeterminant—meaning there is more than one possible outcome—then construction is necessary. The vast majority of originalists claim to be steadfastly committed to the methodology because they think it is a uniquely principled, neutral interpretive tool.67 Two reasons predominate—originalism’s supposed reliability and determinency. Originalism is reliable in the sense that it allows us to determine the meaning of text accurately and without bias by drawing upon objective semantic and historic information.68 Originalism is determinant in the sense that it suffices in and of itself to resolve most legal questions definitively.69 (Of course, critics contend that these claims of legitimacy are unfounded.70) Many originalists also insist that the methodology promotes democratic values. One way it does this is by placing limits on unelected actors, like judges, thereby preserving space for democratic decision-making.71 As Robert Bork explains, “the attempt to adhere to the principles actually laid down in the historic Constitution will mean that entire ranges of problems and issues are placed off-limits for judges.”72 Similarly, some originalists insist that originalism’s limits on Congress are also part of its democracy sustaining slant. For instance, the late Justice Antonin Scalia conceptualized originalism’s construction of constitutional rights as restraining both the courts and Congress and saw this function as key to preserving democratic values. Scalia explained this point at length in Columbia v. Heller: “The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future .”73 Absent from most originalists’ account of the methodology is what truly drives the endeavor— originalism, like all other interpretative methodologies, proactively tries to make meaning out of our world. Even taking originalists’ at their word—that text’s meaning is fixed, and that has legal significance—the means they use to fix texts’ meaning is too often uninterrogated by originalists. While historical meaning might sound somewhat objective—that which we have proof of being the prevailing understanding at the time a text was ratified or enacted—there is considerable disagreement about what exactly it is that originalists are actually doing with history. A growing cadre of critics insist that originalists are not doing right by history, at least not by the prevailing standards of history as a discipline. For example, Saul Cornell urges while “originalism focuses on the meaning of historical texts, originalist practices are largely antithetical to accepted historical methodology.”74 Cornell’s chief charge is that one cannot make serious claims about what the Constitution meant in the Founding era without employing basic methods of intellectual history.75 As he explains succinctly elsewhere, “if one wishes to understand what the Constitution meant at a particular point in the past, one needs a rigorous historical method to recover the range of meanings it might have had for various groups living at the time [and] intellectual provde[s] a tried and true method for accomplishing this goal.”76 Others charge that most judges and lawyers lack the requisite skills to do originalism. In this vein, historian Jack Rove argues that “there is good historical evidence that jurists rarely make good historians, and a theory of interpretation which requires judges to master the ambiguities of history demands a measure of faith that we, as citizens and scholars alike, should be reluctant to profess.”77 Similarly, Rebecca Piller adds that because American judges are not required to undertake training in history prior to taking the bench, they are “largely unqualified to assume the role of novice historians” and, in turn, “[t]heir lack of sophistication in the field promises to produce, at best, crude and haphazard analyses of history and, at worst, utter fabrications.”78 Further supporting this point is Alfred H. Kelly’s insight that “[m]ore often [judges acting as historians] state as categorical absolutes propositions that [historians] would find to be tentative, speculative, interesting, and worthy of further investigation and inquiry, but not at all pedigreed historical truth.”79 I agree that many originalists are ill-equipped to act as historians. However, I do not think that this is fatal to the originalist project. Originalists are not in a rigorous sense trying to do history, at least not the way that historians do it.80 Their talk about history is, as the late Justice Scalia acknowledged in his seminal article Originalism: The Lesser Evil, a meaning-making project.81 Originalists do not seriously portend that today’s most difficult legal questions can be solved by looking something up in a history book or performing nuanced historical analysis the way historians would in their own field. Instead, originalism uses the idea of our past as an anchor to limit how judges can (or not) make decisions today. Originalist history is, in this sense, an imagined past that informs how we perceive or wish our rights to be enforced in the present.82 Originalism can be a powerful methodological tool. I say this not because I think originalism uniquely produces objectively right answers. But rather because originalism is a viable, well-accepted modality for courts to make decisions in contentious constitutional and statutory cases. As others observe, originalism’s turn to history—the very act of constructing a nuanced vision of the past, adding context to otherwise obtuse higher-level principles—can create a valuable present-day forum for contemporary stakeholders to make sense of our most pressing problems.83 I draw here, in part, on the work of originalists who recognize that the methodology’s strength at least in part comes from its capacity to help make meaning of the present by reference to the past.84 On this view, the original public meaning inquiry is not simply a turn to the history books, but a substantive meaning-making exercise. A critical look at history is absolutely necessary here. Not simply because it is necessary to look at a broad set of original sources to sketch out the original public’s understanding of a given legal text, but because the very process of intentionally including a range of voices from the past ensures that exercise affirms our overarching commitment to democracy. Put another way, the original meaning inquiry presents an opportunity for originalists to proactively engage minority communities in the meaning-making inquiry. This serves a redemptive function—bringing minorities into the fold of both the present and past interpretive communities.85 Moreover, methodological originalists’ mode of meaning making is not necessarily a bad thing. Other interpretive schools take their own methodological liberties for precisely the same reason—to both guide and limit how judges construe legal texts. However, like every other methodology, it is necessary for originalism to be responsive to concerns that its meaning project must be capacious enough to account for present circumstances. In particular, the fact that our contemporary public includes as full citizens persons who, in the various Framing generations, were not considered as such. Among others, women as well as Black and transgender persons. If originalism’s goal is to divine meaning as fixed by the past, and that exercise is supposed to be one that promotes our current constitutional republic, then the burning question is whose past do we consider and whose, if any, do we not take into account.

#### Originalism, properly wielded—some may argue—can be used to combat the racial discrimination the aff critiques.

Rebeiro 23 – Associate Professor of Law, J. Reuben Clark Law School, Brigham Young University. (Forthcoming, Bradley, Frederick Douglass and the Original Originalists , 48 Brigham Young University Law Review (forthcoming 2023) BYU Law Research Paper No. 22-06 ) NAR

Abstract: Constitutional scholars incessantly grapple over the significance of the Constitution’s original meaning. More specifically, they are preoccupied with, on the one hand, what that meaning is (if such meaning exists) and, on the other hand, the exact nature of that meaning’s authority (if any) over the Constitution and its interpreters. But this debate is hardly novel. In fact, one of the most compelling voices in U.S. history was immersed in similar debates and, out of the constitutional sparring of his time, forged an arresting theory of constitutional interpretation. Frederick Douglass, once a fierce opponent of the U.S. Constitution, evolved into a defender of the Constitution with a robust theory of constitutional interpretation that addressed the constitutional evil of slavery. For example, in 1847, Douglass stated: “The Constitution I hold to be radically and essentially slaveholding . . . [t]he language of the Constitution is you shall be a slave or die.” Yet, five years later in his famous speech, “What to the Slave is the Fourth of July?”, Douglass declared: “interpreted as it ought to be interpreted, the Constitution is a glorious liberty document.” Because Douglass was primarily a political and constitutional actor that never wrote a treatise of jurisprudence, his understanding of constitutionalism must be gleaned from his many speeches and other writings. I therefore take on the task of welding together these speeches and writings to demonstrate how Douglass’s theory fuses historical meaning, established legal rules of interpretation, natural rights principles, and a conception of justice into a cohesive approach that addresses the problem of constitutional interpretation and construction. Though Douglass was one of the most prominent political thinkers and constitutional actors of the 19th century, his constitutional thought has been overlooked by most legal scholars and mostly mischaracterized by political scientists. Due to the aforementioned lack of a singular treatise on the subject, as well as Douglass’s constitutional transformation over the course of his life, this comes as no surprise. Legal scholars tend either to dismiss his constitutional theory as incoherent or to assume that Douglass’s reformed theory was not sincere, but merely a smokescreen for political purposes. Others have referred to Douglass as a living constitutionalist or offered wholly new categories to explain Douglass’s position, such as “reform textualism.” However, Douglass’s theory, similar to his contemporaries, may be seen as anticipating the modern shift to originalism. But this claim challenges the conventional scholarly wisdom in two ways. First, the current literature mostly characterizes Douglass as, at the very least, anti-originalist. Second, though Douglass’s theory shares many elements with originalism, originalism’s current formulations leave little room for philosophical inquiry, which Douglass’s theory admittedly does. His theory does not fit perfectly into any of the many variations of originalism today, thereby offering present-day originalists new possibilities. I will thus refer to Douglass’s theory as “natural rights originalism.” Natural rights originalism deviates most importantly in not abandoning the original philosophical principles that animated the Constitution’s framing. This theory, the product of an insatiably inquisitive mind, transformed Douglass’s constitutional thinking—no longer was the Constitution an instrument of oppression, but one of freedom.

#### Leaning on Douglas, as opposed to Bell, might be grounds for an abolitionist constitutionalism (something that CRT might prevent).

Roberts 19 [Dorothy E. Roberts, George A. Weiss University Professor of Law and Sociology, University of Pennsylvania; Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, University of Pennsylvania Law School; Professor of Africana Studies and Professor of Sociology, University of Pennsylvania School of Arts &amp; Sciences, 11-8-2019, “Abolition Constitutionalism” Harvard Law Review Volume 133, Accessed 1-26-2021, https://harvardlawreview.org/2019/11/abolition-constitutionalism/]

Every advance toward black liberation since the Civil War ended has been met with formidable political and judicial backlash.415 Critical race scholar Professor Derrick Bell observed that the Reconstruction Era’s constitutional compromise with respect to black people’s freedom reverberates through contemporary adjudications of civil rights violations “in which the measure of relief is determined less by the character of harm suffered by blacks than the degree of disadvantage the relief sought will impose on whites.”416 Bell’s writings, which within legal scholarship are some of the most piercing critiques of constitutional hypocrisy, became increasingly pessimistic about the chances for racial justice in America.417 He pointed to white citizens’ persistent refusal to abdicate their racial domination at the sacrifice of black people’s rights.418 Despite decades devoted to civil rights protest and litigation based on constitutional guarantees, the majority of black Americans saw their economic and political conditions worsen as the Court reinforced institutionalized forms of subordination.419 In the end, Bell proposed that we approach the Constitution with “Racial Realism,” based on the realization that “Black people will never gain full equality in this country.”420 How can we reconcile Bell’s sobering assessment of constitutional law as inevitably denying freedom to black people with an abolition constitutionalism that envisions their future freedom? Some guidance might be found in the thinking of an earlier abolitionist. Similarly to Bell, Frederick Douglass acknowledged the proslavery intent of both the white framers who drafted the Constitution and the white judges who interpreted it.421 Douglass was also aware of white southerners’ ironclad resolve to preserve the Slave Power and believed it would take armed struggle to overcome it.422 At the same time, Douglass refused to be bound by an understanding of the Constitution that supported slavery.423 He recognized that court-made doctrines that maintained white supremacy were not constitutionally mandated and could be overturned by a counter-constitutionalism that affirmed freedom and democracy.424 Racial Realism counsels against any faith in the moral power of the Constitution alone to dismantle the prison industrial complex.425 Yet this conclusion need not preclude activists from imagining an alternative constitutionalism as part of a movement to abolish prisons. It is the commitment to building a radically different society, one that has eliminated carceral systems and the racial capitalist order they support, that makes an abolition constitutionalism realistic. This mash-up of Racial Realism and abolitionist vision, along with its interpretative methodology, forms a framework for evaluating the Court’s anti-abolition jurisprudence.

#### b) Black Feminist Legal Theory

#### Such a jurisprudence builds off of-and challenges CRT. The extent to which these critiques constitute an alternative jurisprudence, or simply an extension of what CRT jurisprudence looks like will be up for debate.

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Critical race theorists, black feminists in particular, share these basic critiques but find CLS inconsistent and theoretically unsatisfying. It is inconsistent because CLS as a whole is unable to sustain racial critiques of its own professional norms, hierarchies, and ideas, even though crits have long been known for viewing legal academe as a site of resistance. This is best exemplified by the hostility with which internal critiques of CLS by feminists and “race crits” were greeted at annual conferences on CLS (Crenshaw et al. 1995, xxii–xxiii). Would-be critical race theorists find CLS theoretically unsatisfying because at times, though by no means in every instance or by all proponents, these theorists view racial analysis of the law as falling within the “instrumentalist” (xxiv–xxv) view of the law they have long critiqued. Other postmodern CLS advocates, adopting a social constructionist view of race that amounts to a “vulgar anti-essentialism” (xxvi), tend to downplay, neglect, or trivialize the interrelationship of law and race altogether. Critical race theorists, heavily influenced by Derrick Bell’s radical critique of liberal integrationism and the law (see Crenshaw et al. 1995, xx), seek to offer a corrective to these modes of thinking, offering new insights into the way law produces racial identity and how it functions to contain and condition racial politics. Critical race black feminists, like other feminists working within the critical race theory tradition, challenge, augment, and extend critical race theory’s basic frameworks to address questions of class, gender, and sexuality. The use of nontraditional writing genres has been a primary strategy for critical race theorists in general and black feminist critical race theorists in particular in developing their analyses and challenging legal methodology. Many critical race theorists, for instance, employ irony, storytelling, and the relaying of personal experiences in an effort to affront and expose the law’s false presentation of itself as linear, objective, unyielding, and timeless (Wing 1997, 3; Delgado and Stefancic 2000, xvii). As black feminist legal theorist Patricia J. Williams observes, “Legal writing pre- sumes a methodology that is highly stylized, precedential, and based on deductive reasoning. Most scholarship in law is rather like the ‘old math’: static, stable, formal—rationalism walled against chaos” (1991, 7). Williams’s approach (what she calls “‘a model of inductive empiricism, borrowed from—and parodying—systems analysis’”; 1991, 7) integrates insights from the humanities and social sciences as well as the law and engages individuals in the production of legal reasoning and knowledge; moreover, it uses various types of stories and personal encounters to make the experience of legal “others” comprehensible (7–8). In one of her notable anecdotes, for instance, Williams explains how she and fellow law professor and key CLS figure Peter Gabel differently negotiated the leasing process upon moving to New York City (146–48). Gabel, eager to diminish the cool proceduralism and implied suspicion inherent in legal transactions, eschewed the typical requirements for executing a lease, paying $900 to secure an apartment without any documentation of the transaction whatsoever (146). Williams, on the other hand, “rush[ed] to show good faith and trustworthiness, . . . [signing] a detailed, lengthily negotiated, finely printed lease” (147). “Unlike Peter [Gabel],” she explains, as a black woman, “I am still engaged in a struggle to set up transactions at arm’s length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce” (148). Williams uses her personal experiences to ground her analysis in the law on a range of topics, from equal opportunity and affirmative action to prejudice and the Tawana Brawley scandal (see also Williams 1995). Her work The Alchemy of Race and Rights (1991), now canonical in the fields of feminist and critical race legal studies, is a meditation on class hierarchy and the raceing and gendering process of the law. It also served as a powerful rejoinder to CLS scholars who advocated the abandonment of rights talk and criticized the pursuit of legal rights by progressives. Intersectionality The efforts to expand rights have been practically addressed by a range of black feminist legal theorists such as Regina Austin (1989), Dorothy Roberts (1997), and Judy Scales-Trent (1989), who have, among other things, argued for an explicitly black feminist/womanist jurisprudence, exposed discrimination against drug-addicted mothers, and championed equal protection of black women under the Constitution, respectively.4 The most influential theoretical contribution, however, has been the emphasis on “intersectionality,” a term coined by critical race black feminist Kimberle´ Crenshaw (1989). At the outset, it is important to state that Crenshaw’s assessment fits squarely within a trajectory or body of theorizing and research on black women that tries to capture black women’s multidimensional experience of oppression. We have witnessed this ongoing conversation regarding black women’s political experiences through discussions of double jeopardy (Beale 1970), multiple jeopardy (King 1988), “simultaneous oppressions” (Combahee River Collective 1982, 13), race as a metalanguage (Higginbotham 1992), and black feminist standpoint theory (Collins 1990). This connection is made most visible in Crenshaw’s reference to But Some of Us Are Brave. In her well-known piece “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” Crenshaw notes, “I have chosen this title [All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave] as a point of departure in my efforts to develop a Black feminist criticism because it sets forth a problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis” (1989, 139). She critiques a “single axis” (140) framework within the law that renders illegible discrimination and violence against black women who do not fit neatly into categories of race and gender because these categories are implicitly coded male and white, respectively. Legal scholars have developed the framework of intersectionality to great effect. Today, intersectionality is a well-established paradigm that informs research regarding women of color and their experiences with respect to race, gender, and other categories of identity. It has been and continues to be utilized across such diverse fields as human development, sociology, psychology, medicine, and political science, demonstrating the relevance of this approach for conducting research, producing contemporary theory, and developing policy prescriptions. Elsewhere, scholars and activists from different parts of the globe are finding ways to utilize the unique insights supported by this approach. One source notes that Crenshaw’s “work on race and gender was influential in the drafting of the equality clause in the South African Constitution. In 2001 she authored the background paper on Race and Gender Discrimination for the UN World Conference [against] Racism [WCAR] and helped facilitate the inclusion of gender in the WCAR Conference Declaration” (Thomas 2004, 4). Discrimination Although intersectionality has been utilized as a research paradigm across a broad range of disciplines, intersectional analysis has been particularly useful in legal applications in terms of workplace harassment and discrimination. In her groundbreaking work on the sexual economy of slavery, for instance, Adrienne Davis (2004) positions the multiple dimensions of black women’s slave labor—their sexual labor in terms of abuse and forced reproduction, their economic exploitation in working to generate marketable goods, and their role in performing a range of work, not just domestic labor, in order to maintain plantations—as a foundational precursor of modern-day sexual harassment. As she contends, “Foregrounding the interplay between slavery’s political economic structure and its sexual norms . . . sheds light on the plantation complex as a vast workplace and one of the earliest American sites of institutionalized sexual harassment. The labor relation as defined by slavery incorporated sexual relations for purposes of pleasure, profit, punishment, and politics” (462–63). For Davis, understanding slavery, and plantations in particular, as the location of some of the earliest forms of sexual harassment is an important historical corrective that helps us to expand our understanding of the changing operation of harassment over time as well as our definition of feminist resistance to this type of sexual oppression. As she explains, taking into account African American women’s resistance to sexual harassment in slavery confounds our understanding of early feminist activism, which is typically equated with white women’s activism (464–67). Most treatments of slave resistance to sexual terrorism fail to capture “enslaved women as gender activists operating independently of feminism’s official white foremothers or, even more radically, as their predecessors in recognizing and resisting gender subordination” (465). Davis’s framework is consistent with the observations of Beverly Guy-Sheftall (2002), Kimberly Springer (2002), and others who argue against the wave theory of feminist history; all note that it focuses on white female political and social activity. Bringing margin to center (hooks 1984), we find that, for all of us, our feminist foremothers are, in fact, black. Davis’s assessment of slavery as the most pernicious system of sexual harassment also foregrounds the importance of geography in rendering more nuanced readings of sexual harassment according to space and place. Sexual harassment within slavery highlighted the compounded vulnerability of women tied to certain forms of labor and defied easy demarcations between the public and the private and our definition of sexual harassment as something that happens only in nondomestic work environments (Davis 2004, 462–63). In a similar vein, in her work “The Harm That Has No Name,” Deirdre E. Davis (1997) explores street harassment, as opposed to workplace harassment, as a form of “sexual terrorism” (193). She identifies street harassment as part of a larger system of institutions and cultural and legal practices that support sexual violence against black women. In situating or naming street harassment in this way, she, along with other black feminist lawyers and scholars, contributes to feminist interventions to reframe seemingly personal experiences in terms of their political effects and, more important, to build legal bases for their resistance. Davis also emphasizes that black women’s history of enslavement grounds their experiences of harassment in ways that not only amplify the experiences of other women but also make them qualitatively distinct (195). For Davis, harassment rises to the level, moreover, of what Williams (1997) has famously described as “spirit murder,” or the psychological assault that black women endure because of everyday encounters with gendered racism or “micro-aggressions” (199). More recently, feminist legal theorist Imani Perry (2007) has examined the relationship between sexual harassment and “hollering” or street calling. Others outside of legal academe, such as political scientist Hawley Fogg-Davis (2006), emphasize its effects on lesbian women and call for solidarity among heterosexual and lesbian women in fighting this type of harassment. Conclusion Despite the rich and varied history of black feminist legal theory, the existing terrain presents several challenges. Ironically, the current leanings toward postfeminist, post–civil rights ideology threaten to overtake the conceptual terrain of black feminism either through devaluation and dismissal or through misappropriation. In closing, I will focus on the latter, that is, misappropriation. Scholars across the academy now invoke intersectionality only to divorce it from its connection to generations of prior theorizing and research by and about black women, abstracting its meaning so that it applies to any and all forms of difference or identity.5 Some scholars, for instance, are now producing work under the rubric of intersectionality while talking about questions of class and white women in various settings, a discussion that more properly falls under the designation whiteness studies. Or worse yet, scholars are not focusing on race at all or are treating it cursorily.6 How is it that scholars can publish work on intersectionality without citing much or citing only selectively the broad body of black feminist scholarship produced under its purview? How can intersectionality, a product of black feminists’ efforts to challenge and unravel the gender subordination constitutive of so much of black studies and politics as well as the racial subordination that has been so central to much of mainstream feminism, be used to silence, once again, the voices of black women? If certain strands of postfeminism operate by utilizing feminist ideas or representations in order to hail feminism’s modern irrelevancy (McRobbie 2007, 28), the current misappropriation of intersectionality functions as a post–black feminist politics that trades on the currency and intellectual sexiness of the term while displacing black female subjectivity. Indeed, postfeminist, post–civil rights approaches to intersectionality ensure that all the women will stay white and all the blacks will stay men, even as scholars advance their careers by misappropriating black women’s intellectual labor. The obvious question, of course, is: will some of us stay brave? We need to be brave enough to challenge the people, particularly white feminists and their black interlocutors, positioned to shape the development of intersectionality research (and I am not just talking about black women being enlisted in that bravery).7 Part of what is necessary to continue to facilitate black feminism’s transformation of the academy is something that seems counterintuitive to the current moment, with its proclamations of new horizons for racial integration, given the election of Barack Obama as president of the United States, namely, the development of black feminist networks, organizations, online media outlets, journals, and presses. This call is certainly not new. But in the current seduction of postfeminist, post–civil rights ideology, such calls seem anachronistic for some, to be sure. For international audiences, for instance, the visibility of black women’s literature, among other things, renders a false image of black women’s studies’ backing in U.S. colleges and universities in terms of structural support, such as programs or departments (Guy-Sheftall and Hammonds 2005, 65–66). But what Hull and Smith (1982, xxiv–xxv) relay as some of the primary elements of producing black women’s studies scholarship and practice, namely, networking and institution building among black feminists, is still in short supply. Where it has been present, as in, for instance, the development of the Association of Black Women Historians, it has proven beneficial on a number of fronts. This organization provides mentoring for its members, contacts for book publishing—a requirement that is increasingly more common in academe, even as presses are shrinking their output—and the legitimation of their work through prizes and other forms of professional acknowledgment. Black women in other disciplines have developed similar networks, such as the Association for the Study of Black Women in Politics (in political science) and the Collegium of Black Women Philosophers. To be sure, in addition to the efforts to integrate programs and departments, it is critical for black female scholars in law schools and other contexts to organize in independent organizations and collectives. We must make conversing among ourselves about the plight of black women our first and most urgent priority.

#### Just because the two share themes, however, does not mean that they are synonymous. Black feminist legal theory is distinct from CRT.

Kupupika 21 – J.D. candidate at UVA Law interested in making an impact in the legal field through research, critical thinking, and a passion for service (Trust Kupupika, "Shaping Our Freedom Dreams: Reclaiming Intersectionality through Black Feminist Legal Theory," Virginia Law Review Online 107 (2021): 27-47) NAR

Similar to its criticisms of CLS, a significant Black feminist critique of feminist legal theory was its lack of a developed racial analysis.1 5 Feminist legal theory's reliance on essentialist views of womanhood demonstrates this shortcoming. 16 In Race and Essentialism in Feminist Legal Theory, Angela P. Harris critiques the gender essentialism within the writings of prominent feminist legal theorists Catharine MacKinnon and Robin West. Harris agrees with the utility of categorization within feminist legal theory, but she exposes the implicit essentialism of even a purposefully race-neutral approach to the category of "women." Harris notes that "feminist legal theory, ... despite its claim to universality, seems to" define the category of "women" as "white, straight, and socioeconomically privileged." 17 Harris highlights the differing approach of Black feminist legal theory, which intentionally constructs categories as "explicitly tentative, relational, and unstable." 8 In addition to embracing multiple consciousness, 19 Harris outlines that Black feminist legal theory offers "at least three major contributions" to feminist legal theory, which include "the recognition of a self that is multiplicitous, not unitary; the recognition that differences are always relational rather than inherent; and the recognition that wholeness and commonality are acts of will and creativity, rather than passive discovery."20 Despite these differences, however, there are many similarities between Black feminist legal theory and CRT. This is largely because many of CRT's foundational scholars, such as Kimberl6 Crenshaw, also provide the backbone of Black feminist legal theory.2 1 In Angela P. Harris's paper, Foreword: The Jurisprudence of Reconstruction, she asserts the Black feminist acceptance of CRT as a "critical social science" that emphasizes that "[t]he crisis in our social system is our collective failure to adequately perceive or to address racism."22 Specifically, Black feminist legal theory agrees that this crisis is "caused by a false understanding of 'racism' as an intentional, isolated, individual phenomenon, equivalent to prejudice" instead of "as a structural flaw in our society." 23 Harris notes that CRT's commitment to postmodernist skepticism of law's neutrality, when juxtaposed with its modernist aspirations to achieve racial liberation, creates a tension within the theory. Black feminist legal theory responds to this tension by offering a "jurisprudence of resistance."25 Cheryl I. Harris's paper Law Professors of Color and the Academy: Of Poets and Kings asserts that a jurisprudence of resistance requires legal scholars of color "to tell a different story that is neither known or familiar and indeed may be disturbing, annoying, and frightening." 26 Harris does not fret whether she is taking a postmodernist or modernist approach; instead, she focuses on her responsibility as a Black woman within the legal academy to uplift "a jurisprudence that resists subordination and empowers."2 7 She achieves this in her paper by relying on the CRT-inspired narrative format,2 8 sharing her experience as a Black female law professor at a time when she was one of few. Harris ultimately acknowledges that while "[t]here is much room for debate as to how we achieve" social transformation, the task should be "to take risks, raise contradictions, raise consciousness, and develop an oppositional role-not for its own sake, but for the sake of those of us who remain under the burden of inequities and injustice in the social order." 2 9 Evident through its departures from CLS, feminist legal theory, and CRT, Black feminist legal theory presents a distinct lens through which Black feminist legal scholars have shaped a liberatory practice. This practice ultimately pairs critical legal analyses with social awareness drawn from Black feminism. A close examination of intersectionality can further flesh out the defining tenets of Black feminist legal theory.

### 3) Critiques of CRT

#### There are numerous critical perspectives that have major problems with CRT and its theoretical presuppositions. These come from a variety of perspectives, only a few of which have been reproduced here. Huge careers are made documenting the benefits and deficiencies of CRT, and to be honest an entire year’s resolution could be had on “Resolved: CRT is a good theory.” This conversation can involve a number of critical perspectives {even to the extent that they do not offer an ‘alternative’ jurisprudence or framework for examining law}.

#### On the flip side, and beyond direct engage with CRT, one genre of argument might be expected to involve a number of critics against the invocation of the term ‘CRT’. More generally, this line of argument might suggest that there is a huge risk in using the term CRT. One form of this argument might be that it encourages right-wing backlash. Another form, might have actual critiques and concerns about what CRT could do to American jurisprudence.

#### This critique, for instance, may suggest that CRT prevents more than a casual reform of our existing system of legal jurisprudence, and might argue that it threatens liberalism as we know it.

Pyle 99 – (Jeffrey J. Pyle, "Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism," Boston College Law Review 40, no. 3 (May 1999): 787-828 ) NAR

In recent years, critical race theory ("CRT") has come to occupy a conspiauous place in American law schools.1 The theory holds that despite the great victories of the civil rights movement, liberal legal thought2 has consistently failed African Americans and other minorities. 3 Critical race theorists attack the very foundations of the liberal legal order, including equality theory,4 legal reasoning, 5 Enlightenment rationalism6 and neutral principles of constitutional law.7 These liberal values, they allege, have no enduring basis in principle, but are mere social constructs calculated to legitimate white supremacy.8 The rule of law, according to critical race theorists, is a false promise of principled government, and they have lost patience with false promises. For them, the practice of law is just another front in the fight to achieve racial "liberation.' 0 The "race-crits," as they call themselves," identify less with the egalitarian integrationists who led the non-violent civil rights movement than with the black nationalists of the late 1960s who demanded "black power.'12 While critical race theorists purport to share the liberals' goal of racial and social justice, they view that endeavor not as a matter of principle, but as a matter of simple group interest to be achieved "by any means necessary." 3 They have no qualms arguing for jury nullification on the basis of racial affinity,14 hate-speech codes which criminalize bigoted expression 15 or group rights doctrines which would allow victims of historic racism to sue whites as a group for reparations. 16 The harmful precedents such measures would establish is of little concern to the race-crits-their goal is minority advancement at all costs. 17 This Note criticizes CRT as an unprincipled, divisive and ultimately unhelpful attack on the liberal tradition in America.18 First, race-crits fail to offer replacements for liberalism's core values.19 Rather, their postmodern rejection of all principles leaves them entirely "critical," while their narrow, interested stance renders them mere advocates within the liberal legal system, not theorists who might offer better alternatives. 20 Second, despite their undeniable energy, the racecrits are remarkably unhelpful as legal and political advocates within the liberal system. Their wholesale rejection of the rule of law limits their persuasiveness as legal advocates, while their dismissal of America's guiding principles makes them politically ineffective. 2 ' In the process, the race-crits' racialist, blame-game rhetoric does much to alienate potentially helpful whites.22 My disagreement with the race-crits has less to do with their long-term goals than with their diagnoses and solutions. Disadvantage in the United States continues to fall too heavily on racial minorities. 2 Inequities in criminal justice,24 immigration law25 and welfare "reform" remain rampant,26 but are due to much more than simple bigotry.27 The most important political problem today is to prepare all persons to survive and prosper in a service-oriented, information-driven economy.28 Inequalities in wealth are growing because low-skilled jobs are leaving for third-world shores, while better paying jobs increasingly require advanced education.2 9 Addressing these problems is a tall order, and will not be advanced very far by academic demands for race-based benefits. Indeed, the very idea of race-based measures as a remedy for economic disadvantage is collapsing as Americans come to think less in terms of black and white and more in terms of a diverse rainbow of colors, with many hues in between.3 So long as race was a reasonable proxy for disadvantage, as it was in the wake of de jure segregation, identity-group remedies like race-based affirmative action made a great deal of sense.3 1 But, as the black middle class has grown and Americans have come to recognize wide economic and cultural differences within (and not just between) ethnic groups, such claims have lost some of their force.32 Thus, when critical race theorists treat civil rights law as a species of interest-group politics, they surrender the moral high ground of constitutional principle and risk being seen as just another group clamoring for benefits.33 Such advocacy does nothing for disadvantaged minorities in America.

#### These critiques may suggest that jurisprudential methods that prioritize political issues over “objective” criteria risk undermining the rule of law generally, and encouraging a swivel toward revolutionary violence.

Frohnen 20 – Professor of Law, Ohio Northern University College of Law, Senior Visiting Fellow, Center for the Study of Statesmanship (Bruce P. Frohnen, "Augustine, Lawyers & the Lost Virtue of Humility," Catholic University Law Review 69, no. 1 (Winter 2020): 1-22) NAR

In a recent article in The Chronicle of Higher Education, Yale law professor Samuel Moyne laments the failures of "judicialized progressivism."I Moyn calls for law school reforms to address the fact that they no longer produce sufficient "liberal results" to make their training consistent with elite students' social justice ideals.2 The goal of making law schools "staging grounds for social change" undermining "unjustifiable hierarchies" requires, in Moyne's view, that law schools train lawyers to "demystify" the "rule of law" (a phrase Moyne himself uses only ironically) to show its "disservice to the interests of ordinary people."3 Moyne sees such work as humbling for lawyers because it questions the legitimacy of the meritocracy at whose apex they supposedly sit. It seems more accurate to say that it places those lawyers who choose his path above the meritocracy itself, condemning not their own status, but rather the legal order.4 The clear implication is that the moral choice for members of the legal profession in both practice and academia is to disrupt legal conventions and structures in the name of greater social justice. Is this the proper attitude and goal for lawyers? My contention here is that this attitude has served to undermine and even cause us to forget certain fundamental truths regarding law. These truths include the following: First, for every society, "order is the first need of all."5 People require sustained, consistent rules governing their interactions in order to go about their lives in peace. Those most relevant are the fundamental, grounding norms, such as promises must be kept, especially when memorialized in contracts, and the state must be looked to primarily as the enforcer of settled rules; these norms make peace and civil government possible.6 Classical liberal thinkers argued that the only alternative to general enforcement of such norms is return to a pre-political "state of nature."? Even the radical Jean-Jacques Rousseau, who yearned for such a return, acknowledged that it would involve destruction of social order and, with it, civilization. 8 Second, the laws we all must follow are not and cannot be perfect in any sense; they cannot be perfectly rational, wise, effectual, or just. As products of flawed human beings, both laws and legal procedures are liable to mistake and even ill will, such that tragedy and injustice will stalk all that we do, even in the halls of justice. The process always will be imperfect; the law always will miss the mark of pure justice. 9 Third, as an inescapable consequence of these two basic truths and their effects on daily life, there always will be a danger of illegitimacy to the law, and hence order in society. At the very least, political institutions require a Weberian brand of political legitimacy whereby the people's beliefs or confidence lends authority to those in positions of power sufficient for them to rule. 10 Should the people, or even a substantial part thereof, come to believe that the laws are merely expressions of power, that they are tools of some ruling class with no inclination to serve the common good, social trust will disintegrate. Law and social order will soon follow, leading to either revolution or chaos, in which only force and fraud can rule. 1 My contention is that lawyers have willfully forgotten these truths. The how and why are as simple as they are contested: many lawyers, both secular and religious, prefer to practice law as political advocacy because in this way they can see themselves as warriors for social justice. Unfortunately, their practice rests on deliberate ignorance of law's nature as a flawed, limited, but necessary tool for maintaining order, rather than a means of making society truly, fully just. Consistently denied success in their utopian endeavors, lawyers respond not by rethinking those endeavors, but by calling into question the legitimacy of law. Some might consider the motivating factor here to be disappointment or righteous anger. It seems more accurate, however, to see it as a dangerous, overweening pride causing one to refuse to rethink one's own presuppositions in light of experience. The antidote to this problem is a resuscitation of that old Christian virtue of humility. Here I begin with a brief discussion of the nature of humility as a virtue. I proceed to examine the radical critique of law in its most overtly political, secular forms. I then lay out the elements of radical political theology which I argue undergird radical legal critiques of both secular and religious varieties. I proceed to a more detailed discussion of the political theology provided by the radical (and much beloved) Catholic lawyer Thomas Shaffer. In the section that follows I use the work of Saint Augustine, as well as observations on the nature and limits of law taken from legal practice, to show the intrinsic weaknesses of Shaffer's perspective and its secular offshoots. I then build on this critique through an examination, perhaps surprisingly, of the practical necessity of humility assumed by the Model Rules of Professional Conduct (MPRC). I close with some observations on the necessity of Christian attitudes and virtues to encourage humility and the humble but necessary lawyerly task of helping people get on with their lives without disturbing fundamental social peace.

## Topic Checklist

1) Is it a legal topic? ✔

2) Does it have a summary explaining the rationale for the topic? ✔

3) Does it outline the core controversy? ✔

4) Does it describe why the topic is valuable to debate? ✔

5) Does it provide sample resolutions? ✔

6) Does it provide sufficient solvency advocates?\* ✔

7) Does it provide sufficient aff ground?\* ✔

8) Does it provide sufficient negative ground?\* ✔

9) Does it address potential uniqueness concerns in a satisfactory manner?\* ✔

10) Is at least one of the authors a current member of the college debate community? ✔

11) Is the evidence for advocates and other areas recent?\* ✔

\* = Some of these questions are inappropriate given the alternative conception of stasis offered by the resolution. For example, asking “Does it address potential uniqueness concerns” presumes that legal topics are about policy platforms, instead of advancing legal theories; and asking if there are “recent advocates” inappropriately constraints the creativity of our students from being their own advocates. To that extent that we are willing to dig deeper on why these are important questions to ask in a policy-focused resolution, this alternative resolution resolves those concerns. If we are interested in a timely, educational, resolution that provides an equal shot for both teams to win the round, then this topic fits the bill.

1. Frank H. Lane, “Faculty help in intercollegiate contests,” *Quarterly Journal of Speech* 1, no. 1 (1915), 14. [↑](#footnote-ref-1)
2. Consider, for example, J.R. Pelsma’s 1919 observation that “The employment of a professional coach is attended with so many possibilities of evil that we are glad that his ‘days are in the sere and yellow leaf.’” Pelsma’s less-than prophetic pronouncement of the demise of coaching not withstanding, it is clear that early instructors of debate teams were well aware of the dangers in this tension. See J.R. Pelsma, “Questionnaire on Debating,” *The Quarterly Journal of Public Speaking: The Official Organ of the National Association of Academic Teachers of Public Speaking* 2 (1916), 131. [↑](#footnote-ref-2)
3. Or, if it does happen in the form of the “hired gun,” this is not something anyone will defend pedagogically. And if they would, I’d be more than happy to hear the arguments in favor of it. [↑](#footnote-ref-3)
4. I use these terms with scare quotes intentionally. Other ways to describe this tension has been through “Performance” debate and “Plan” debate, or “Alternative” debate, and “Traditional” debate. There are a number of ideological assumptions baked into the terms used to describe either side in this exchange, but I believe “New” debate aptly attends to the historicity of emergent debate practices (beginning most notably within the Louisville Project in 2001) counterposed against “Old”—but nevertheless evolving and reacting—styles/modes of debate. See Shanara Rose Reid-Brinkley, “The Harsh Realities of" Acting Black": How African-American Policy Debaters Negotiate Representation Through Racial Performance and Style,” PhD diss., University of Georgia (2008). Particularly Chapters 3 and 4. [↑](#footnote-ref-4)
5. And sometimes, when the results have not been favorable for “Old” debate, they have set in motion plans like the “Policy Research League” that replicate historical practices of white flight. Thankfully (at present) plans like the PRL seem to have stalled. [↑](#footnote-ref-5)
6. Tiffany Yvonne Dillard-Knox, “Against the grain : the challenges of black discourse within intercollegiate policy debate,” *Electronic Theses and Dissertations*, Paper 2161 (2014), 69. [↑](#footnote-ref-6)
7. Whether “Old” debate will vote for this resolution is an open question. In my experience as a coach, often on the side of going for framework there is a somewhat persuasive claim made by debaters (and encouraged by their coaches) that debaters are agnostic about the content of the resolution, and in reality, they would be fine with any topic as long as there is an agreed upon point of stasis. But in practice there is an overwhelming preference for a certain type of resolution, the policy/plan focused type. Nevertheless, I am hopeful that the case can be made–coach to coach, educator to educator–that something can and should change. [↑](#footnote-ref-7)
8. Bell’s dissent from the majority decision in *Brown v. Board* is reprinted from: Derrick A. Bell, “Bell, J., dissenting,” in *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision*, ed. Jack M. Balkin (New York: New York University Press, 2002): 185-200. [↑](#footnote-ref-8)