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## How Critical Race Theory Marginalizes the African American Christian Tradition

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# HOW CRITICAL RACE THEORY MARGINALIZES THE AFRICAN AMERICAN CHRISTIAN TRADITION

Brandon Paradise\*

*This Article offers the first comprehensive account of the marginalization of the African American Christian tradition in the movement of race and law scholarship known as critical race theory. While committed to grounding itself in the perspectives of communities of color, critical race theory has virtually ignored the significance of the fact that the civil rights movement came out of the Black church and that today more than eighty percent of African Americans self-identify as Christian. In practical terms, critical race theory's neglect of the Christian tradition has meant that arguments developed in race and law scholarship are sometimes incompatible with the deeply religious normative frameworks that many Black Americans bring to bear on issues of law and justice. As a result, there is a significant disconnect between race and law scholarship and the comprehensive normative commitments of the community whose concerns that scholarship seeks to address. By offering the first comprehensive account of this disconnect, this Article supplies an important foundation for scholars who wish to close the gap between race and law scholarship and the larger African American community.*

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## INTRODUCTION

Although joined by secularists, the civil rights movement was fundamentally a religious movement: born in the Black church and powered by the Black prophetic tradition.<sup>1</sup> Marching together in prayer and song,<sup>2</sup> the brave women and men who confronted and overcame the evil of racial apartheid did so with confidence that God was on their side and that victory against the evil of racism would, whatever the cost, ultimately be won.<sup>3</sup> Yet, notwithstanding the undeniable and powerful role that the African American Christian tradition played in defeating the evil of Jim and Jane Crow, and notwithstanding the still central role of faith for overwhelming majorities of Black people,<sup>4</sup> most race and law scholarship fails to articulate religiously grounded normative sources.

A thoughtful observer might assume that the marginalization of the African American Christian tradition in race and law scholarship reflects a general trend in American society toward secularization in the years following the civil rights movement.<sup>5</sup> A thoughtful observer might also assume that race and law scholarship neglects African American religious sensibilities because academics are, on the whole, less religious and more secular than the general population.<sup>6</sup> Yet, even if accepted, neither of these

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1. DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 1-8, 86-97, 97 (2004) (“What is remarkable about the civil rights movement, and what makes it most like one of the great historic revivals, is that the enthusiasm moved out of the church and into the streets.”).

2. See HAROLD A. CARTER, *THE PRAYER TRADITION OF BLACK PEOPLE* 106-13 (1984).

3. Compare CHAPPELL, *supra* note 1, at 3-5, 4-5 (“The conviction that God was on their side comes through in many statements by black movement participants during the 1950s and 1960s . . . Experiencing and witnessing . . . [“conversion experiences during the mass meetings and demonstrations”] . . . gave participants confidence, not simply in the righteousness of their protest, but also in the effectiveness of that protest in the world.”), with MARTIN LUTHER KING, JR., *Nonviolence and Racial Justice*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 9 (James W. Washington ed., HarperCollins 1991) [hereinafter KING, JR., *Nonviolence and Racial Justice*] (explaining the non-violent protest movement in terms of the Christian tradition and as rooted in the “belief that God is on the side of truth and justice”).

4. See, e.g., Michelle A. Vu, *African-Americans Most Religiously Devout Group*, CHRISTIAN POST (Feb. 2, 2009 10:30 AM), <http://www.christianpost.com/news/african-americans-most-religiously-devout-group-36736/> (citing survey results that a vast majority of African-Americans consider religion a very important part of their lives).

5. See Thomas C. Berg, *Race Relations and Modern Church-State Relations*, 43 B.C. L. REV. 1009, 1012 (2002) (noting that in the late 1950s and early 1960s American society underwent increasing secularization).

6. See Gary A. Tobin & Aryeh K. Weinberg, *Profiles of the American University: Volume II: Religious Beliefs and Behavior of College Faculty*, INST. FOR JEWISH & CMTY. RESEARCH 1 (2007), available at <http://www.jewishresearch.org/PDFs2/FacultyReligion07.pdf> (finding that “[f]aculty [a]re [m]uch [l]ess [r]eligious [t]han [t]he [g]eneral [p]ublic”); Neil Gross & Solon Simmons, *How Religious are America’s College and University Professors?*, 9 (Feb. 6, 2007),

suggestions adequately explains the neglect of religion in race and law scholarship.

As a matter of principle, the major intellectual force in race and law scholarship, critical race theory (CRT), is committed to anchoring itself in and ensuring that the legal academy includes the perspectives of people of color.<sup>7</sup> Considering CRT's commitment to producing scholarship from the perspective of Black people together with the fact that seventy-eight percent of African Americans identify as Protestant and seventy-two percent of African American Protestants report that "God's law" provides the basis for right and wrong<sup>8</sup>—notwithstanding the degree to which American culture or, more narrowly, the academy has undergone increasing secularization—the neglect of religious sensibilities in CRT requires further explanation. For the same reason, assuming, *in arguendo*, that race and law scholars are far less religious than the broader African American community, CRT's commitment to including in legal scholarship the perspectives of communities of color would seem to require far greater attention than has been given to African American religious sensibilities.

It is the task of this Article to grapple with why—despite the prominence of the Black church in the civil rights movement, the still central role of faith for many African Americans, and CRT's commitment to addressing racial subordination from the perspectives of Black people—religiously grounded normative arguments are rarely advanced and have played, at best, only a marginal role in race and law scholarship.

Although the importance of grappling with this question should be obvious, before describing my efforts to engage this puzzle, I will provide two reasons that this inquiry is significant. First, understanding how the religious character of the social movement that overthrew legalized racial subordination has been marginalized in the body of legal scholarship that seeks to continue that movement is a profound question about the nature and genealogy of social justice and antiracism advocacy. Second, for persons of faith—who represent the overwhelming majority of African Americans—seeking to understand the marginal role of religious sensibilities in CRT scholarship constitutes an engagement with one of the most enduring foci of human life, the problem of self-knowledge, grounding, and orientation. It is to ask: how do one's ultimate commitments relate to

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[http://religion.ssrc.org/reforum/Gross\\_Simmons.pdf](http://religion.ssrc.org/reforum/Gross_Simmons.pdf) ("[I]t is clear that on the whole, and measured various ways, that professors are less religious than the general U.S. population.").

7. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV.C.R.-C.L. L. REV. 323, 325 (1987).

8. Neha Sahgal & Greg Smith, *A Religious Portrait of African-Americans*, PEW FORUM ON RELIGION & PUBLIC LIFE (Jan. 30, 2009), <http://www.pewforum.org/2009/01/30/a-religious-portrait-of-african-americans/> (78% of Black Americans identify as Protestant); JASON E. SHELTON & MICHAEL O. SMITH, BLACKS AND WHITES IN CHRISTIAN AMERICA: HOW RACIAL DISCRIMINATION SHAPES RELIGIOUS CONVICTIONS 120 (2012) (stating that 72% of Black Protestants report that God's law provides the basis for right and wrong).

as well as orient and ground one with respect to CRT scholarship and its commitment to addressing racial subordination?<sup>9</sup>

Before describing how I engage the marginal role of religious reasons in CRT scholarship, a proviso is in order. While African Americans are overwhelmingly Christian and, specifically, Protestant, African Americans practice a wide variety of faith traditions, including Islam, Judaism, Buddhism, African traditional religions, and non-Protestant Christian traditions, including Catholicism and Eastern Orthodoxy.<sup>10</sup> Accordingly, religiously grounded normative arguments from a wide variety of traditions can help to develop self-knowledge among African Americans. Despite the great diversity of religions among African Americans, in the interests of manageability, this paper's examination of the role of religiously grounded normative arguments in CRT focuses on the neglect of normative arguments grounded in the Christian tradition. While aware of the limitations of this approach, I think it is justified by Christianity's disproportionate role in African American history and by virtue of the fact that nearly eighty-four percent of contemporary African Americans identify as Christian.<sup>11</sup>

Our inquiry proceeds in two parts. In the first part, I seek both to substantiate my claim that the African American Christian tradition has played only a marginal role in CRT scholarship and to develop my claim that legal scholarship grounded in the African American Christian tradition can further self-knowledge among African Americans. In the second part, I seek to understand why CRT has failed to develop a substantial literature engaging the law from the perspective of the African American Christian tradition. I essentially conclude that CRT's deep debt to Black nationalist/Black power and left radical thought renders CRT at best indifferent to Christianity.

In light of the conclusions reached in Part II, I conclude that a substantial body of legal scholarship developed from the normative resources of African American Christianity is unlikely to develop within CRT. However, I also note that there is little discursive room to develop such a

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9. In describing efforts to clarify the relationship between Black religious sensibilities and CRT as, in part, in exercise in developing self-knowledge, I do not mean to suggest that offering religiously grounded normative arguments provides a resource that is relevant for all Black people's efforts to cultivate self-knowledge. Indeed, such a suggestion would fail to acknowledge that Black agnostics and atheists (and perhaps some Black religionists) would reject the claim that understanding how religious sensibilities relate to efforts to address racial subordination contributes to self-knowledge. Nevertheless, because faith plays a central role in the lives of many African Americans, it is reasonable to assume that faith is central to the self-identities of Black religionists and, by extension, self-knowledge.

10. *U.S. Religious Landscape Survey - Religious Affiliation: Diverse and Dynamic*, PEW FORUM ON RELIGION & PUBLIC LIFE 36, 44 (Feb. 2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

11. Sahgal & Smith, *supra* note 8 (stating that 78% of African Americans identify as Protestant, 5% as Catholic, and .5% as Orthodox Christian).

literature within the colorblind tendencies of mainstream scholarship. As a result, any effort to develop a substantial body of legal scholarship engaging the law from the perspective of the African American Christian tradition finds itself sandwiched between, on the one hand, left radical thought and, on the other hand, colorblind approaches to law. Accordingly, developing a substantial body of legal scholarship capable of furthering the self-understanding of African American Christians will require pioneering scholars who are willing to create new discursive space and, as I suggest in closing, a new and distinctive approach to legal scholarship.

I. CRITICAL RACE THEORY, AFRICAN AMERICAN CHRISTIANITY  
AND SELF-KNOWLEDGE

A. *Critical Race Theory and Christianity*

In light of the fact that a significant majority of African Americans are Protestants<sup>12</sup> and that a substantial percentage of this majority report that “God’s law” provides the basis for right and wrong,<sup>13</sup> the Christian tradition constitutes an undeniably important source of normative meaning for a majority of African Americans. Yet, despite the deep, historical, and enduring connection between the African American community and the Christian faith, Christianity has neither been central to nor has it deeply informed CRT as a movement of legal scholarship.<sup>14</sup> Of the twenty-seven articles that form the anthology, *Critical Race Theory: The Key Writings that Formed the Movement* (1995), only one article draws on the Christian tradition: Anthony Cook’s *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*<sup>15</sup> Even more starkly, of the sixty-three articles gathered in the anthology, *Critical Race Theory: The Cutting Edge* (2000), none interrogate race and law from the perspective of the African American Christian tradition.<sup>16</sup> Similarly, none of the nineteen articles in the anthology, *Crossroads, Directions, and a New Critical Race Theory* (2002), focus on the intersection of race, law, and Christianity.<sup>17</sup> Finally, in the introduction to their book, *Words That Wound: Critical Race Theory, As-*

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12. *Id.*

13. Shelton & Smith, *supra* note 8, at 120.

14. African Americans identify with a wide-range of religious traditions. However, because African Americans are disproportionately Protestant, and the Black church has had an especially important role throughout African American history, this Article focuses on Protestant Christianity.

15. CRITICAL RACE THEORY: KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) [hereinafter Cook, *Beyond Critical Legal Studies*].

16. CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

17. CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002).

*saultive Speech, and the First Amendment*, celebrated critical race theorists Mari Matsuda, Charles Lawrence III, Richard Delgado, and Kimberlé Crenshaw write that CRT is interdisciplinary, borrowing “from several traditions, including liberalism, law and society, feminism, Marxism, post-structuralism, critical legal theory, pragmatism, and nationalism.”<sup>18</sup> Consistent with the marginal to nonexistent role that the African American Christian tradition has played in leading CRT anthologies, Christianity is not included among the traditions that four important CRT scholars list as contributing to CRT.<sup>19</sup>

While we can thus conclude that the African American Christian tradition has not been central to CRT scholarship, individual scholars have nevertheless authored articles examining race, law, and the Christian tradition.<sup>20</sup> Indeed, over a series of articles and a monograph, Anthony Cook has produced an invaluable body of writings drawing on the Christian tradition and developing arguments underscoring the importance of religio-spiritual values to progressive politics and legal reform.<sup>21</sup> While no other legal scholar has matched Cook’s sustained attention to critically examining the relationship between the Christian tradition and race and law, other scholars have also written in the area.<sup>22</sup> Although this literature is but

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18. MARI MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 6 (1993).

19. *Id.*

20. See *infra* notes 21–22 and accompanying text.

21. See, e.g., ANTHONY E. COOK, *Toward a Normative Framework of a Love-Based Community*, in *LAW & RELIGION: A CRITICAL ANTHOLOGY* 373–82 (Stephen M. Feldman ed., 2000); Anthony E. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 *GEO. WASH. L. REV.* 959 (2000); ANTHONY E. COOK, *THE LEAST OF THESE: RACE, LAW AND RELIGION IN AMERICAN CULTURE* 1–2 (1997) [hereinafter Cook, *THE LEAST OF THESE*]; Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 *GEO. L.J.* 1431, 1432 (1994) [hereinafter Cook, *The Death of God*]; Anthony E. Cook, *Reflections on Postmodernism*, 26 *NEW ENG. L. REV.* 751 (1992) [hereinafter Cook, *Reflections on Postmodernism*]; Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 *U. ILL. L. REV.* 1007 (1992) [hereinafter Cook, *Spiritual Movement Towards Justice*]; Cook, *Beyond Critical Legal Studies*, *supra* note 15.

22. See, e.g., DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL FOR AN ALIEN LAND CALLED HOME* (1996) (although written in a form that resembles a novel and not very much focused on law, Bell argues that gospel music helped Blacks to survive slavery and Jim Crow and remains a relevant and invaluable resource in the struggle against racial subordination); DERRICK BELL, *ETHICAL AMBITION* 75–93 (2002) (although a biographical and not a scholarly text, Bell acknowledges the importance of Christianity in the civil rights era, describes the role of Christianity in his early years and his evolution toward a Christianity “beyond theism” in which Christ’s divinity is understood as a myth. In this sense, Bell’s Christianity is far removed from that of classical Christianity in general and the Black Christian tradition in particular); Anthony V. Baker, “Go Down Moses!”: *Law Through the Eyes of the African-American Religious Tradition*, in *FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW* 117, 124–25 (Robert F. Cochran, Jr. ed., 2008) (arguing that African Americans have historically been focused on surviving racially oppressive conditions and that African American Christianity has been a source of liberation in the face of an oppressive and unrespon-



a spatter against the substantial volume of existing race and law scholarship, and has sometimes been written in the form of a book review or as a book chapter in a volume dedicated to examining the general connection between faith and law, a small and sporadic volume of literature examining the intersection of race, law, and the Christian tradition does exist.<sup>23</sup> What does not (yet) exist is a sustained body of scholarship in which legal scholars are developing the connections between race, law, and African American Christianity in dialogue with one another—a dialogue with an eye toward constructing a common conversation and set of understandings about the implications of the African American Christian tradition for American law.

Given the central role of Christianity among a strong majority of African Americans, as well as CRT's emphasis on the importance of developing a body of legal scholarship that "looks to the bottom" and reflects the normative perspectives of communities of color,<sup>24</sup> developing a robust literature grounded in the normative resources of the African American Christian tradition appears to be consistent with CRT's character as a project. Indeed, such a body of literature would represent the work of what

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sive legal system); W. Burlette Carter, *Can This Culture be Saved? Another Affirmative Action Baby Reflects on Religious Freedom*, 95 COLUM. L. REV. 473, 475, 504, 511-12, 516 (1995) (critically reviewing STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993) and arguing, inter alia, that Carter neglects minority religious traditions, including Black liberation theology and that his "'objective' model is the experience of White America and mainstream religionists"); Stephen L. Carter, *The Black Church and Religious Freedom*, in *BLACK FAITH AND PUBLIC TALK: CRITICAL ESSAYS ON JAMES H. CONE'S BLACK THEOLOGY & BLACK POWER* 20, 23 (Dwight N. Hopkins ed., 1999) (arguing that "religious freedom is important to our [the Black] community because of our need to constitute ourselves as a community of resistance"); Jonathan C. Augustine, *The Theology of Civil Disobedience: The First Amendment, Freedom Riders, and Passage of the Voting Rights Act*, 21 S. CAL. INTERDISC. L.J. 255, 256 (2012) (arguing "that a Judeo-Christian suffering servant theology undergirded the use of civil disobedience in the Movement and caused it to be successful because, among other things, the VRA was enacted"); George H. Taylor, *Race, Religion, and Law: The Tension Between Spirit and Its Institutionalization*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 51, 52, 67 (2006) (examining Christianity's role in perpetuating racism and its role in resisting it and arguing, "particularly in areas such as civil rights" that "faith in law [should] not become dogmatic, insular, and immune to criticism from external values such as religious faith . . . the goal is to maintain the tension—both in criticism and insight—in the relation between religion and law"); John Araujo, *Justice as Right Relationship: A Philosophical and Theological Reflection on Affirmative Action*, 27 PEPP. L. REV. 377, 470-74 (2002) (arguing from Thomistic principles that justice as right relationship can justify affirmative action); W. Burlette Carter, *What's Love Got to Do with It? Race Relations and the Second Great Commandment*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 133 (Michael W. McConnell et al. eds. 2001); Davison M. Douglas, *Reinhold Niebuhr and Critical Race Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 149 (Michael W. McConnell et al. eds. 2001).

23. See sources cited, *supra* notes 21-22.

24. Compare Charles R. Lawrence III, *Foreword to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* xiv-xvii (Francisco Valdes & Jerome M. Culp eds., 2002), with Matsuda, *supra* note 7 at 325.

Antonio Gramsci calls an “organic intellectual,”<sup>25</sup> who through a philosophy of praxis “construct[s] an intellectual-moral bloc which can make politically possible the intellectual progress of the mass and not only of small intellectual groups.”<sup>26</sup> Moreover, such a body of critical scholarship would squarely fit legal scholar Mari Matsuda’s widely influential argument, inspired in part by Gramsci’s concept of the “organic intellectual,” that “the actual experience, history, culture, and intellectual tradition of people of color in America” should serve as the epistemological source for critical scholars.<sup>27</sup>

If we take seriously the value of grounding critical scholarship in the perspectives of Black people, then the need for a greater and more cohesive engagement with African American religious sensibilities is obvious.<sup>28</sup> Moreover, as a scholarly movement that aspires to bridge the divide between the legal academy and communities of color, that the African American Christian tradition has not played a more central role in CRT is puzzling and calls for explanation.<sup>29</sup> However, before we explore potential explanations, we first discuss (1) what it means to draw on the normative resources of the African American Christian tradition and (2) how drawing on these resources can advance the self-understanding of African American Christians.

#### B. *Self-Understanding and Arguments Grounded in the Normative Resources of the African American Christian Tradition*

To engage law from the vantage point of African American religious sensibilities is to think about and critique law from the perspective of religiously grounded normative sources. To appreciate what this means, it is helpful to first think about what a legal norm entails. Although *exactly* what a legal norm entails is the subject of enduring dispute and inquiry,<sup>30</sup> I

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25. Matsuda, *supra* note 7, at 325.

26. ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 330–33 (Quintin Hoare & Geoffrey Nowell Smith eds., 1971).

27. Matsuda, *supra* note 7, at 325.

28. *See id.*

29. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568 (1984) (suggesting the undesirability of a “distancing of the scholar from the community he writes about”); Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 333 (2006) (“CRT scholars listen to and scrutinize the voices, understandings and experiences of marginalized and oppressed peoples to situate, test, and inspire the examination of particular and/or novel approaches to law.”).

30. *See* Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1174–75 (2006) (“[D]efin[ing] a norm as a standard of conduct or purported standard of conduct that (1) is of a type which has existence conditions that refer in some fairly direct way to facts about human behavior, attitudes, or beliefs, or to some combination of such facts, and that (2) does in fact exist because the appropriate existence conditions have been met . . . not all contemporary legal philosophers accept the claim that the

proceed from the view that legal norms are rules, standards, or principles<sup>31</sup> enforced by the state, constructed from social practice, and specifying standards of behavior against which conduct can be criticized.<sup>32</sup> Accordingly, we are talking about a legal norm when we say: the law requires that X ‘ought,’ ‘should,’ or ‘must’ do Y.<sup>33</sup>

Legal norms can be grounded in a diverse array of normative sources. That this is so is particularly apparent in a society as diverse as the contemporary United States, whose members cannot be assumed to share similar values or even value structures. In particular, for some citizens, religious commitments constitute near comprehensive sources of normative orientations, whereas other citizens may develop their normative commitments from sources, such as Kantian ethics, Rawlsian liberalism, and libertarian thought. Still other citizens form their normative commitments from a diverse array of both religious and nonreligious sources, and it is possible that at least some citizens do not seriously reflect on the sources of their normative commitments.

Owing in large part to the diversity of its citizenry, legal norms in the United States are sometimes controversial.<sup>34</sup> This is largely because normative commitments that are elevated to the status of legal norms occasionally conflict with the social practices and/or value structures of at least some citizens. This rather obvious point can be seen in political conflicts

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‘normative’ content of law can be completely captured by a set of norms, in the sense of ‘norm’ [just] defined.”); Sylvie Delacroix, *LEGAL NORMS AND NORMATIVITY: AN ESSAY IN GENEALOGY XVIII–XIX* (2006) (offering a constructivist account of legal norms as contingent on “social practice and human judgments”). *But see also* H.L.A. HART, *THE CONCEPT OF LAW* 254–59 (2012) (conceding that a “practice theory of rules” cannot account for group or individual morality but nevertheless accounts for conventional social rules, including many legal rules but that enacted legal rules can arise prior to their having been practiced).

31. See Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, and Principles*, *LEGAL THEORY LEXICON*, available at [http://lsolum.typepad.com/legal\\_theory\\_lexicon/2004/03/legal\\_theory\\_le\\_3.html](http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html) (last updated Sept. 22, 2014).

32. Compare Leslie Green, *Introduction to HART*, *supra* note 30, at xxi, with HART, *supra* note 30, at 57.

33. HART, *supra* note 30, at 57.

34. See *infra* notes 35–38 and accompanying text.

over such things as laws relating to or governing marijuana use,<sup>35</sup> affordable healthcare,<sup>36</sup> and affirmative action.<sup>37</sup>

At this point it is helpful to introduce a distinction. Although closely related, the terms ‘norm’ and ‘normative’ must be distinguished. Following legal philosopher Stephen Perry, the “term ‘normative’ refers in a general and rather diffuse way to the full range of reasons for action that people can have, and thus includes within its scope moral and prudential reasons as well as reasons that derive from norms.”<sup>38</sup> In contrast, “[a] norm . . . has social or behavioral existence conditions.”<sup>39</sup> Thus, “[a] norm cannot exist unless somebody thinks that it has some effect on someone’s reasons for action, although by the same token it can exist even if it does not, in fact, affect anyone’s reason for action at all.”<sup>40</sup>

While legal norms can rest on a wide variety of underlying normative beliefs, and so may be deeply controversial, it should go without saying that citizens with radically distinctive and even conflicting normative com-

35. Niraj Chokshi, *Coalition runs full-page New York Times ad to dispute pro-marijuana editorial*, WASH. POST GOVBEAT BLOG (Aug. 2, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/08/02/coalition-runs-full-page-new-york-times-ad-to-dispute-pro-marijuana-editorial/> (describing debate over legalization that played out in the pages of the New York Times); David Brooks, *Weed: Been There. Done That.*, N.Y. TIMES, Jan. 3, 2014, at A19 (“In legalizing weed, citizens of Colorado are, indeed, enhancing individual freedom. But they are also nurturing a moral ecology in which it is a bit harder to be the sort of person most of us want to be.”); Luke Fortney & Jason Kindschi, *Medical Marijuana: Navigating the Controversy*, INTEGRATIVE MEDICINE ALERT, 2013 WLNR 14791174 (JUNE 1, 2013) (noting that 18 states and the District of Columbia permit medical marijuana use and that in 2012 Colorado and Washington state decriminalized recreational use and observing, “[w]ithout question, cannabis has proven to be controversial.”).

36. Compare Paul Krugman, *The Incompetence Dogma: So Much for Obamacare Not Working*, N.Y. TIMES, June 27, 2014, at A29 (noting that the conservative view of government as incapable of “doing anything useful” rather than analysis drives much of the opposition to Obamacare), with Richard Kirsch, *The Politics of Obamacare: Health Care, Money, and Ideology*, 81 FORDHAM L. REV. 1737, 1745 (2013) (“The reelection of President Obama ushers in a new era of health care in the United States, an era in which the question is not whether there should be a government guarantee of access to affordable health coverage, but how that guarantee is implemented.”).

37. Compare Garrett Epps, *On Affirmative Action, the Court Tackles a Deceptively Simple Question*, THE ATLANTIC, Oct. 15, 2013, <http://www.theatlantic.com/national/archive/2013/10/on-affirmative-action-the-court-tackles-a-deceptively-simple-question/280596/> (describing the debate over the constitutionality of legislation banning affirmative action as rooted in deep differences over normative judgments about the meaning of equality), with Drew DeSilver, *As Supreme Court defers affirmative action ruling, deep divides persist*, PEW RESEARCH CENTER, June 24, 2013, <http://www.pewresearch.org/fact-tank/2013/06/24/as-supreme-court-defers-affirmative-action-ruling-deep-divides-persist/> (describing value differences that relate to the political divide over affirmative action).

38. Perry, *supra* note 30 at 1175 (2006); Perry, *supra* note 30 and accompanying text (providing Perry’s definition of “norms.”).

39. *Id.* at 1175.

40. *Id.*

mitments may converge to support the same legal norm.<sup>41</sup> Thus, whether citizens agree to oppose or support a particular legal norm depends on the content of their normative sources and how those sources bear on the particular legal norm at issue—not on whether their normative sources may conflict. Accordingly, citizens who draw on religious normative sources can come to the same conclusion as citizens who draw on secular normative sources about whether to support or to oppose a particular legal norm, and citizens who draw on religious normative sources may find themselves in disagreement with other citizens who draw on religious normative sources. It is, of course, also true that citizens who draw on secular normative sources can disagree about the desirability of a particular legal norm.

Given the indeterminacy of categories of normative sources, the African American Christian tradition has supported a rich variety of normative orientations on issues of great importance to the Black community.<sup>42</sup> African American Christian thinkers have disagreed with each other about a wide variety of topics, including the moral status of nonviolence<sup>43</sup> and the Black power movement,<sup>44</sup> and the desirability of integration as a goal<sup>45</sup> and the relative importance of Black Liberation vis-à-vis reconciliation with Whites.<sup>46</sup> In addition to coming to different conclusions about how

41. John Rawls's notion of an overlapping consensus in which citizens with diverse comprehensive doctrines nevertheless agree on principles of justice relies on something like the idea I am advancing. See JOHN RAWLS, *POLITICAL LIBERALISM* 134 (2005).

42. See *infra* notes 43–46 and accompanying text.

43. Compare JAMES CONE, *GOD OF THE OPPRESSED* xv–xvi, xviii (1997) (rejecting nonviolence as the product of white Christianity's effort to subordinate Black people), with MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 9, 69 (James M. Washington ed., HarperOne 1991) [hereinafter KING, *A TESTAMENT OF HOPE*] (rooting nonviolence in his Christian faith and stating, "I'm committed to nonviolence absolutely.").

44. Compare KING, *A TESTAMENT OF HOPE*, *supra* note 43, at 251 ("Let us be dissatisfied until that day when nobody will shout "White Power!"—when nobody will shout "Black Power!"—but everybody will talk about God's power and human power"), with JAMES CONE, *BLACK THEOLOGY & BLACK POWER* 47–566 (1997) [hereinafter *BLACK THEOLOGY & BLACK POWER*] (focusing on the gospel as liberation from oppression and arguing that Black Power is consistent with Christian theology).

45. Compare KING, *A TESTAMENT OF HOPE*, *supra* note 43, at 117–25 (describing integration in contrast to desegregation as the ultimate goal), with *BLACK THEOLOGY & BLACK POWER*, *supra* note 44, at 18–19 ("[T]he idea of integration, at this stage, too easily lends itself to supporting the moral superiority of white society . . . .What is needed, then, is not 'integration' but a sense of worth in being black, and only black people can teach that.").

46. Black theologian James Cone has emphasized that God stands with Black people against the White oppressor, and that in the context of a White racist society the Christian gospel requires what appears to be an exclusive focus on Black liberation. Compare *BLACK THEOLOGY & BLACK POWER*, *supra* note 44 at 36 ("In Christ, God enters human affairs and takes sides with the oppressed.") and *id.* at 38 (identifying the gospel as a gospel of liberation), with JAMES CONE, *A BLACK THEOLOGY OF LIBERATION* 5 (2010) (indicating that Black theology as a theology of liberation emerges in the context of a "white racist society" and arguing that "there

Christianity bears on these historically important questions of race relations, diverse interpretations of Christianity within the African American community have led to different conclusions about major topics, such as conformity to consumer culture and whether abortion and same-sex marriage should be legal.<sup>47</sup>

As is clear from this brief discussion of some of the major topics on which African American religious sensibilities lead to differing normative positions, the turn to religiously grounded normative sources is not necessarily a turn to particular conclusions about substantive policy issues. As a result, the political implications of developing a more robust literature examining race and law from the perspective of such sources are not clear. Indeed, one of the reasons to develop such a literature is to increase our understanding of how a critically important source of normative meaning in the African American community bears on questions of race and law. In this sense, race and law scholarship grounded in the African American Christian tradition constitutes a phenomenological exploration of what it is to relate to American law as an Black Christian. Through such an exploration, race and law scholarship can further self-understanding among African American Christians.

To illustrate how race and law scholarship developed from the normative resources of the African American Christian tradition can deepen self-understanding among African American Christians, I now want to discuss a concrete example. In particular, through considering the post-structural rationale that has been used to support arguments that anti-dis-

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can be no theology of the gospel which does not arise from an oppressed community.”) and CONE, GOD OF THE OPPRESSED, *supra* note 43, at ix, 215, 218-19 (indicating that God is with black people and against the white oppressor and that in the context of a white supremacist society black people should be focused on liberation rather than reconciliation). Thus, in Cone’s view, “black people cannot talk about the possibilities of reconciliation [(which for Cone is “the heart of the New Testament message”)] until full emancipation has become a reality for *all* black people.” BLACK THEOLOGY & BLACK POWER, *supra* note 44 at 146-47. In contrast, while sharing Cone’s belief that liberation is the predicate for reconciliation, J. Deotis Roberts argues that liberation should not be understood so as to eclipse the equally important goal of reconciliation. J. DEOTIS ROBERTS, LIBERATION AND RECONCILIATION: A BLACK THEOLOGY xvii, 8-20 (2005).

47. See, e.g., Audrey Barrick, *Pastors Seek to Quash Prosperity Gospel in Black Churches*, CHRISTIAN POST (Mar. 23, 2010, 3:42 PM), <http://www.christianpost.com/news/pastors-seek-to-quash-prosperity-gospel-in-black-churches-44429/> (describing Black pastors turning away from the “prosperity gospel” focusing on health and wealth); Danielle Bennett, *The Black Church and Same-Sex Marriage*, HUFFINGTON POST (Jan. 10, 2013, 2:42 PM), [http://www.huffingtonpost.com/danielle-bennett/the-black-church-and-same\\_b\\_2450841.html](http://www.huffingtonpost.com/danielle-bennett/the-black-church-and-same_b_2450841.html) (indicating that some Black pastors disagree with President Obama’s recent support for same-sex marriage); Michael Gryboski, *Black Pastors: Church ‘Woefully Uninformed’ About Abortion’s Impact*, CHRISTIAN POST (May 15, 2013, 12:25 PM), <http://www.christianpost.com/news/black-pastors-church-woefully-uninformed-about-abortions-impact-95891/> (reporting that “[a] coalition of African-American clergy and leaders who came to the nation’s capital to lobby for a Congressional investigation of the abortion industry says that the African-American church is by and large ignorant of abortion’s negative impact.”).

crimination law should be reformed to protect “rights-to-difference,” I illustrate how including African American religious sensibilities in race and law scholarship can enhance self-understanding among African American Christians.<sup>48</sup> More specifically, I will argue that the post-structural rationale for rights-to-difference conflicts with traditional Christian metaphysical commitments and fails to grasp the nature of African American historical resistance to racial subordination, thereby impeding self-knowledge among contemporary African American Christians. I then show how an argument for rights-to-difference developed from the normative resources of the African American Christian tradition both renders Black historical resistance intelligible and enhances the self-understanding of contemporary African American Christians. Before proceeding, I ask readers to bear in mind that this example is illustrative and intended to emphasize the value of including African American religious sensibilities in CRT. As such, what follows is neither intended nor required to be a comprehensive discussion of the connection between the African American Christian tradition and the post-structural rationale for rights-to-difference.

### 1. Christianity and the Post-Structural Rationale for Rights-to-Difference

CRT scholars in favor of rights-to-difference have frequently employed post-structuralist understandings of language—in which language signifies but does not correspond to a reality external to “language games” or discourse<sup>49</sup>—to advance the claim that things such as speech, clothing, and culture (all a part of discourse) constitute race itself and that these, in turn, constitute important aspects of personhood.<sup>50</sup> As a result, discrimination

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48. Law professor Richard Ford, who coined the term “rights-to-difference,” describes “rights-to-difference discourse” as “arguments hold[ing] that a just society could and should prohibit discrimination on the basis of [sic] the cultural difference (thereby establishing a ‘right-to-difference’) for the same reasons it should prohibit discrimination based on statuses such as race.” RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 4 (2005).

49. Compare Janet Soskice, *Religious Language*, in *A COMPANION TO PHILOSOPHY OF RELIGION* 202 (Philip L. Quinn & Charles Taliaferro eds., 1999) (noting that “structuralist and later poststructuralist accounts of language . . . seem to cut language free from any questions of ‘aboutness’ into a free play of signs”), with Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 *N.Y.U. REV. L. & SOC. CHANGE* 517, 518-19 (2008) (“In keeping with Judith Butler’s theory of performativity, I will suggest that the performance of identity is all that identity consists of. We are no more than what we pretend to be.”), and Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 868-73 (2002) (locating the origins of Butler’s notion of performative identity in JL Austin’s speech act theory).

50. Compare Yoshino, *supra* note 49, at 868-73 (building on Judith Butler’s poststructuralist account of identity, Yoshino argues that a “commitment against status discrimination might require us to prohibit discrimination against an act constitutive of that status.”), with Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 *J. CONTEMP. LEGAL ISSUES* 701, 720 (2001) (“To the extent the employee’s continued existence and success in the workplace is contingent upon her behaving in ways that operate as a denial of self, there is a continual harm to that employee’s dignity.”) and Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L.*

against speech, clothing, and culture can constitute racial discrimination and undermine personhood.<sup>51</sup> In other words, adopting the post-structuralist notion that the human self is constructed out of social practices and performances,<sup>52</sup> proponents of rights-to-difference have argued that foregoing performances of racial identity in response to discriminatory pressures undermines the human self.<sup>53</sup> As a result, proponents of rights-to-difference argue that anti-discrimination law should be reformed to provide rights-to-difference.<sup>54</sup>

While I suspect that African American Christianities—historically formed and rooted in the struggle against white supremacy—would overwhelmingly oppose discrimination against racially associated identities, the post-structural rationale for reforming anti-discrimination law to provide rights-to-difference relies on premises that may be irreconcilable with the African American Christian tradition. As I have already indicated, according to the post-structural rationale, the human self is constituted in language games.<sup>55</sup> This anthropological premise stands in deep conflict with the African American Christian tradition, which holds that the human being has an eternal self and soul whose dignity consists in its nature as

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REV. 1259, 1262, 1265 n.11, 1288 (2000) (adopting Judith Butler's constructivist account of identity and noting that "identity performances can become a denial of self" and describing as "victims [those] who do identity work to prevent employment discrimination and preempt stereotyping."). Incidentally, not all proponents of rights-to-difference adopt a post-structural rationale. See also Brandon Paradise, *The Politics of Identity After Identity Politics: Militant Covering*, 33 WASH. U. J.L. & POL'Y 161, 173 n.25 (2010).

51. See Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, *supra* note 50 at 720.

52. Compare *supra* notes 48-50 and accompanying text with David Stern, *The return of the subject? Power, reflexivity and agency*, 26(5) PHILOSOPHY AND SOCIAL CRITICISM 109, 112 (2000) ("On Butler's account . . . the subject is culturally constructed all the way down."); ANTHONY ELLIOTT, CONCEPTS OF THE SELF 164 (2007) (noting that for Butler the notion of a self with "inner depth" is an illusion produced by discourse); Kathy Dow Magnus, *The Unaccountable Subject: Judith Butler and the Social Conditions of Intersubjective Agency*, 21(2) HYPATIA 81, 92 (2006) (citing Seyla Benhabib, *Subjectivity, Historiography and Politics: Reflections on the "Feminism/Postmodernism Exchange"*, in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 20-21 (Seyla Benhabib et al. eds., 1994) (noting that "Benhabib has argued that Butler reduces the subject to a mere effect of language and so dissolves the notions of 'intentionality, accountability, self-reflexivity, and autonomy.'"); Magnus, *supra* note 52, at 92 ("As Butler maintains, there is "no 'I' that is not always already preceded by formative moral norms which as such have a social character"). Contrary to the classical Christian tradition which maintains that the subject is grounded in and called to being by God, Magnus explains that for Butler "[n]o subject will know her ultimate ground or be able to account for herself completely. And every subject will be called into being in and through the address of an other [human being], which, for Butler, is always already conditioned by a preestablished discourse." *Id.* at 99.; see also SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 214-218, 215 (1992) (noting that Butler's theory of performativity calls into question whether there is a self, a "doer behind the deed.").

53. See *supra* notes 49-51 and accompanying text.

54. See *supra* notes 48-51 and accompanying text.

55. See Cooper, *supra* note 49, at 537.



*imago Dei* (that is, being made in the image of God).<sup>56</sup> Indeed, as philosopher Cornel West has written, the theology of the African American church “linked God’s plan of salvation to black liberation—and bestowed upon black people a divine source for self identity—for example, as children of God—that stood in stark contrast to the cultural perceptions and social roles imposed upon them by a racist American society.”<sup>57</sup>

Importantly, although the African American Christian tradition would reject the post-structural rationale’s conception of the self, invidious discrimination against racially associated identities conflicts sharply with the Christian ideal of agape love towards all people. As a result, there is a strong basis upon which to conclude that the African-Christian tradition agrees with proponents of rights-to-difference about the wrongfulness of discrimination perpetrated against racially associated identities. Notwithstanding this normative agreement, the conflict between Christian anthropology and the post-structural rationale for rights-to-difference is important, for as I now argue, the latter renders unintelligible African American historical resistance and therefore African American self-understanding.<sup>58</sup> In contrast, an argument for rights-to-difference developed out of the normative resources of the African American church furthers self-understanding among African American Christians.<sup>59</sup>

Broadly stated, because the post-structural rationale’s language bound analysis is essentially atheistic,<sup>60</sup> it impedes African American self-under-

56. Compare Martin Luther King, Jr., *The Ethical Demands for Integration*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 118-19 (James M. Washington ed., 1991) (discussing the “sacredness of human personality” and stating that “[e]very human being has etched in his personality the indelible stamp [the image of God] of the creator.”), with Alvin Plantinga, *Advice to Christian Philosophers*, 3 *J. SOC’Y CHRISTIAN PHILS.* 253, 269 (1984), available at [http://www.faithandphilosophy.com/article\\_advice.php](http://www.faithandphilosophy.com/article_advice.php) (“[C]reative anti-realism is presently popular among philosophers; this is the view that it is human behavior-in particular, human thought and language—that is somehow responsible for the fundamental structure of the world and for the fundamental kinds of entities there are. From a theistic point of view, however, universal creative anti-realism is at best a mere impertinence, a piece of laughable bravado”).

57. Cornel West, *Prophetic Christian as Organic Intellectual: Martin Luther King, Jr.*, in *CORNEL WEST, THE CORNEL WEST READER* 428 (1999).

58. See discussion, *infra* pp. 132-34.

59. *Id.*

60. Compare Plantinga, *supra* note 56, and accompanying text, with Andrea M. Stephenson, Abstract, *A Space for Divinity in Post-Structuralism: Post-Structuralism and Liberal Theology (Be)coming Together in Spirit*, (2010) (unpublished Ph.D. dissertation, Claremont Graduate University) (on file with ProQuest/UMI Dissertations) (“[P]ost-structuralism has been characterized as atheistic in part because of its critique of the idea of a transcendent being.”) and *id.* at ix (noting “the general equating of post-structural thought with atheism.”). Incidentally, it bears noting that Stephenson argues for a post-structural notion of divinity that she believes will rescue post-structuralism from the charge of atheism, at least from the perspective of liberal theology. See generally *id.* However, for reasons that are far beyond the scope of this article, the notion of divinity that Stephenson advances does not rescue post-structuralism from the charge of atheism from the perspective of the African-American Christian tradition or other traditional expressions

standing. In particular, contrary to the view that the human being is constituted in and by language, generations of African Americans—going back to slavery—have believed that a personal God gave them self-worth and dignity.<sup>61</sup> As a result, even in the most dehumanizing circumstances, and notwithstanding the ideology of white supremacy, many African Americans rooted their humanity in a God given, transcendent sense of self-worth.<sup>62</sup> Thus, because the post-structural rationale implicitly denies the possibility of a transcendent, supernatural source of self-identity and self-worth, it implicitly fails to acknowledge and even erases the African American historical experience, in which many African Americans maintained a sense of self-worth and dignity in the most oppressive of conditions, including slavery.<sup>63</sup> As a result, the post-structural rationale cannot account for and even renders unintelligible the historical experience of African Americans, and thereby impedes African American self-understanding.

## 2. A Christian Rationale for Rights-to-Difference and Its Advantages

In contrast to the post-structural rationale, the African American Christian tradition is capable of normatively justifying rights-to-difference while both being faithful to the African American historical experience and maintaining the self's transcendent source. As I have already intimated, rather than justifying rights-to-difference by resorting to a performative notion of racial identity whose success depends upon the premise that the human self is constituted in language, discrimination against racially associated identities can be understood through the lens of the African American Christian tradition as a failure to act with agape love. Importantly, because failure to act with agape love can be harmful, this argument does not reject the claim that such discrimination is harmful. However, because its normative orientation is the ideal of agape love, and not the injury to the self that supports the post-structural rationale, the Christian argument that I have offered accommodates the possibility that the self can be sustained and maintained even when faced with assault. More specifically, because in the Christian view the self finds its origin and sustenance in God and is not originated in language, unlike the post-structural view of

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of Christianity that insist upon God as a transcendent being. *See id.* at 3-4 (noting that she does not expect to convince people who “determinately hold on to a notion of God as an all-transcendent Father”).

61. It is precisely because of this transcendent source of identity and dignity that James Cone writes of Jesus Christ giving “many [blacks] dignity in the midst of humiliation,” and Albert Raboteau writes of slaves “developing [from Christianity] both a sense of personal dignity and an attitude of moral superiority to their masters.” CONE, *GOD OF THE OPPRESSED*, *supra* note 43, at 112; ALBERT J. RABOTEAU, *SLAVE RELIGION: THE “INVISIBLE INSTITUTION” IN THE ANTEBELLUM SOUTH* 301 (2004).

62. RABOTEAU, *supra* note 61, at 301-02.

63. *See supra* notes 61-62 and accompanying text.

the self, Christian anthropology provides a basis for self-identity and resistance that transcends racially subordinating language games.

Thus, in addition to maintaining the self's transcendent source, the Christian argument provides the God-oriented, metaphysical context in which many African Americans were able to maintain a sense of self-worth and dignity in the face of total institutional and cultural subordination. As a result, unlike the post-structural rationale, the Christian justification for rights-to-difference renders intelligible the profound strength and resiliency of the African American people. As such, because it avoids the post-structural rationale's atheistic anthropology<sup>64</sup> and instead develops from a Christian conception of the self, the Christian argument for rights-to-difference furthers, rather than obscures, self-understanding among African American Christians. While this is but a single illustration of how drawing on the normative resources of the African American Christian tradition can advance the self-understanding of Black Christians, I could give many more.<sup>65</sup> But rather than providing additional illustrative examples, I now want to turn to possible explanations of why—despite CRT's commitment to the looking to the bottom—the African American Christian tradition has to date played only a marginal role in CRT scholarship.

## II. ILLUMINATING RELIGION'S MARGINAL ROLE IN CRT SCHOLARSHIP

This Part considers explanations of the peripheral role of the African American Christian tradition as a normative resource for CRT scholarship that are both endogenous and exogenous to CRT's commitments and historical formation. As this Part makes clear, there are strong reasons to believe that CRT's failure to develop a robust literature grounded in the African American Christian tradition is endogenous to CRT itself. However, there are exogenous explanations that may also limit the extent to which CRT scholars have sought to develop arguments from religiously grounded normative sources. We first examine plausible exogenous explanations.

### A. Exogenous Explanations

We have already mentioned the first exogenous explanation that we shall consider: that race and law scholars may be less religious than the African American population as a whole, and so are not inclined to construct normative arguments from the resources of the African American Christian

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64. See *supra* notes 50, 52-53, 60, and accompanying text; see also GENE E. VIETH, *POSTMODERN TIMES: A CHRISTIAN GUIDE TO CONTEMPORARY THOUGHT AND CULTURE* 87 (1994).

65. Although I am not able to explore them here, one could further the self-understanding of Black Christians by bringing the normative resources of the African-American Christian tradition to bear on topics, such as *de facto* school and residential segregation, interracial adoption, same-sex marriage, and immigration.

tradition. While this explanation sounds plausible and could be explored through survey data on CRT scholars' religious identifications, as far as I am aware, no such data has ever been collected.<sup>66</sup> However, it bears noting that more than half of Black law students report being very or extremely spiritual.<sup>67</sup> Indeed, it bears noting that only a tiny percentage of Black law students (3.8% of men and 0.8% of women) report being either atheists or agnostics.<sup>68</sup> Moreover, while significantly less than the percentage of the general African American population, well over fifty percent of Black law students identify as Protestant Christian.<sup>69</sup> Yet, because law professors tend to come from a rarified group of law students,<sup>70</sup> and because Black students who go on to become race and law scholars may not be representative of Black law students in general, the foregoing statistics may not bear a significant relationship to the religious beliefs of Black CRT scholars.<sup>71</sup>

Yet, even if data on religious affiliations of Black students does not correlate with CRT scholars' religious identifications, attributing the Christian tradition's marginal role in CRT scholarship to the religious affiliations or beliefs of CRT scholars is not particularly compelling.<sup>72</sup> Whether or not a significant number of CRT scholars identify as Christian, we would expect CRT scholarship to explore a significant source of values for communities of color, because CRT is committed to examining

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66. Interestingly, although data correlating race and religion has yet to be collected, law professors in general are far less likely to identify as Protestant or Catholic than are Americans in general. *Compare* AM. BAR FOUND., AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 18 (2011), available at [http://www.americanbarfoundation.org/uploads/cms/documents/after\\_tenure\\_report-final\\_abf\\_4.1.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-final_abf_4.1.pdf) (of responding American law professors, fifteen percent identified as Protestant and seven percent as Catholic), with PEW FORUM, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (2008), available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf> (51.3% and 23.9% of Americans identify, respectively, as Protestant and Catholic).

67. Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 RUTGERS RACE & L. REV. 75-S, 118-S (2012) (reporting that 50.3% of Black men compared to 27.2% of white men and 65.2% of Black women as compared to 27.0% of white women identified as either extremely or very spiritual).

68. *Id.*

69. *Id.* (reporting that 49.5% and 59.3%, respectively, of Black male and Black female students identify as Protestant).

70. Paul Campos, *A failure of the elites*, LAWYERS, GUNS & MONEY (July 23, 2013), <http://www.lawyersgunsandmoneyblog.com/2013/07/a-failure-of-the-elites#more-46121> ("For example, a study of entry-level tenure-track hires between 2003 and 2007 found that, out of 466 hires, 40.1% came from just two schools: Harvard and Yale (85.6% came from a total of 12 schools).").

71. A recent survey of students attending Yale Law School, from which a disproportionate number of law professors graduate, see *id.*, finds that law students at Yale are far less likely to identify as Christian and far more likely to identify as atheists or agnostics than are members of the general American population. Jordan Lorence, *Atheists and Agnostics Are the Largest Affiliation of Yale Law School Students*, SPEAK UP (Nov. 3, 2011), <http://blog.speakupmovement.org/university/freedom-of-religion/atheists-and-agnostics-are-the-largest-affiliation-of-yale-law-school-students/>.

72. See *supra* notes 67-71 and accompanying text.

law from the perspective of communities of color and a strong majority of the African American community identifies as Christian. Furthermore, while it is possible that the faith identifications of CRT scholars helps to explain the peripheral role that the African American Christian tradition has played in CRT scholarship, this explanation assumes that a CRT scholar's commitment to including the perspectives of subordinated communities would fall away just because she does not identify with a certain faith. However, because there is no reason to believe that a scholar must subscribe to the Christian faith in order to consider how Christianity might bear on the normative perspectives that African American Christians might have on questions of race and law, there is no strong reason to conclude that non-Christian CRT scholars committed to including the perspectives of subordinated communities would refuse to draw on the normative resources of the Christian tradition.<sup>73</sup> Indeed, as I have intimated, precisely because CRT is committed to drawing on the perspectives of subordinated communities,<sup>74</sup> as a matter of self-consistency, CRT is called to give far greater attention to Christianity than it has so far given.

The second exogenous explanation arises from the possibility that there are disincentives against writing Christian-informed scholarship in a mainstream academic culture that some perceive to be biased against scholarship grounded in the Christian faith.<sup>75</sup> If such a bias in fact exists, one might plausibly believe that it would deter CRT scholars from drawing on the African American Christian tradition. While this hypothesis seems reasonable, if explanatory, it contradicts CRT's self-styled status as a rebellious, fearless form of outsider scholarship that resists and overcomes efforts to exclude and silence the perspectives and values of subordinated communities.<sup>76</sup> As a result, this explanation of the marginal role of African American faith in CRT scholarship appears to be inconsistent with CRT's own commitments as well as its character as an oppositional, outsider body of scholarship.

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73. As I discuss later in the article, in contrast to CRT, LatCrit has engaged in an organized and self-conscious discussion on the role of religion and Catholicism in Latino/a communities and the importance thereto for LatCrit theory. See discussion, *infra* pp. 168-75.

74. See *supra* note 29 and accompanying text.

75. David A. Skeel Jr., *The Paths of Christian Legal Scholarship*, 12 GREEN BAG 2D 169, 181 (2009) ("Young scholars in secular law schools still face significant disincentives to producing faith-oriented scholarship early in their careers, such as the possibility that Christian legal scholarship will be valued less highly in the tenure and promotion process than more traditional secular legal scholarship, and the difficulty of placing Christian legal scholarship in elite law journals.").

76. See Penelope E. Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855, 871 (2000) ("[Critical race] theory incorporated 'an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies.' In addition, much of critical race theory is 'marked by deep discontent with liberalism, a system of civil rights litigation and activism, faith in the legal system, and hope for progress.'" (footnotes omitted).

A third, plausible exogenous explanation of the marginal role of the African American tradition in CRT flows from the First Amendment's Establishment Clause.<sup>77</sup> While there are no constitutional barriers preventing race and law scholars from offering religious reasons for their normative claims or from developing their normative claims from religious premises,<sup>78</sup> as a practical matter, the Establishment Clause may operate to constrain the effectiveness of scholarship grounded in religiously grounded normative arguments. More specifically, assuming that race and law scholarship generally seeks to influence the law, it is plausible to conclude that race and law scholars will craft arguments that are designed to persuade the legislative or judicial branch. As I argue below, notwithstanding the Establishment Clause, there may be advantages to offering religiously grounded arguments in the legislative context. In contrast, there are reasons to believe that the Establishment Clause operates to limit the effectiveness of legal scholarship developed from religious premises and directed to the judiciary. As a result, in contrast to CRT scholarship directed to the legislative branch, CRT scholarship directed to the judiciary may, for practical reasons, gain little by drawing on the normative resources of the African American Christian tradition.<sup>79</sup> But before reaching the question of the comparative practical efficacy of religiously grounded arguments in the legislative and judicial contexts, we first consider the constitutional standards applicable to each. We begin with the legislative context.

Under the Court's *Lemon* test, laws adopted with religious motivations pass constitutional muster so long as they (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) do not result in an excessive entanglement between state and religion.<sup>80</sup> Indeed, as Michael Perry has written:

Although the nonestablishment norm that is constitutional bedrock for us Americans forbids government to privilege one or more churches, it does not go so far as to forbid government to take action based on religiously grounded moral belief. No such rule is—no such rule has ever become—part of our constitutional bedrock. Nor does authoritative case law contain any such rule[.]<sup>81</sup>

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77. See U.S. CONST. amend. I.

78. Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932, 936-37 (1989) (“The establishment clause by its terms forbids the imposition of religious belief by the state, not statements of religious belief in the course of public dialogue.”).

79. See discussion, *infra* pp. 138-41.

80. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 CORNELL J.L. & PUB. POL’Y 1, 23-24, 31-32, 35, 48 (2002).

81. Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 671 (2001) [hereinafter Perry, *Why Political Reliance*] (footnote omitted) (citing *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987)).

Thus, although legislation must pass the *Lemon* test, the Constitution does not require a legislator to exclude her own “religiously grounded moral belief.”<sup>82</sup> As a result, provided that a particular piece of legislation can satisfy *Lemon*, it follows that race and law scholars who look to religious traditions for normative sources are not for that reason incapable of influencing lawmakers.

Accordingly, provided *Lemon* is satisfied, legislators are free to adopt the proposals of scholars who draw on the normative resources of a religious tradition.<sup>83</sup> However, in light of the fact that much race and law scholarship, and much legal scholarship in general, is focused on developing arguments directed to persuading the judiciary, it is important to consider the effectiveness of addressing religiously grounded normative argument to a judicial audience. As I have already indicated but now explain in more detail, for practical reasons, constitutional considerations operate to limit the effectiveness of such arguments.

While in some cases judges may be required to create policy, their first task is to apply and interpret the law.<sup>84</sup> As a result, they are not free to resolve cases according to their own convictions but must justify their decisions within the terms of relevant case and statutory law.<sup>85</sup> Moreover, given the rareness, at least in the modern era, with which judges or legislators explicitly articulate religious premises,<sup>86</sup> sources of law relevant to a judge’s resolution of a case will nearly always rely on reasoning that does

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(Scalia, J., dissenting) to emphasize the point that no authoritative case law renders legislation unconstitutional because of the presence of religious motivations).

82. Perry, *Why Political Reliance*, *supra* note 81, at 671. It bears emphasizing that while religious motivations are not constitutionally fatal, legislation must have a secular purpose. As a practical matter, it appears that the clear presence of religious motivations may increase the odds that a particular piece of legislation will be found to lack the requisite secular purpose. See *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”); see also *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion [(the secular purpose prong)] . . . the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.”) (citations omitted).

83. See *supra* notes 80–82 and accompanying text.

84. See Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211, 227 (2007).

85. *Id.* at 219–20, 228.

86. As far as I am aware, no empirical study is available to support the assertion that legislators rarely articulate religious premises in support of legislative acts. However, because of *Lemon*’s requirement that legislation have a secular purpose, and because evidence of religious motivation may belie such a purpose, legislatures that explicitly rely upon religious premises invite constitutional challenge. See *supra* notes 80–82 and accompanying text. As a result, notwithstanding the absence of a rigorous empirical study, it is rare for legislators to ground legislation upon explicitly articulated religious premises. In addition, because judges are also subject to *Lemon*, it is likewise rare for the judiciary to rely upon explicitly articulated religious premises. See *infra* notes 89–91 and accompanying text.

not reference religion. In other words, judges are nearly always required to resolve cases within the terms of legal authorities that do not employ religiously grounded thought.

Because judges will decide nearly all cases within discursive frameworks that are devoid of any reference to religious sources, arguments that can hope to effectively persuade a judge toward resolving a case in a particular way will usually engage the relevant sources of law in non-religious terms.<sup>87</sup> Accordingly, scholars and litigants who hope to influence the judiciary will almost never find appeals to religiously grounded normative sources very helpful.<sup>88</sup> Moreover, even while judges may decide “hard” cases by resorting to their own religious convictions,<sup>89</sup> constitutional constraints require their decisions to be justified in legal and not religious terms.<sup>90</sup> In particular, like legislators, judges are required to abide by the First Amendment, and so their decisions must meet the *Lemon* test.<sup>91</sup> Thus, even if a religiously grounded argument were to persuade a judge that a particular normative position were correct, the judge would still be required to articulate a rationale for her decision that satisfies *Lemon*’s three pronged test. As a result, whether litigants, scholars, or activists, those who hope to persuade the judiciary should provide a rationale by which a judge can justify her decision.

Because both legislators and judges must satisfy the *Lemon* test, it is tempting to conclude that religiously grounded normative sources are equally situated whether one is seeking legislative reform or whether one is addressing the judiciary. However, in light of practical considerations, this would be the wrong conclusion to draw. When addressing the judiciary, scholars, litigants, and activists are focused on persuading one and as many as nine people, who may or may not hold particular religious convictions, to adopt their view of how a matter should be resolved. In con-

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87. It bears noting that when a matter involves religious freedom (and possibly even subsidies to religious organizations) it may be helpful and even necessary to address religiously grounded arguments to the judiciary. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2765–66, 2785 (2014) (finding that under the Religious Freedom Restoration Act of 1993 the religious beliefs of owners of closely held corporations entitle such corporations to an exemption from the contraceptive mandate promulgated pursuant to the Patient Protection and Affordable Care Act).

88. Compare *supra* note 86 and accompanying text, with *supra* note 87 and accompanying text.

89. See Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 555, 560–61 (1998) [hereinafter Idleman, *The Limits of Religious Values*].

90. A relatively recent example of a judge appealing to her religious convictions occurred in *State v. Arnett*, 724 N.E.2d 793 (Ohio 2000) in which during sentencing Judge Melba Marsh quoted the Bible. Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1, 4–5 (2000).

91. Idleman, *The Limits of Religious Values*, *supra* note 89, at 553 (footnote omitted) (“Without question these [*Lemon*] proscriptions apply to judges, both federal and state, no less than to other governmental actors.”).



trast, when pursuing legislative reform, the potential audience is much broader, including co-religionists or other allies who may join on behalf of lobbying for desired legislative reform. As a result, the impact of constitutional constraints on race and law scholars who seek to ground their arguments in the Christian tradition has very different implications in the legislative and judicial contexts. To put it bluntly, because religious motivations are not fatal to the justification needed for legislation to pass constitutional muster, and because approximately seventy-three percent of Americans identify as Christian,<sup>92</sup> arguments grounded in the normative resources of the Christian tradition can be helpful in organizing political support on behalf of legislative reform.<sup>93</sup>

Accordingly, given the importance of political support in the legislative context, the religious demographics of the country, and the terms on which judges are required to resolve cases, it is reasonable to conclude that race and law scholarship grounded in the Christian tradition can be more effective when addressed to the legislature than to the judiciary.<sup>94</sup> Thus, with respect to the marginal role of the African American Christian tradition in CRT, we can conclude the following: while Establishment Clause concerns do not in themselves relegate African American religious sensibilities to the periphery of race and law scholarship, as a practical matter, these concerns do limit the usefulness of including religiously grounded normative sources in arguments that are primarily designed to indicate how a judge should resolve an issue. Because much race and law scholarship, like legal scholarship in general, has a judicial audience in mind, as a practical matter, the Establishment Clause may operate to limit the extent to which race and law scholars draw on the African American Christian tradition, and in this sense, can be understood to act as a repulsive force against the inclusion of that tradition.

However, there are reasons to question the strength of this explanation of the marginal role of religiously grounded arguments in CRT. While the Establishment Clause may operate to constrain the extent to

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92. "Nones" on the Rise, PEW FORUM (Oct. 9, 2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (noting that in 2012 seventy-three percent of Americans identified as Christian).

93. The activity of Christian lobbyists in Washington, DC provides broad support for the claim that appeals to the Christian tradition can mobilize political support on behalf of legislative reform. See *Lobbying for the Faithful*, PEW FORUM (May 15, 2012), <http://www.pewforum.org/2011/11/21/lobbying-for-the-faithful-exec/> (describing the activities of religious advocacy groups and noting that, "about half of the religious advocacy groups in the study are exclusively Christian. Many of the religious coalitions and interreligious groups, however, are partly or largely Christian in outlook."). Moreover, appeals to the African-American Christian tradition have proven effective in mobilizing Blacks politically. See FREDERICK C. HARRIS, SOMETHING WITHIN: RELIGION IN AFRICAN-AMERICAN POLITICAL ACTIVISM 142 (1999) ("[R]eligious symbols and rituals have served as resources for black mobilization in a variety of historical settings and political contexts.").

94. See *supra* notes 87-93 and accompanying text.

which race and law scholarship directed to the judiciary draws on religiously grounded normative sources, this explanation is difficult to reconcile with the fact that, although CRT has influenced the law and the judiciary,<sup>95</sup> CRT's critics and allies have noted that CRT is overwhelmingly critique-oriented, largely lacks a positive program for legal reform, and has not been focused on developing positions that the judiciary is likely to actually adopt.<sup>96</sup> Thus, because it is reasonable to conclude that CRT has not been primarily concerned with developing critiques and programs that the judiciary is likely to actually adopt, Establishment Clause based constraints on the efficacy of religiously grounded normative arguments are not a particularly persuasive explanation for the marginal role of the African American Christian tradition in CRT. Indeed, reflecting, in my view, CRT's willingness to develop critiques that courts are unlikely to adopt, legal scholar Penelope Andrews notes that in "a series of conversations . . . civil rights lawyers [told her] that they do not find much of critical race theory useful in their endeavors in the courts."<sup>97</sup> Consistent with these conversations, Andrews also notes that while CRT has generated substantial attention, its influence "in this country has been somewhat limited. It has been of fairly significant theoretical value, but this has largely been confined to a few academics in law faculties."<sup>98</sup>

In summary of our discussion of potential exogenous explanations, while it is possible that CRT scholars' religious identifications, disincentives against Christian-informed scholarship, and the Establishment Clause all contribute to the marginal role of the African American Christian tradition in CRT scholarship, these explanations are each in some respect

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95. Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "a Foot in the Closing Door,"* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 24 (Francisco Valdes & Jerome M. Culp, eds. 2002).

96. Andrews, *supra* note 76, at 873 n.91; see also Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 389 (1998) ("On the question of whether critical race theory has any sort of agenda, set of action points, or guide points for the future, it seems to me that the criticism that the movement has spent too much of its energy on pointing out flaws in liberalism may actually be true.").

97. Andrews, *supra* note 76, at 873 n.91, 874.

98. *Id.* at 877; see also *id.* at 873 n.91 (reflecting her claim that "critical race theory's" influence is somewhat limited, Andrews notes that a search of federal case law for references to CRT "proved fruitless"). I have updated the search and have located three references to CRT. See, e.g., *United States v. Heineman*, No. 2:11 CR 432 DN, 2013 WL 840039, at \*1-2 (D. Utah Mar. 6, 2013); *Cambridge Univ. Press v. Becker*, 863 F.Supp.2d 1190, 1262-63 (N.D. Ga. 2012); *Locurto v. Giuliani*, 269 F.Supp.2d 368, 386 n.10 (S.D.N.Y. 2003). As Andrews notes, lack of references to CRT "may just indicate that judges do not explicitly mention critical race theory, but may in fact cite the work of an individual scholar who identifies as a critical race theorist." Andrews, *supra* note 76, at 873 n. 91; see also Jeffrey J. Pyle, *Note, Race, Equality and the Rule of Law: Critical Race Theory's Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 821 (1999) ("Despite its ten years as a 'movement,' its voluminous publications and ubiquitous presence in law schools, critical race theory has had almost no influence outside the walls of academia.").

inadequate. As mentioned, given CRT's commitment to drawing on the values and perspectives of the communities about which it writes, there is no strong reason to assume that individual CRT scholars' religious identifications are responsible for the neglect of the African American Christian tradition. Likewise, CRT's proven willingness to challenge and confront the commitments of the mainstream legal academy would seem to belie the claim that biases against Christian-informed scholarship has led CRT to neglect an important source of values and normative meaning for the African American community.<sup>99</sup> Lastly, while the Establishment Clause may constrain the extent to which judiciary-directed race and law scholarship draws on religiously grounded normative sources, CRT's proven and consistent capacity to resist the lure of narrowing its focus to arguments that the judiciary is likely to actually adopt calls this explanation into question. Moreover, whether or not practical considerations serve to limit the usefulness of including religiously grounded normative sources in arguments in the judicial context, the legislative context is another matter. Indeed, as we have seen, in the latter context, there may be distinct advantages to drawing on the normative resources of the African American Christian tradition. As a result, it is possible to draw the conclusion that legal scholarship directed to achieving legislative reform can hold particular importance for organic intellectuals who believe bottom-up scholarship cannot ignore the Black community's central historical normative resource: the Black church.

### B. *Endogenous Explanations*

For the reasons described above, the exogenous explanations that we have considered are not entirely satisfying accounts of why CRT has failed to develop a substantial body of literature examining race and law from the normative perspective of the African American Christian tradition.<sup>100</sup> In search of a more compelling explanation, we now consider endogenous explanations of CRT's neglect of African American Christianity. In other words, we consider whether there is anything in CRT itself that helps to explain its failure to develop a substantial body of literature examining race and law from the perspective of the Christian tradition.

I develop this search for an endogenous explanation along three major lines of inquiry. First, I examine whether CRT's internal commitments align CRT with scholars who oppose, as a matter of political morality, the use of religious reasons in public debate. Finding that CRT rejects the possibility of neutral discourse and is committed to particularity, I argue that CRT is actually better aligned with scholars who support religious reasons in public discourse. Second, I review CRT's origins to evaluate how a movement formed primarily by Black scholars, committed to in-

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99. See Andrews, *supra* note 76, at 871.

100. See discussion, *supra* pp. 141-42.

cluding in scholarship the perspectives of communities of color and focused on understanding and exposing American law's complicity in perpetuating and reproducing racial subordination, essentially omits from consideration the most significant source of normative meaning for a significant percentage of the African American community and the primary engine of the civil rights movement: the Christian tradition and the Black church.<sup>101</sup> From this review, I conclude that CRT's deep intellectual debt to Black nationalist and Black power thought renders it at best indifferent to the African American Christian tradition. Third, I argue that CRT's commitment to a secular constructionist conception of subordination, in which religion is treated as any other social factor, stands in tension with attempts to ground CRT arguments in the normative resources of the Christian tradition.

### 1. The Explanation from Political Morality

Having explained that the Constitution does not limit the role of religious reasons in public discourse and that there are reasons to believe that race and law scholars can more effectively employ religious reasons in legislative as opposed to judicial contexts, I now inquire whether debates over the political morality of using religious reasons in public deliberation help to account for the peripheral role of religion in CRT scholarship. Significantly, unlike the Establishment Clause's potential role in deterring the development of a substantial body of CRT scholarship that draws on religious sources, the political morality of religious reasons is a question of political theory. Thus, for the simple reason that debates in political theory are theoretical and lack the force of law, they cannot be expected to have the practical, limiting effect that constitutional considerations may sometimes have on the arguments that legal scholars advance. As a result, to determine whether debates on the political morality of religious reasons has shaped CRT scholarship, it would be helpful to have empirical data on race and law scholars' attitudes toward debates on democratic citizenship and religious reasons. Unfortunately, as far as I am aware, such data is unavailable. However, because such data would tell us about individual scholars' attitudes about religious reasons in public discourse, and it would not interrogate CRT's internal commitments, even if such data were available, it would form the basis of a potential exogenous, rather than endogenous explanation of religion's marginal role in CRT scholarship. Moreover, because survey data indicates that, "compared with other groups, African-Americans express a high degree of comfort with religion's role in politics," such an explanation would not cohere with CRT's commitment to including the values and perspectives of the community it seeks to represent.<sup>102</sup> To avoid this problem, and because of its greater

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101. See *supra* note 1 and accompanying text; *supra* note 8 and accompanying text.

102. *A Religious Portrait of African Americans*, *supra* note 8.

explanatory power, we pursue the following endogenous line of inquiry: whether CRT's core tenets or methodological commitments serve to align it with opponents of religious reasons in public discourse, thereby helping to explain religion's marginal role in race and law scholarship.

At the outset of an inquiry that seeks to learn what effect, if any, debates on the political morality of religious reasons have had on chilling the development of a substantial body of race and law scholarship that draws on religiously grounded norms, it bears noting that no one, as far as I am aware, has systematically approached this debate from the perspective of African American religious sensibilities and history. This omission in the literature is particularly striking in light of the positive role that religion played in the abolition and civil rights movements as well as religion's negative role in justifying slavery and Jim Crow.<sup>103</sup> And yet, viewed from a certain standpoint, this omission is understandable. In particular, in contrast to the significant role that religion has played in the persecution of the Jewish people over the long course of their history in the Western world,<sup>104</sup> the subordination of African Americans has largely been a matter of race.<sup>105</sup> Thus, whereas Jewish Americans have given considerable thought to the role of religion in the Jewish struggle for equality,<sup>106</sup> and they have often been in favor of maintaining a strong separation between church and state, thereby minimizing the role of religion in public life,<sup>107</sup> for African Americans, race, and not religion, has been the defining fea-

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103. Compare MARK A. NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS* 33-48 (2006) (reviewing biblical arguments in favor of slavery, against slavery as practiced in the United States and in favor of abolition) with CHAPPELL, *supra* note 1, at 1-8 (noting the central role that religion played in inspiring and sustaining the Black civil rights movement) and with Russell Hawkins, *Religion, Race, and Resistance: White Evangelicals and the Dilemma of Integration in South Carolina 1950-1975* 107-43 (2009) (PhD dissertation, Rice University) (on file with ProQuest/UMI Dissertations) (arguing that folk theology justified resistance to integration among white evangelicals in South Carolina).

104. Richard Harries, *AFTER THE EVIL: CHRISTIANITY AND JUDAISM IN THE SHADOW OF THE HOLOCAUST* 16-21 (2003).

105. Malcolm X, *Message to the Grass Roots*, in *MALCOLM X SPEAKS* 4 (George Breitman ed., 1994) ("You don't catch hell because you're a Baptist, and you don't catch hell because you're a Methodist. You don't catch hell 'cause you're a Methodist or Baptist . . . You catch hell because you're a black man. You catch hell, all of us catch hell, for the same reason.").

106. See, e.g., *RELIGION AS A PUBLIC GOOD: JEWS AND OTHER AMERICANS ON RELIGION IN THE PUBLIC SQUARE* (ed. Alan Muttelman) (2003) (providing various essays by leading scholars engaging the relationship between Jewish Americans, religion in the public square and separation of church and state); NAOMI COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* (1992) (providing a historiography of both the American Jewish relationship to a predominately Christian United States and Jewish engagement with the separation of church and state); Theodore Y. Blumoff, *The Holocaust and Public Discourse*, 11 *J.L. & RELIGION* 591, 596 (1994-95) (Considering Jewish perspectives on religion in public discourse and noting that "[t]he fear of identifying one's religion in public discourse is the Holocaust's bequest to many American Jews.").

107. Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 *DEPAUL L. REV.* 499, 501-02 (1998).

ture of the struggle for equality.<sup>108</sup> As a result, even while the African American church was the central engine of the civil rights movement,<sup>109</sup> and African Americans remain deeply religious, it is not difficult to understand why theoretical debates on the political morality of religious reasons in public discourse have given little attention to the African American community or its churches.<sup>110</sup>

While this is not the place for such a systematic engagement, there are obvious questions that such a treatment should consider. For example, while concern with religious warfare and stability informs the debate on religious reasons in public discourse, African Americans have no direct historical connection to internal European religious wars, and have been oppressed by Whites who represent the range of European Christendom.

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108. See generally Malcolm X, *supra* note 105 and accompanying text; see JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN-AMERICANS* 146, 176 (8th ed. 2000) (noting the racial justification for slavery).

109. See Chappell, *supra* note 1, at 86-97, 97 (“What is remarkable about the civil rights movement, and what makes it most like one of the great historic revivals, is that the enthusiasm moved out of the church and into the streets.”).

110. Incidentally, there has also been a marked neglect of the extent and manner in which the African American Christian tradition bears on the First Amendment’s Establishment and Free Exercise Clauses. For example, in Phillip Hamburger’s magisterial book on the history of the separation of church and state in the United States, *SEPARATION OF CHURCH AND STATE* (2004), I have been able to locate only one paragraph and accompanying footnote in which Hamburger discusses Black Christian attitudes toward the relationship between church and state. Hamburger writes that, “The black Baptist conventions [of the late 1800s] stayed even further from separation [than their white counterparts]. Unlike the Southern Baptist Convention, they could hardly afford to disavow interference with political affairs, for their conventions had to struggle to sustain the political strength of their people. . . . In addition, like many of their white brethren, the black Baptist conventions probably had theological objections to separation. Certainly, although they adopted resolutions on both religious and political issues, they adopted none on behalf of the separation of church and state.” PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 280 (2004). Perhaps the most thoughtful assessment of African American interests in Establishment Clause jurisprudence is Tracey L. Meares and Kelsi Brown Corkran’s co-authored article, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315 (2006-07). While Meares and Corkran do not attempt to theorize an African American Christian approach to church-state relations, they analyze the Chicago Black community’s “May 1997 community-wide prayer vigil to end violence against children” and note that “the highest-ranking police officer of the Harrison District, Commander Claudell Ervin[’s]” participation in the vigil raises Establishment Clause issues. *Id.* at 1333, 1362, 1377. They also review African American litigation over government support of religious schools and faith-based social services and conclude that, “[f]or the most part, the litigation pattern suggests that the African-American community’s interest in the Establishment Clause has been instrumental—a legal vehicle used to achieve a higher end such as desegregation.” *Id.* at 1377. Consistent with the discussion in this Article of the central role of Christianity in the lives of African Americans and survey data showing that substantial numbers of African Americans are comfortable with religion having a role in politics, Meares and Corkran note, “[t]here is little concern about, or even attention to, the potential dangers that outsiders see regarding close church-state relationships exhibited by representative African-American institutions; perhaps this is not surprising, particularly in light of the centrality of church-like norms, religious language, and other social practices readily flowing from the towering institutions of African-American cultural life.” *Id.* at 1377.

From these facts we might ask whether the religious peace offered by the enlightenment; the First Amendment's aim of avoiding religious division; and contemporary-era debates about the role of religious reasons are: (1) chiefly concerned with potential infighting among whites and (2) are simply not concerned with addressing the racial basis upon which Blacks are and have been oppressed. As anyone acquainted with the history of Western European and American efforts to avoid religious division and violence would reply, ending racial subordination was not a focus of efforts to resolve religious hostilities. Given the historical oppression of Black people on the basis of race and the central role that religiously-inspired movements have historically played in bringing about greater racial equality, it is necessary to ask—particularly if religious argument might reconfigure the racial status quo—what is at stake for the Black community in debates about the political morality of religious argument?

However, this is not the place to engage these and similar questions at any length. Here, where I am concerned with whether debates on political morality help to explain the marginal role of religion in race and law scholarship, I have set a more modest task. Rather than systematically assessing how African American history and religious sensibilities might respond to the debate on religious reasons, I inquire whether CRT's core commitments or methods serve to align it with opponents of religious reasons in public discourse, despite the historical and contemporary centrality of religion as a source of values for many African Americans. In other words, because my goal here is to determine whether the debate on political morality helps to explain the marginal role of religion in race and law scholarship, I am asking whether there is reason to believe that CRT is aligned against the offering of religious reasons in public discourse. Of course, in part because CRT and debates over religious reasons have ostensibly disparate foci, this question is difficult to address. Nevertheless, given the centrality of religion in the Black community and religion's marginal role in an intellectual movement that emphasizes the value of "looking to the bottom," it is useful to grapple with whether CRT is implicitly aligned with opponents of religious argument in public discourse.<sup>111</sup>

Let me begin by describing CRT's general commitments. As Kimberlé Crenshaw has observed, CRT is "dynamically constituted,"<sup>112</sup> and as Rachel Moran has said, CRT is a "sprawling, unruly, and sometimes fractious field."<sup>113</sup> Thus, in the context of discussing CRT's core ideas, Devon Carbado has said, "[w]e need more, not fewer, efforts to

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111. This inquiry is somewhat analogous to the inquiry in CRT's formative years into whether liberal ideology and critical legal studies were normatively and methodologically biased against voices of color. See discussion, *infra* pp. 154–57.

112. Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) [hereinafter Crenshaw, *Twenty Years*].

113. Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2375 (2003).

define the ‘dynamically constituted’ borders of CRT.”<sup>114</sup> As a result, describing CRT’s general commitments is difficult. Nevertheless, following Carbado, we can ask, “[w]hat are (or should be) some of CRT’s core ideas?”<sup>115</sup>

As other scholars have indicated, CRT includes the following core ideas: (1) a critique of liberalism, particularly liberalism’s commitment to an ideal of objective, neutral, and ahistorical legal reasoning, and a commitment to historical and contextual legal analysis;<sup>116</sup> (2) a concern with both theory and praxis;<sup>117</sup> (3) as explained by Derrick Bell’s interest-convergence theory, racial progress in America is not linear but instead characterized by reform and retrenchment of racial hierarchy;<sup>118</sup> (4) racial disparities cannot be explained by individual agency and merit but instead reflect “inherit[ed] advantages and disadvantages,” including “the historically accumulated social effects of race”<sup>119</sup> and, as a result, colorblindness can perpetuate racial inequality while color consciousness can work to resolve race-based disparities;<sup>120</sup> (5) “race” is not a biological category but is instead the product of law, social relations, and ideology;<sup>121</sup> (6) whiteness is property;<sup>122</sup> (7) racial subordination is a structural phenomenon;<sup>123</sup> (8)

114. Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1602 (2011).

115. *Id.* at 1607.

116. MATSUDA ET AL., *supra* note 18, at 6 (“Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law”); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (2001) (stating that critical race theory “questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law”). Imani Perry, *Occupying the Universal, Embodying the Subject: African American Literary Jurisprudence*, 17 LAW & LITERATURE 97, 119 (2005) (“CRT scholars have critiqued the liberal model’s use of Enlightenment-derived conceptions of rationality, humanism, and the like, and been critical of its imposition of norms that privilege whiteness and maleness and upper class status”); Girardeau A. Spann, *Conservative and Progressive Legal Orders: Just Do It*, 67 LAW & CONTEMP. PROB. 11, 15 (2004) (“[L]iberalism is rooted in Enlightenment conceptions of reason. Liberalism is committed to the belief that syllogistic rational analysis provides a reliable method for developing fair and equitable solutions to even our most intractable social problems. In recent years, however, critical race theory has argued that this commitment to reason often masks the ways in which legal and cultural norms are racially oppressive.”) (footnotes omitted).

117. Adrien Katherine Wing, *Global Critical Race Feminism Post 9-11: Afghanistan*, in 10 WASH. U. J.L. & POL’Y 19, 24 (2002).

118. See Carbado, *supra* note 114, at 1607-08 (noting that “Derrick Bell’s theory of interest convergence . . . [is] as an explanation for the reform/retrenchment dynamic”); Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 449 nn.143-46 (2012) (citing and discussing sources stating that the interest-convergence thesis is a central principle of critical race theory).

119. See Carbado, *supra* note 114, at 1608.

120. See *id.* at 1609.

121. *Id.* at 1609-10.

122. See *id.* at 1610-11 (citing Cheryl Harris’s widely influential article, *Whiteness as Property*, 106 HARV. L. REV. 1701 (1993)).

123. Carbado, *supra* note 114, at 1613.



racism is endemic to American democracy, constituting rather than opposing it;<sup>124</sup> (9) critical race theory aspires to be anti-essentialist;<sup>125</sup> and (10) CRT “insists on recognition of the experiential knowledge of people of color and [their] communities of origin in analyzing law and society,” with such knowledge “gained from critical reflection on the lived experience of racism and from critical reflection upon active political practice toward the elimination of racism.”<sup>126</sup>

In addition to inquiring about core ideas, we might also ask whether CRT is methodologically distinctive. Although CRT lacks a unifying methodology, and individual race and law scholars employ a wide range of methodologies, including traditional legal analysis, interdisciplinary work, historical analysis, and deconstruction, perhaps because of its contrast with traditional legal analysis, narrative is perhaps most distinctively associated with CRT scholarship.<sup>127</sup> Most immediately, narrative enables marginalized communities to have their voices and perspectives heard. Thus, the counter-narratives of minority communities challenge and contest the dominant narratives that undergird American law. In this way, among other things, narratives “add the perspective of powerless people to the law,” and works to include “outsiders” and stories from the “bottom-up.”<sup>128</sup>

Although CRT is “sprawling” and “unruly,” I have briefly although not definitively, described the core ideas and methodologies that scholars have attributed to CRT. Now the task is to attempt to understand whether CRT’s commitments and methods align it with scholars who advocate against the inclusion of religiously grounded normative sources in public debate. To that end, I now briefly describe the debate on the political morality of offering religious reasons in liberal democracy.

As distinguished from inquiries about potential legal limits on the role of religious reasons in either lawmaking or judicial adjudication, the debate over the political morality of offering religious reasons in public

124. *Id.* at 1613.

125. *Id.* at 1614-15; see also Brenda D. Cummins & Justin D. Cummins, *Taking the Fork in the Road*, 29 WM. MITCHELL L. REV. 1069, 1071 (2003) (“Another theme of CRT is ‘antiessentialism.’”).

126. MATSUDA ET AL., *supra* note 18, at 6.

127. Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory*, 45 VILL. L. REV. 1195, 1196 n.4 (2000) (“CRT is known for its lack—and perhaps rejection—of a unifying method.”); see also Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151, 1163 (2008) (“A body of mainstream scholarship expressed deep hostility to Critical Race Theory (CRT), its intellectual claims about the centrality of race to the fabric of the law, and its innovative methodology—especially narrative scholarship.”). *Introduction to CRITICAL RACE FEMINISM* 3 (Adrien K. Wing ed., 1997) (“CRT’s critique of society thus often takes the form of storytelling and narrative analysis – to construct alternative social realities and protest against acquiescence to unfair arrangements designed to benefit others.”).

128. Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM L. REV. 640, 645-46 (2001).

discourse asks whether it is ethical, in a liberal democracy, for citizens to argue and act on the basis of religious views.<sup>129</sup> While the arguments in this area have been developed along a variety of lines and with great nuance, the issue that has historically divided most participants is differing judgments over whether religious reasons threaten the stability and/or viability of liberal democracy, with those who conclude in the affirmative arguing for rules of discourse that limit or exclude religious reasons, and those who conclude in the negative generally resisting substantial restraints on the use of religious reasons.<sup>130</sup> A second major source of division is over whether religious arguments are particularly divisive, threatening the legitimacy of the political order.<sup>131</sup> A third source of contemporary division is whether respecting our fellow citizens requires us to refrain from offering religious reasons or at least requires us to also offer proper political justifications for our policy preferences.<sup>132</sup>

Whatever the relative importance of the three foregoing fault lines in the debate over the political morality of religious reasons, for our purposes, it is not important to consider each of these potential reasons for limiting religious discourse in detail. Because many proponents of restricting religious reasons on the basis of any (or any combination) of the three foregoing rationales would not seek to limit religious reasons in legal scholarship, the appropriate focus is to determine whether CRT is aligned with arguments for limitations on religious discourse that would preclude the use of religious reasons in CRT scholarship.

To better understand the nature of the arguments that are our focus, it is helpful to distinguish between, on the one hand, justificatory uses of religious reasons, and on the other hand, political uses of religious reasons. As I am using the terms, justificatory uses justify the exercise of state power, whereas political uses occur when citizens offer arguments for their preferred coercive laws.<sup>133</sup> With this distinction in place, we are in a position to appreciate what is, for our purposes, a critical line of demarcation *among opponents* of uses of religious reasons in public discourse. That line is as follows. Scholars such as the later John Rawls and Robert Audi would, respectively, permit political uses of religious reasons for coercive laws with the “proviso” that they are followed in due course with proper, justifica-

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129. See Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 551 (2003).

130. Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Political Dynamism*, 86 NOTRE DAME L. REV. 119, 130-37 (2011).

131. *Id.*

132. *Id.*

133. These terms were inspired by Christopher Eberle's discussion of “justificatory liberalism,” a term coined by the philosopher Gerald F. Gaus in his book, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY* 3 (1996). Christopher J. Eberle, *What Respect Requires—And What It Does Not*, 36 WAKE FOREST L. REV. 305 n.1, 305-10 (2001).

tory reasons (that is, reasons that all citizens can reasonably accept) and, more restrictively, provided that they are, in most circumstances, justified by a secular rational and secular motivation.<sup>134</sup> In contrast, scholars such as Bruce Ackerman and Thomas Nagel would altogether exclude religious reasons from public discourse about coercive laws.<sup>135</sup> As a result, because

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134. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783-84 (1997) (describing the proviso). Incidentally, Rawls notes that the proviso does not apply to the “background culture,” which includes universities, and to which no restrictions apply. *Id.* at 784 n.51. As a result, arguably, there are no restrictions on the use of religious reasons in race and law scholarship, and the proviso is only, if at all, applicable to a scholar who becomes a public intellectual or public leader, such as Martin Luther King, Jr. *Compare id.* at 768 n.13 (noting that the background culture includes universities and professional schools), *and id.* at 785 n.54 (noting that King and the Abolitionists would have satisfied the proviso) *with id.* at 767 (appearing to restrict the public forum to judges, government officials, candidates for public office and their campaign managers), *and* PAUL J. WEITHMAN, RELIGION AND THE OBLIGATIONS OF CITIZENSHIP 180-87 (2004) (describing ambiguity in whether, how and when Rawls’s proviso is applicable to ordinary citizens who are not acting in an official capacity). *See* Robert Audi, RELIGIOUS COMMITMENT AND SECULAR REASON 86-100 (2000) (indicating that religious reasons may be offered and discussing principles of secular rationale and secular motivation).

135. *See* Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 215, 226-28, 232 (1987) (“A solution to this impasse [the unavailability of a “common description resulting in a common impersonal assessment”] requires that we find a way of being impartial not only in the allocation of benefits or harms but in their identification. The defense of liberalism requires that a limit somehow be drawn to appeals to *the truth* in political argument, and that a standpoint be found from which to draw that limit.”); *id.* at 232 (“Public justification in a context of actual disagreement requires, first, preparedness to submit one’s reasons to the criticism of others, and to find that the exercise of a common critical rationality and consideration of evidence that can be shared will reveal that one is mistaken. This means that it must be possible to present to others the basis of your own beliefs, so that once you have done so, *they have what you have*, and can arrive at a judgment on the same basis. That is not possible if part of the source of your conviction is personal faith or revelation—because to report your faith or revelation to someone else is not to give him what you have, as you do when you show him your evidence or give him your arguments.”); Bruce Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 12 (1989) (“One thing is clear. Somehow or other, citizens of a liberal state must learn to talk to one another in a way that enables each of them to avoid condemning their own personal morality as evil or false.”); *id.* at 19-21 (noting that his proposed solution constitutes a neutrally constrained dialogue). Readers who recall Richard Rorty’s response to Stephen Carter’s book, *THE CULTURE OF DISBELIEF* (1994), in which Rorty famously argued that religion is a “conversation-stopper” that should be excluded from public deliberation, may wonder why I have not identified Rorty as a leading proponent of the extreme, exclusionary view of religious reasons in public deliberation. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 168-74 (1999). But as readers will also recall, in response to Nicholas Wolterstorff and Jeffrey Stout’s criticisms, Rorty retracted his argument that religion is a “conversation-stopper,” and revised his approach to religious arguments in the public square. Richard Rorty, *Religion in the Public Square: A Reconsideration*, 31 J. RELIGIOUS ETHICS, 141, 148 (2003). In particular, Rorty now agrees that Wolterstorff “is right to insist that both law and custom should leave him free to say, in the public square, that his endorsement of redistributionist social legislation is a result of his belief that God, in such passages as Psalm 72, has commanded that the cause of the poor should be defended.” *Id.* at 142-43. And yet Rorty writes that he “cannot help feeling that, though the law should not forbid someone from citing such texts [Leviticus 18:22] in support of a political position [opposing same-sex marriage or the appeal of anti-sodomy laws], custom should forbid it.” *Id.* at 143. He also notes that “[t]his response would come pretty close to doing what Carter and Wolterstorff

both Rawls's and Audi's positions are consistent with race and law scholars offering religiously grounded normative arguments, examining whether CRT is aligned with their positions will not help to explain the marginal role of religiously grounded normative sources in race and law scholarship. In contrast, examining whether CRT is implicitly aligned with either Ackerman or Nagel's position, both of whom would preclude religiously grounded arguments in public deliberation, will help to determine whether CRT is biased against religious reasons in public discourse.

Ackerman argues for an ideal of "conservational restraint" in which citizens "engage in a restrained dialogic effort to locate normative premises that both sides find reasonable."<sup>136</sup> While insisting on identifying such premises excludes religion, according to Ackerman, such restraint constitutes "a way of reasonably responding to [citizens'] continuing moral disagreement."<sup>137</sup> Like Ackerman, Nagel would exclude religion from public political conversation.<sup>138</sup> Under his standard, which he calls "impartiality," political argument should occur using a "common critical rationality and consideration of evidence that can be shared."<sup>139</sup> As Nagel explains, "[t]his means that it must be possible to present to others the basis of your own beliefs, so that once you have done so, they have what you have, and can arrive at a judgment on the same basis;"<sup>140</sup> and "[b]ecause to report your faith or revelation to someone else is not to give him what you have," religion must be excluded from political discourse about coercive laws.<sup>141</sup>

While in their particulars Ackerman and Nagel's views differ, they share a commitment to altogether excluding religious reasons from public discourse.<sup>142</sup> Specifically, unlike theorists such as Audi and Rawls, they do

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think should not be done: excluding certain appeals to religious conviction from the public square." *Id.* at 143. Significantly, while explaining that he feels that certain appeals to religious convictions should be excluded, he says that he lacks a "principle which differentiate[s]" between citing Psalm 72 in favor of government-financed health insurance and citing Leviticus 18:22 in opposition to changes in the law that would make life in the U.S. more bearable for gays and lesbians." *Id.* at 143. As a result of Rorty's inability to explain his views in a principled way, Princeton philosopher Jeffrey Stout has written, "In the end, Rorty does not claim to have done much more than express his contempt for homophobes who use the Bible to defend policies antithetical to his liberal convictions . . . ." Jeffrey Stout, *Rorty on Religion and Politics*, in *THE PHILOSOPHY OF RICHARD RORTY* 523, 545 (2010). As an intellectual movement committed to ending all forms of subordination, CRT's core values align it with Rorty's view of the harm of antigay political activity. However, because Rorty has not provided a principled argument for "excluding certain appeals to religious convictions," and has retracted his earlier argument that religion is a conversation stopper, I do not attempt to determine whether CRT is aligned with Rorty's desire to exclude certain religious appeals in the public square.

136. Ackerman, *supra* note 135, at 17, 18.

137. *Id.* at 19.

138. Nagel, *supra* note 135, at 232.

139. *Id.*

140. *Id.*

141. *Id.*

142. See *supra* notes 135-41 and accompanying text.

not appear to distinguish between deliberation and justification, and they favor an ideal public political discourse that is free from religious argument.<sup>143</sup> Moreover, underlying both Ackerman and Nagel's arguments for excluding religion from the public square is an ideal of neutral discourse in which citizens deliberate according to shared premises.<sup>144</sup> Accordingly, a sensible way of determining whether CRT is aligned with Ackerman and Nagel's arguments for excluding religion from public deliberation is to ask whether CRT can join them in their hope of achieving a neutral discourse.

Approached this way, it is not difficult to see that from CRT's point of view Ackerman and Nagel's arguments for excluding religious reasons do not even get off the ground. In particular, consider that Ackerman and Nagel can each be understood to argue the following: (1) that respect of

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143. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION* 55 (1994) [hereinafter *THE CULTURE OF DISBELIEF*] (noting that both Ackerman and Nagel's position would "limit the conversation to premises held in common [and] would exclude religion from the mix."). Incidentally, Stephen Carter has noted that Ackerman's view can be read as permitting religious discourse among citizens and as being concerned with "the work of the liberal state that must, in its formal justification, be liberal." Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 25, 41 (Michael W. McConnell et al eds., 2001). Thus, "[o]ne can therefore, consistently with Ackerman's thesis, envision two separate dialogues—one among the citizens, who are trying to govern themselves, and the other by the actual instrument of organized state power, as it tries to justify what it has done." *Id.* at 41. *But see* *THE CULTURE OF DISBELIEF*, *supra* note 143, at 55 (noting that both Ackerman and Nagel's position would "limit the conversation to premises held in common [and] would exclude religion from the mix."). Importantly, as far as I am aware, Ackerman has not indicated that he in fact envisions "two separate dialogues." Moreover, at least one commentator has described Ackerman as holding the most "extreme" view on excluding religion from public discourse. Sanford Levinson, *Religious Language and the Public Square*, 105 *HARV. L. REV.* 2061, 2064 (1992) (book review) ("[A]ccording to some contemporary liberal theorists, not only public policies, but also the discourse concerning them, should be neutral - devoid of any reference to the moral (or religious) ideals that might in fact motivate many citizens' commitments to the policies. The most extreme such view is surely Bruce Ackerman's: 'We should,' he suggests, 'put the moral ideals that divide us off the conversational agenda of the liberal state.'). As far as I can tell, Nagel's position seems as hostile as Ackerman's position is to religious discourse in public dialogue. Yet, there is some ambiguity in Nagel's position. When discussing his standard of impartiality he uses the phrase "public justification," thus suggesting that his standard is intended to apply to justification only. Nagel, *supra* note 135, at 232. However, he also insists that "we find a way of being impartial not only in the allocation of benefits or harms but in their identification," and that [t]he defense of liberalism requires that a limit somehow be drawn to appeals to *the truth in political argument*. . . ." *Id.* at 227 (emphasis added). Finally he asks, "When can I regard the grounds for a belief as objective in a way that permits me to appeal to it in political argument, and to rely on it even though others do not in fact accept it and even though they may not be unreasonable not to accept it?" *Id.* at 232. In light of the foregoing statements, I conclude that Nagel does not distinguish between justification and deliberation.

144. Michael Perry, *Neutral Politics*, 51 *REV. POL.* 479, 484 (1989) ("One of the more interesting recent efforts to imagine a neutral politics is that of Thomas Nagel. Whereas Ackerman's preferred term is 'neutral,' Nagel's is 'impartial.'").

persons requires some version of neutral or impartial discourse;<sup>145</sup> (2) that religious reasons are incompatible with such a discourse;<sup>146</sup> and (3) that it therefore follows that respecting persons requires the exclusion of religious reasons.<sup>147</sup> As against this position, CRT would join those opponents of Ackerman and Nagel's position who argue that to bracket religion is not to achieve a neutral discourse.<sup>148</sup> Indeed, as one of CRT's constitutive commitments is its rejection of the liberal ideal of neutral legal reasoning, self-consistency would seem to require CRT to reject Ackerman and Nagel's position.<sup>149</sup> Accordingly, because arguments for altogether excluding religious reasons from public political argument are dependent upon a premise that CRT rejects, it is unreasonable to conclude that CRT's internal commitments align it with Ackerman and Nagel's position against the use of religious reasons in public discourse.

Furthermore, there are reasons to believe that CRT is aligned with a view that is radically opposed to the one that Ackerman and Nagel advance: that respect of persons actually requires the admission of religious arguments.<sup>150</sup> As Michael Perry has noted, because "religious convictions are (partly) self-constitutive . . . [t]o 'bracket' such convictions [in political deliberation] is therefore to bracket—to annihilate—essential aspects of one's very self."<sup>151</sup> Given the importance much CRT scholarship attaches to identity and particularity, and the substantial body of CRT literature that argues on behalf of reforming anti-discrimination law to protect against harms to the self flowing from efforts to suppress or disrupt contested identities,<sup>152</sup> CRT would seem sympathetic to Perry's complaint

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145. See Ackerman, *supra* note 135, at 16-19 ("One thing is clear. Somehow or other, citizens of a liberal state must learn to talk to one another in a way that enables each of them to avoid condemning their own personal morality as evil or false."); *id.* at 19-21 (noting that his proposed solution constitutes a neutrally constrained dialogue); Nagel, *supra* note 135, at 215 ("The requirement of impartiality can take various forms, but it usually involves treating or counting everyone equally in some respect—according them all the same rights, or counting their good or their welfare or some aspect of it the same in determining what would be a desirable result or a permissible course of action.").

146. See sources cited, *supra* note 135.

147. See *supra* notes 144, 145.

148. See *supra* note 116; see also MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 181, 180-82 (1988) [hereinafter MORALITY, POLITICS, AND LAW] (arguing that the quest for a politics of neutrality is a "dead-end and that "religious convictions are (partly) self-constitutive and are therefore a principal ground . . . of political deliberation and choice."); see also *Neutral Politics*, *supra* note 144, at 488; THE CULTURE OF DISBELIEF, *supra* note 143, at 55, 56.

149. See sources cited, *supra* note 116 and accompanying text.

150. Compare *supra* notes 116, 147-48 and accompanying text, with *infra* notes 157-59, 169-174 and accompanying text.

151. MORALITY, POLITICS, AND LAW, *supra* note 148, at 181-82.

152. There is a substantial body of literature advocating that anti-discrimination law should be reformed to protect against discrimination directed at pressures designed to coerce individuals to suppress or disrupt characteristics perceived to be associated with identities that are often the subject of discrimination, such as race, gender, sex, and sexual orientation. See *e.g.*, Barbara J.

against efforts to exclude religion from public deliberation.<sup>153</sup> Thus, CRT would appear to be sympathetic to a view that is directly opposed to the approach taken by Ackerman and Nagel.

As a result, it is difficult to see how CRT's core commitments serve to bias CRT in favor of either Ackerman's or Nagel's arguments against religious reasons in public discourse. It is therefore unreasonable to conclude that CRT's failure to develop a substantial body of literature drawing on the African American Christian tradition is due to CRT's alignment with scholars who wish to exclude religious reasons from public discourse as a matter of political morality. Thus, our first, potential endogenous explanation fails to illuminate the marginal role of religious arguments in CRT scholarship. We now turn to our second and more successful endogenous explanation: CRT's deep debt to Black nationalist and Black power thought. To this end, we begin with a brief review of CRT's origins.

## 2. CRT: Black Nationalism, Black Power and Christianity

### a. CRT's Origins

Several articles have reviewed and summarized CRT's origins, including articles penned by two of its founding figures, Kimberlé Crenshaw and Richard Delgado.<sup>154</sup> In these articles we learn that there are competing

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Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2034 (1995) (arguing that Title VII should be reformed so that a black employee does not have to "disavow crucial facets of blackness, if she wants to get ahead in her place of employment."); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 867-68 (1994) ("[A]spects of our identities with which we are born, or that develop as a result of our families, do not become less important because we choose to, or must, maintain them. Nor are aspects of our identities less important because we have chosen them, if we have ability to choose . . . . The same thing [employer enforced white supremacy excluding persons of color from workforces or relegating them to subservient positions] happens now with respect to ethnic traits, in the absence of explicit [Title VII] statutory protection.") (footnotes omitted); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1400 (1991) ("Title VII should prohibit accent discrimination . . . . In arguing for accent tolerance, the rationale of accent as immutable is thus a dangerous one [because it feeds into a hierarchy that privileges 'the core group of the entitled']. A more progressive argument is that even if accent is changeable, no citizen should have to alter core parts of identity in order to participate in society. A true antisubordination agenda would apply reasonable accommodation to all differences, whether chosen or immutable, that are historically subject to exploitation or oppression by dominant groups."); Yoshino, *supra* note 49, at 781 (adopting a performative model of identity and arguing that anti-discrimination law should be reformed to protect gays, racial minorities and women from discriminatory pressures to "cover" their identities); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, *supra* note 50, 719-20 (adopting a performative model of identity and arguing that anti-discrimination law should be reformed to protect black women from pressures to perform identities "in ways that operate as a denial of self").

153. See *supra* note 151 and accompanying text.

154. Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1510-15 (2009) (reviewing three accounts of CRT's origins); Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE*

accounts of CRT's rise.<sup>155</sup> Yet notwithstanding the contestability of CRT's causal origins, there appears to be no dispute that CRT developed as a response to the inadequate treatment of race in both traditional, liberal rights-oriented approaches to law and an intellectual movement known as critical legal studies ("CLS").<sup>156</sup>

In traditional, liberal rights analyses of law, racism is reduced to discrimination and bias, and neutrality and objectivity (i.e. colorblindness) are the law's method for resolving racial inequality.<sup>157</sup> In contrast to the colorblind jurisprudence of liberal rights discourse, CLS denied that the law was or even could be neutral and objective.<sup>158</sup> It instead contended that law is rooted in hierarchies and underlying power arrangements and was therefore enmeshed in politics.<sup>159</sup> As a result, many CLS scholars had little use for rights-discourse (which, in their view, served to legitimate an illegitimate perception of law) and preferred to engage in deconstructionist critiques of rights.<sup>160</sup>

However, while CLS was committed to exposing the way in which law functioned to preserve hierarchy and power interests, it gave little attention to exposing how the law perpetuated racial subordination. In fact, because CLS was foremost focused on critiquing law as a legitimating tool of underlying hierarchy, "arguments that cast doubt on the viability of race as a unit of analysis or the utility of race consciousness in deconstructing

MOVEMENT, at xviii-xxii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*] (reviewing CRT's origins).

155. See Delgado, *supra* note 154; *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 154.

156. I have not identified any claim that contests the notion advanced by Crenshaw and others that critical race theory emerged as a response to the inadequate treatment of race in then-existing approaches to law. See *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* 154, at xvii-xix, xxiii-xxvii (describing CRT's emergence as a critique of liberal legal discourse and as a response to the inadequate treatment of race in CLS); Elvia R. Arriola, Foreword: March!, 19 *CHICANO-LATINO L. REV.* 1, 9 n.20 (1998) (citing Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 *SAN DIEGO L. REV.* 1043 (1988) for the proposition that "Critical Race Theory (CRT) as a movement, originated from the critique of the Critical Legal Studies (CLS) movement's inadequate attention to race as a category of analysis.").

157. See *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 154, at xviii-xxii (reviewing CRT's origins).

158. *Id.* at xxii-xxiii.

159. *Id.* at xxiii-xxiv; see also Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 *UCLA. L. REV.* 443, 452 (2001) ("The project of CLS was to demystify the power hierarchies embedded in liberal individual rights discourse by showing the indeterminacy of legal rules and the inherently political choices underlying the current legal order. CLS evolved as an oppositional critique of traditional legal thought that employed a method of analysis known as 'trashing' to expose the law as 'politics by other means.'") (footnotes omitted).

160. See *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 154, at xiii; Cummings & Eagly, *supra* note 159, at 451-52.



hierarchy” had some appeal within CLS.<sup>161</sup> In particular, some CLS scholars rejected race consciousness on the grounds that, as a socially constructed category, race is neither a theoretically nor politically appropriate “category of analysis or . . . basis for political action.”<sup>162</sup> As a result, on the question of race, many CLS scholars could not be distinguished from scholars who approached race vis-à-vis a liberal, anti-discrimination discourse.<sup>163</sup>

While in agreement with the claim that “race” is socially constructed, in response to CLS, CRT scholars argued that, “race was nonetheless ‘real’ in the sense that there is a material dimension and weight to the experience of being ‘raced’ in American society.”<sup>164</sup> Thus, as against CLS, CRT constituted itself as an effort to develop a race-conscious but anti-essentialist approach to legal scholarship.<sup>165</sup> As a result, CRT’s “conditions of possibility” included liberal, anti-discrimination discourse’s rejection of race consciousness.<sup>166</sup> They also included CLS’s ambivalence about emphasizing race and its related neglect of the ways in which its critique of rights discourse overlooked the vital role that rights played in the struggle against racial subordination.<sup>167</sup> Moreover, unlike CLS, CRT sees “race” as central, is committed to “race consciousness,” and shares in common with liberal anti-discrimination discourse a commitment to rights discourse;<sup>168</sup> however, CRT also sees itself and CLS as “aligned—in radical left opposition to mainstream legal discourse.”<sup>169</sup>

In the context of the alignment between CRT and CLS, to be in “radical left opposition to mainstream legal discourse”<sup>170</sup> essentially means to reject an enlightenment ideal of law that conceives of law as an autono-

161. Crenshaw, *Twenty Years*, *supra* note 112, at 1264.

162. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 154, at xxvi.

163. Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1491 (2011). (“[W]ith respect to race, the crits for the most part had not developed particularly critical approaches and instead embraced the same liberal integrationist ideologies that distinguished liberal and progressive whites from racist whites.”). Some CLS scholars did embrace the importance of race as an independent unit of analysis. *Id.* at 1491 (noting “Duncan Kennedy, Mary Jo Frug, and this author [Gary Peller] helped constitute another CLS faction embracing the kind of critical identity projects that the emerging CRT left, led by Crenshaw and others, was articulating. But a significant cohort of crits either did not engage with the race discourse at all, or reacted negatively.”).

164. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 154, at xxvi.

165. *Id.*

166. *Id.* at xix, xxiii-xxiv.

167. Compare *id.* at xix, xxvi, with *supra* note 162-63 and accompanying text.

168. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 154, at xxiii-xxiv, xxvi-xxvii.

169. *Id.* at xxvi-xxvii.

170. *Id.*

mous, ahistorical phenomenon capable of and appropriately understood by objective, rational, and neutral analysis.<sup>171</sup> In contrast to this enlightenment conception of law, CLS and CRT are allied in their commitment to demonstrating law's historical, contingent and all but neutral nature.<sup>172</sup> In particular, CLS scholarship exposes the lie of law's neutrality by demonstrating that power relations and hierarchy undergird the neutral façade of rights discourse,<sup>173</sup> while CRT exposes the ways in which law's false claim to neutrality is belied by its pervasive role in enacting and failing to address "racial subordination."<sup>174</sup>

b. *CRT's Deep Debt to Black Nationalist and Black Power Thought*

In their co-authored introduction to the landmark anthology, *Critical Race Theory: The Key Writings that Formed the Movement (1995)*, founding critical race theorists Kimberlé Crenshaw, Neil Gotanda, Kendall Thomas, and Gary Peller write that "most of us [critical race theorists] 'really' identified with"<sup>175</sup> the Black Power movements, "whose political insights and aspirations went far beyond what could be articulated in the [then] reigning language of the legal profession and the legal studies we were

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171. However, it bears noting that, as legal scholar Angela Harris has observed, "[i]n its modernist moments, CRT aims not to topple the Enlightenment, but to make its promises real." Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 754 (1994) (footnotes omitted). In other words, in its modernist moments CRT assumes that correctly understanding race will lead to emancipation. *Id.* at 743 ("In its 'modernist narratives,' CRT seems confident that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free."); *see also id.* at 753. Importantly, however, this is not to suggest that CRT adopts modernist conceptions of law as ahistorical, neutral, and objective. *Id.* at 754 ("In both its modernist and its postmodernist moments, CRT puts law's supposed objectivity and neutrality on trial, arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege."). Incidentally, Harris also notes that, while often adopting a postmodern narrative that "emphasizes the extent to which what you see depends on where you stand," CRT's use of legal story telling often makes modernist claims about "what really happened." *Id.* at 756. Thus, "[s]ometimes, CRT seems to be asking the reader to accept outsider stories as 'true' in a conventional sense; other times, CRT seems to call 'truth' itself into question." *Id.* at 757. (footnotes omitted). In this sense, Harris argues that CRT exists in tension with modernist truth claims and postmodern suspicion about truth. *Id.* at 754. However, it is not clear to me how Harris's discussion of the tension between CRT's modernist and postmodernism moments amounts to anything more than a description and embrace of what German philosopher Jurgen Habermas has described as the performative paradox of deconstructive, postmodern analysis. JURGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* (1985).

172. *See supra* notes 158, 169, 170 and accompanying text.

173. *See supra* note 159 and accompanying text.

174. *Compare supra* notes 116, 119-23, with *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 154, at xxv, xxii.

175. *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 154, at xx.

pursuing.”<sup>176</sup> Suggesting that CRT as a movement has overcome the articulatory limitations that prevailed in both traditional liberal civil rights discourse and CLS, Gary Peller writes, “[i]n my view, the distinguishing and historic contribution of CRT has been to bring the kind of critical nationalist analysis of race that had been articulated in the 1960s and 1970s by Malcolm X, the Black Panthers, and others, to the world of scholarship and theory.”<sup>177</sup>

As is perhaps most obviously perceived in both the ambivalence many CRT writings have toward integration and in the considerable body of CRT scholarship asserting and defending the importance of Black identity,<sup>178</sup> the politics of the Black nationalist/Black power era inflect much race and law scholarship.<sup>179</sup> Significantly, however, the same concerns that led Black power and Black nationalist thought to question integration and to emphasize Black identity had significant implications for Black America’s relationship to the African American Christian tradition.<sup>180</sup> For this reason, CRT’s deep debt to Black nationalist/Black power thought is essential to understanding the focus of this paper: the limited attention that the African American Christianity has received in race and law scholarship and the consequences of this neglect. In particular, as the next section explains, the Black nationalist and Black power thought that Gary Peller credits critical race theory with bringing to the legal academy played a critical role in challenging the legitimacy of African American Christianity. As I will argue, understood from this historical vantage point, CRT’s deep debt to Black power thought helps to explain the discontinuity existing between CRT as a body of scholarship that aspires to speak from a

176. *Id.*

177. Peller, *supra* note 163, at 1494.

178. See Michelle Adams, *Racial Integration*, 94 CAL. L. REV. 261, 265–66 (2006); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 18, 92 (1992); Lesley A. Jacobs, *Integration, Diversity, and Affirmative Action*, 32 LAW & SOC’Y REV. 725, 733 (1998) (stating “integration has fallen on hard times, subject in particular to powerful critiques by critical race theorists.”); Cristina M. Rodriguez, *Acommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.–C.L. L. REV. 133, 165 n.102 (2001) (“Critical race theorists further complicate the integration story by demonstrating that the assumption that all blacks should seek integration . . . is in fact an assimilationist vision that exposes color-blindness as a fiction.”); See, e.g., Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1139–40 (2004) (arguing in favor of protecting against discrimination against, among other things, Black identity); Yoshino, *supra* note 49, at 781 (2002); Flagg, *supra* note 152, at 2038–51.

179. It is worth noting that, in sharp contrast to the politics that characterized Black nationalist/Black power movements, CRT has generally sought to develop an anti-essentialist notion of Black identity. Compare Carbado, *supra* note 114, at 1614–15, with THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 355 (2009) (“At the core of black power was cultural essentialism—the notion that there was a true, identifiable, authentic form of black racial expression and that movement energies should be directed toward the production and reproduction of it.”).

180. See discussion *infra* Section II.B.2.c.

perspective of color but largely neglects the religious sensibilities that remain deeply important to a significant majority of African Americans.

c. *Christianity on Trial*

To understand the impact of Black Power on the relationship between Blacks and the African American Christian tradition, one must first understand the context in which Black Power gained wide appeal. Most importantly, it is essential to understand how Nation of Islam leader Elijah Muhammad's vigorous critique of Christianity as the White man's religion helped to set the conditions for the emergence of Black Power.<sup>181</sup> While African Americans rejected the slaver's version of Christianity and reinterpreted it to be a religion of empowerment and liberation,<sup>182</sup> Muhammad's critique played to longstanding ambivalence among African Americans about the fact that Christianity was the religion of their enslavers and packaged to render Blacks docile and resigned to their inferior, subjugated position.<sup>183</sup> Given this existing ambivalence, together with the fact that many African Americans perceived the contemporary black church to be accommodationist,<sup>184</sup> Muhammad (and his prominent disciple, Malcolm X) found a significant audience for the Nation of Islam's "us" v. "them," colored v. white critique of Christianity as aiding and abetting the White man's oppression of not just African Americans but of colored people all over the world.<sup>185</sup>

In his theology of racial nationalism, Whites were the genetic enemies of dark humanity,<sup>186</sup> and Christianity was a tool Whites used to teach Blacks to love their enemies and focus on the reward of a fictional after-life.<sup>187</sup> Unlike the Black man's true religion, Islam, Christianity could pro-

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181. See MARK L. CHAPMAN, *CHRISTIANITY ON TRIAL: AFRICAN-AMERICAN RELIGIOUS THOUGHT BEFORE AND AFTER BLACK POWER* 69-70, 168-69 (2006).

182. RABOTEAU, *supra* note 61, at 294 ("Slaves distinguished the hypocritical religion of their masters from true Christianity and rejected the slaveholder's gospel of obedience to masters and mistress.").

183. CHAPMAN, *supra* note 181, at 2 (noting that African-American ambivalence toward Christianity goes back to the fact that "black people have never forgotten that they were introduced to Christianity by their enslavers.").

184. See *infra* notes 210-211 and accompanying text.

185. See CHAPMAN, *supra* note 181 and accompanying text; *id.* at 44-49, 53 (describing white Christian nations as the enemy and oppressor and all other human beings as the dark, oppressed members of humankind); *id.* at 51 (noting that "Elijah Muhammad's central argument [was] that the enslavement of the dark world was aided by the "tricks and lies" of the white man's Christianity."); *id.* at 69-70 (describing the emergence of Black Power and Elijah Muhammad and Malcolm X's "profound impact on the younger, more militant leaders of the civil rights movement").

186. *Id.* at 47-49.

187. *Id.* at 51-52.

duce neither unity nor effective resistance against the White oppressor.<sup>188</sup> Muhammad also criticized Christianity's universalism and called King's preaching of the "brotherhood of white people" ignorant;<sup>189</sup> he likewise rejected King's commitment to integration, reconciliation, and God's universal love for humanity.<sup>190</sup> In Muhammad's view, only dark, oppressed people deserved God's love, whereas Whites deserved God's punishment.<sup>191</sup> Consistent with his theology, Muhammad also rejected the Christian message of loving one's enemies and emphasized intraracial love and the right of self-defense as opposed to Black Christian leaders' emphasis on interracial fellowship and King's commitment to nonviolence.<sup>192</sup> For Muhammad, the Christian call to love White people—Blacks' oppressors and enemies—undermined the self-love and intraracial love critical to achieving the Black unity that was essential for achieving the nationalist, unified, and separatist vision that he believed to be the appropriate remedy to the problem of American race relations.<sup>193</sup>

Frustrated with the results of the civil rights movement, and against the backdrop of the Nation of Islam's vigorous critiques of Christianity as a White man's religion and its rejection of integration and nonviolence, many African American youth were tired, weary, and disillusioned with the efficacy of Christian love, nonviolence, and integration.<sup>194</sup> It was in these conditions that the secular, Black Power movements came on to the national scene in the late 1960s and early 1970s.<sup>195</sup> Like the Nation of Islam, Black Power activists embraced Black nationalism and self-defense and rejected integration and nonviolence;<sup>196</sup> they also "dismissed Christianity as an irrelevant, white religion designed to oppress African-Americans."<sup>197</sup> Combined with the Nation of Islam's scathing critiques of Christianity, the rise of Black Power caused "the credibility of the Christian faith to be severely tested," with young Blacks increasingly viewing the "black church as an 'Uncle Tom' institution that was irrelevant to the concerns of youth during a new age of Black Power and black pride."<sup>198</sup>

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188. See *id.* at 56 (Elijah Muhammad emphasized that Islam "was the natural religion of all the non-white peoples of Africa and Asia."); *id.* at 59 (noting that "Elijah Muhammad argued that Islam creates unity among blacks while Christianity sows division" and teaches Blacks to love their White oppressor).

189. *Id.* at 54-55 (citation omitted).

190. CHAPMAN, *supra* note 181, at 55.

191. *Id.* at 55.

192. *Id.* at 52-53, 64 (noting that Elijah Muhammad stated "that it is against the very nature of God, and man, and all life, to love their enemies").

193. *Cf. id.* at 42, 52-53.

194. See *id.* at 69-70.

195. See *id.*

196. CHAPMAN, *supra* note 181, at 69, 74.

197. *Id.* at 102.

198. *Id.* at 70.

Indeed, in the era of Black Power “many militant young people believed that it was impossible to be both fully black and Christian at the same time.”<sup>199</sup> Accordingly, the rise of Black Power marked a significant shift among young Blacks away from the African-American Christian tradition.

d. *Black Power, the Black Church and Black Liberation Theology*

Black Power soon became “the litmus test of authentic black leadership.”<sup>200</sup> Traditionally focused on interracial reconciliation and integration, in the age of Black Power, the Black church was faced with becoming irrelevant to the freedom struggle and to many young African Americans.<sup>201</sup> Moreover, there was a sense among many Black ministers and theologians that the Black church had failed to emphasize and develop a distinctively Black identity and needed to break free from white Christianity.<sup>202</sup> Thus, on July 31, 1966, the National Committee of Black Churchmen (NCBC) published a statement in major American newspapers, including the New York Times, embracing the slogan, “Black Power,” and turning away from a primary emphasis on interracial harmony, integration, and universality and toward “a new interpretation of black faith that focused on *blackness* and *power*.”<sup>203</sup> As Mark Chapman has written, “[b]y emphasizing power instead of Christian love and interracial harmony, the NCBC signaled an important shift in African American religious thought.”<sup>204</sup> But more significantly, by emphasizing the need for Black power, the NCBC hoped to make Christianity relevant to Black liberation and to thereby rehabilitate the credibility of the Black church.<sup>205</sup>

The turn toward Black power also had revolutionary theological implications.<sup>206</sup> In particular, if the gospel was to be understood from the standpoint of Black Power and Black liberation, it was necessary to address the implications of Black Power for the Black church and to reconcile Black Power to the Christian message.<sup>207</sup> While a full-blown, systematic Black theology would await James Cone’s “A Black Theology of Libera-

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199. *Id.* at 83.

200. *Id.* at 75.

201. *See id.* at 70 (“Increasingly, young African-Americans began to view the black church as an ‘Uncle Tom’ institution that was irrelevant to the concerns of youth during a new age of Black Power and black pride.”).

202. *Cf.* CHAPMAN, *supra* note 181, at 75-91.

203. *Id.* at 76 (*italics in original*); *see also* GAYRAUD S. WILMORE, *BLACK RELIGION AND BLACK RADICALISM: AN INTERPRETATION OF THE RELIGIOUS HISTORY OF AFRICAN AMERICANS* 227 (3d ed. 1998).

204. CHAPMAN, *supra* note 181, at 77.

205. *See id.* at 82. It also bears noting that, in embracing Black power, the NCBC clearly rejected the other-worldly focus that had long been at the center of criticisms of the Black church. *Id.* at 78-79.

206. *See id.* at 83, 102-03.

207. *See id.* at 83.

tion,”<sup>208</sup> some Black religious leaders and thinkers took up three themes that reflect earlier steps toward developing Black liberation theology.<sup>209</sup> First, religious leaders took up a radical, internal prophetic critique of the contemporary Black church’s failure to maintain and practice the Black church’s historic commitment to Black liberation.<sup>210</sup> Importantly, however, in taking up this internal prophetic critique, Black church leaders sought to defend biblical Christianity against its nationalist and Black power critics and to persuade young Black people that the problem was not Christianity, but how the contemporary church had practiced it.<sup>211</sup> Second, some Black religious thinkers argued that Black Power’s call for Black empowerment and independence is a necessary precondition for attaining genuine integration and the Beloved Community but is not a call for permanent separation.<sup>212</sup> Third, they argued that the church’s embrace of Black Power and Black particularity was not “a retreat from the universalism of the Christian gospel” but a “necessary corrective to the ‘idol of integration’ and its negative impact on the black community.”<sup>213</sup> Moreover, contrary to the church’s embrace of Black Power representing a rejection of Christian universalism, some church leaders argued that, by accepting Black Power, the church was acknowledging that Black people must first love themselves in order to love others.<sup>214</sup>

In addition to the above, three theological themes developed in response to Black Power, any discussion of the development of Black liberation theology must include the April 25-27, 1969, Interreligious Foundation for Community Organization’s (IFCO) National Black Economic Development Conference.<sup>215</sup> At this historic conference of more than 600 delegates drawn from both religious and secular African American organizations, a series of resolutions rejected Black capitalism in favor of “land ownership, cooperatives, and mass-based organizations for the political and economic control of urban areas where blacks

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208. John J. Carey, *Black Theology: An Appraisal of the Internal and External Issues*, 33 THEOLOGICAL STUDIES, no. 4, (1972), at 684.

209. James Cone, *The Gospel and the Liberation of the Poor*, CHRISTIAN CENTURY, Feb. 1, 1981, <http://www.religion-online.org/showarticle.asp?title=1696> (noting that “A Black Theology of Liberation” was Cone’s “first attempt to write a systematic theology, using black liberation as the central motif”); See C. ERIC LINCOLN & LAWRENCE H. MAMIYA, *THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE 176-178* (1990) (noting that motifs of Black liberation had existed in the Black church well before the impact of Black nationalism and Black power, but it was only in response to the latter movements that Black theology became the subject of systematic theology).

210. CHAPMAN, *supra* note 181, at 83-85.

211. *Id.* at 83.

212. *Id.* at 85-87.

213. *Id.* at 88.

214. *Id.*

215. WILMORE, *supra* note 203, at 233-34.

predominated.”<sup>216</sup> Moreover, seeing the need for continued national focus on Black economic development the “Black Economic Development Conference” (BEDC) was voted into separate existence.<sup>217</sup> In addition, and more significantly, the conference approved by a vote of 187 to 63 secular activist James Forman’s Black Manifesto denouncing capitalism and imperialism and calling upon white churches and synagogues to pay \$500 million in reparations to Blacks.<sup>218</sup>

While the Manifesto was approved by a vote of the BEDC, it was Forman’s action of May 4, 1969 that gained the Manifesto national attention and sparked national controversy.<sup>219</sup> Boldly disrupting Riverside Church’s Sunday service, Forman proclaimed the Manifesto’s demands.<sup>220</sup> As a result, outrage ensued among both liberal white Christians and Black church leaders, and Forman’s actions inspired similar disruptions across the country.<sup>221</sup>

Although the leaders of major church denominations expressed contrition for complicity in historic racial oppression, not a single major church body acknowledged the legitimacy of the Manifesto’s demands for reparations.<sup>222</sup> Nevertheless, the NCBC and IFCO supported the Manifesto, and the BEDC in close cooperation with the NCBC worked to operationalize the Manifesto’s demands.<sup>223</sup> Although complicated internal church politics ultimately frustrated the Black ecumenism that was needed to make those demands effective, the Manifesto nevertheless “spurred the formation of an ecumenical response on the part of African-Americans to the religion of the rich and powerful.”<sup>224</sup> It also further underscored the need, sensed at least since the NCBC’s 1966 embrace of Black power, for a Black theology capable of articulating Christianity from the vantage point of oppressed Black people.<sup>225</sup>

As I have already indicated, James Cone was the first to develop a systematic Black theology.<sup>226</sup> Defending biblical Christianity from both secular Black power advocates and the Nation of Islam’s critiques, Cone sought “to develop a systematic, black theology of liberation that was both

216. *Id.* at 234.

217. *Id.*

218. *Id.* at 235-36.

219. *Id.* at 237.

220. WILLIAM L. VAN DEBURG, *MODERN BLACK NATIONALISM: FROM MARCUS GARVEY TO LOUIS FARRAKHAN* 182 (1996).

221. WILMORE, *supra* note 203, at 237.

222. *Id.* at 238.

223. *Id.* at 239-42.

224. *Id.* at 242.

225. *See id.* at 242.

226. *See supra* note 208 and accompanying text; Cone, *The Gospel and the Liberation of the Poor*, *supra* note 209 and accompanying text.



fully *black* and fully *Christian*.”<sup>227</sup> More specifically, seeking the “full emancipation of black people from white oppression by whatever means necessary,”<sup>228</sup> Cone aimed to reinterpret the Christian faith in light of Black oppression and to “destroy the influence of heretical white American Christianity.”<sup>229</sup> Thus, in contrast to pre-Black Power religious thinkers, such as Martin Luther King, Jr., Howard Thurman, and Benjamin Mays, who focused on interracial fellowship and Christianity’s universality, Cone emphasized Black particularity.<sup>230</sup> Likewise, unlike pre-Black Power thinkers, for Cone, blackness was “ultimate reality,” not an abstract universalism.<sup>231</sup>

Significantly, in seeking a fully Christian and fully Black theology, Cone did not reject the criteria of universality but reconfigured it.<sup>232</sup> Making Blackness and oppression the point of entry for Christian universalism, Cone argued that, “[b]eing black in America has very little to do with skin color. To be black means that your heart, your soul, your mind, and your body are where the dispossessed are.”<sup>233</sup> Moreover, because “[e]ither God is identified with the oppressed to the point that their experiences becomes God’s experience, or God is a God of racism,”<sup>234</sup> and biblical revelation reveals that God sides with the oppressed,<sup>235</sup> “Christ ‘takes on blackness’ as a sign of God’s identification with the victims of society.”<sup>236</sup> Therefore, to be reconciled to God, White Christians must “become black.”<sup>237</sup>

Having set up God’s identification with Blackness and the need for White Christians to become Black, Cone argued that his theology was both fully Christian and fully Black, and thus capable of reconciling Christianity and Black power.<sup>238</sup> As Cone wrote in his first essay on the relationship between Black power and Christianity:

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227. CHAPMAN, *supra* note 181, at 102.

228. *Id.* at 114 (quoting James H. Cone, *Christianity and Black Power*, in *IS ANYBODY LISTENING TO BLACK AMERICA* (C. Eric Lincoln ed., 1968)).

229. CHAPMAN, *supra* note 181, at 112 (quoting JAMES H. CONE, *BLACK THEOLOGY AND BLACK POWER* 33, 131 (1969)).

230. CHAPMAN, *supra* note 181, at 106-07.

231. *Id.* at 107.

232. See *infra* notes 233-237 and accompanying text.

233. JAMES CONE, *BLACK THEOLOGY AND BLACK POWER* 151 (1969); see also CHAPMAN, *supra* note 181, at 118.

234. JAMES CONE, *A BLACK THEOLOGY OF LIBERATION* 67 (2010) [hereinafter *A BLACK THEOLOGY OF LIBERATION*] (originally published in 1970); see also CHAPMAN, *supra* note 181, at 117-18.

235. *A BLACK THEOLOGY OF LIBERATION*, *supra* note 234, at 67; see also CHAPMAN, *supra* note 181, at 117-18.

236. CHAPMAN, *supra* note 181, at 118.

237. WILMORE, *supra* note 203, at 249.

238. CHAPMAN, *supra* note 181, at 115 (quoting James H. Cone, *Christianity and Black Power*, in *IS ANYBODY LISTENING TO BLACK AMERICA* (C. Eric Lincoln ed., 1968)).

If Jesus is not in the ghetto, if he is not where men are living at the edge of existence, if he is somehow ensconced in the split-level hypocrisy of suburbia, the gospel is a prevarication and Christianity is a mistake. Christianity cannot be alien to Black Power; it *is* Black Power!<sup>239</sup>

While Cone did articulate a systematic theology that embraced Black power, some Black theologians questioned whether Cone's theology was actually Christian.<sup>240</sup> In particular, Cone's theology was critiqued as: (1) compromising Christianity's universality and God's universal love for all people;<sup>241</sup> (2) neglecting "the Christian doctrine of reconciliation;"<sup>242</sup> (3) failing to emphasize the Christian message of the interrelatedness of all people;<sup>243</sup> and (4) as presenting (in regard to his Malcolm X inspired "any means necessary approach" to racial liberation) an un-Christian ethics.<sup>244</sup> However, in addition to these criticisms, some Black religious thinkers took Cone to task for being overly focused on satisfying the Christian test of universality.<sup>245</sup> Finally, in light of the fact of Black oppression, some critics claimed that Cone's theology did not provide sufficient reason to believe that God delivers the oppressed, and thus failed to engage the basic question of whether God is a racist.<sup>246</sup>

While Cone's systematic Black theology was not without critics, he stands among the most influential theologians of American history.<sup>247</sup> Indeed, as the founding father of Black liberation theology, Cone's work has been at the center of an entire academic discipline.<sup>248</sup> He has also deeply influenced church leaders, including President Barack Obama's former pastor, the Reverend Jeremiah Wright.<sup>249</sup> Nevertheless, while Black liberation theology has been the subject of sustained academic discussion and has adherents in the pulpit, it has not made deep inroads into the greater

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239. CHAPMAN, *supra* note 181, at 115. *Id.*

240. *Id.* at 119.

241. *Id.* at 121.

242. *Id.* at 120

243. *Id.* at 121.

244. *Id.* at 120.

245. CHAPMAN, *supra* note 181, at 122-23.

246. *Id.* at 123.

247. Compare J. KAMERON CARTER, RACE A THEOLOGICAL ACCOUNT 157 (2008) ("James H. Cone's theological interrogation of New World Afro-Christian faith pioneers in the history of American theology."), with ANTHONY G. REDDIE, *Politics of Black Entry into Britain: Reflections on being a Black British Person returning to the U.K.*, in BLACK THEOLOGY, SLAVERY, AND CONTEMPORARY CHRISTIANITY 210 (Anthony G. Reddie ed., 2010) (describing Cone as the "Founding Father" of black theology).

248. See REDDIE, *supra* note 247, at 209-10 and accompanying text.

249. Mark Oppenheimer, *A Campaign Pitch Rekindles the Question: Just What Is Liberation Theology?*, N.Y. TIMES, May 25, 2012, at A16; see also *infra* note 253 and accompanying text (noting that black liberation theology has more strongly influenced clergy under 40 years of age).

Black church.<sup>250</sup> As Lincoln and Mamiya's ten-year longitudinal study demonstrates, the influence of Black liberation theology is largely confined to "the educated elite of the black clergy."<sup>251</sup> Its "major formulators . . . have been unable to move beyond their middle-class origins, even though a major tenet of black liberation theology is to do theology from the 'bottom up,' from the perspective of the oppressed in American society;"<sup>252</sup> and at least two-thirds of Black urban ministers have not been at all influenced by Black liberation theology.<sup>253</sup> In addition to the foregoing empirical evidence on Black theology's reception among Black clergy, Cone himself has said "that black church leaders were not open to criticisms from professional theologians teaching in white institutions."<sup>254</sup> Accordingly, it is reasonable to conclude that black liberation theology has found far more adherents in the academy than it has in the pews.

e. *Black Liberation Theology Largely Failed to Rehabilitate Christianity Among Politically Active and College Educated Black Youth*

While Black liberation theology hoped, in part, to counter Black nationalist and Black power critiques of Christianity, its shallow penetration into the Black church raises questions about the extent to which it did so, especially when one considers that the 1970s and 1980s have been described as a period of decline in political activism for the Black church.<sup>255</sup> Moreover, while this decline has been understood as mirroring American trends toward the secularization of public discourse, it is certainly not unrelated to Beverly Hall Lawrence's observation that:

On college campuses [in the 1970s], middle-class blacks were embracing a kind of intellectual and cultural attitude called black nationalism. At the same time, in urban centers, the black consciousness movement with its slogans "black is beautiful" and "I'm black and I'm proud" were attracting followers with the same spirit of nationalism . . . My generation was one that fled the churches filled with those who appeared to us to be helpless, sitting and waiting for (a white) God to intervene and settle problems for them. Many of my friends and I now admit

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250. See *infra* notes 251-254 and accompanying text.

251. LINCOLN & MAMIYA, *supra* note 209, at 179.

252. *Id.* at 180.

253. *Id.* at 179. Lincoln & Mamiya did not collect data on Black liberation theology's influence among rural clergy. *Id.* at 179, 181. In addition, it bears noting that they also found that clergy under forty years of age are more strongly influenced by Black liberation theology than are clergy over forty. *Id.* at 179. Because their study, published in 1990, is now a bit dated, a fresh study would be helpful.

254. ANTHONY B. PINN, *THE BLACK CHURCH IN THE POST-CIVIL RIGHTS ERA* 24 (2002).

255. See *id.* at 18-20.

that the idea of going to church was simply too embarrassing, because it taught people to wait for change to come and because of its reliance on European Christian symbols.<sup>256</sup>

Together with Lincoln & Mamiya's data on Black theology's shallow penetration of the Black church, Hall's testimony on Black nationalist and Black power's negative impact on young Blacks' attitudes toward the church suggests that Black liberation theology did not restore the church's credibility among a significant cohort of young Black people.<sup>257</sup> Indeed, even decades after the era of Black power, the image of Christianity as a White man's religion that "offers no solutions to the harsh realities that shape their everyday lives" continues among some urban youth.<sup>258</sup>

In light of the impact that Black nationalist and Black power critiques had on young Black intellectuals who came of age in the wake of the Black consciousness movement, it is possible to make sense of the marginal role of religious reasons in CRT scholarship even while African Americans remain overwhelmingly Christian. In particular, CRT's deep debt to Black nationalist and Black power thought, together with many of its founders' conscious identification with Black Power movements,<sup>259</sup> means that race and law scholarship developed in an intellectual framework that saw Christianity as at best irrelevant and at worst harmful to efforts to address racial subordination. As a result, whatever the religious commitments of individual race and law scholars, a plausible explanation for the absence of a substantial body of race and law scholarship that draws on the normative resources of the African American Christian tradition is CRT's roots in an intellectual frame that is at best indifferent to the African American Christian tradition.

### 3. The Normative Resources of the African American Christian Tradition Are Extraneous to CRT's Antisubordination Agenda

Although not unrelated to the intellectual influence that Black Power movements have had on CRT, a more specific explanation of the marginal role of African American religious sensibilities in race and law scholarship is CRT's anchoring commitment to what seems to be an exclusively secu-

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256. *Id.* at 19 (quoting BEVERLY HALL LAWRENCE, *REVIVING THE SPIRIT: A GENERATION OF AFRICAN AMERICANS GOES HOME TO CHURCH* 15-16 (1997)).

257. *See supra* notes 251-53 and accompanying text (discussing Lincoln and Mamiya's data).

258. CHAPMAN, *supra* note 181 at 176, 178.

259. *See supra* notes 175-79 and accompanying text; *see also* Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 10-11 (Francisco Valdes et al. eds., 2002) (founding critical race scholar, Kimberlé Crenshaw, describing her early exposure to the politics of the Black Power movement and its resonance with critical race scholar, Derrick Bell's work).

lar, naturalistic conception of subordination.<sup>260</sup> More specifically, as Francisco Valdes has noted, “Critical Race Theory argue[s] that structures of domination and subordination are manufactured by humanity rather than handed down by some ‘natural’ or ‘inevitable’ force.”<sup>261</sup> Thus, CRT seems to view domination and subordination exclusively as the product of power relations constructed by human beings, and therefore proceeds along a naturalistic theoretical framework that cannot easily accommodate the classical Christian notion that spiritual imperfections limit humanity’s capacity to build domination-free social structures.<sup>262</sup> In addition, and consistent with this naturalistic framework, according to the internal logic of CRT’s constructionist antisubordination principle, religion is a social factor, that, like all social factors, should be critiqued from an antisubordination perspective.<sup>263</sup>

Given this internal logic, CRT’s constructionist conception of antisubordination helps to explain the marginal role of the normative resources of the African American Christian tradition in CRT scholarship. Specifically, whereas according to the logic of CRT’s antisubordination principle religion should be critiqued like any other social factor,<sup>264</sup> scholarship drawing on the normative resources of the African American Christian tradition involves taking a perspective internal to Christianity. As

260. See Roy L. Brooks, *Conley and Twombly: A Critical Race Theory Perspective*, 52 How. L.J. 31, 42 (2008) (describing “CRT’s central mission . . . [as] the eradication of racial subordination.”); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of ‘Sex,’ ‘Gender,’ and ‘Sexual Orientation’ in Euro-American Law and Society*, 83 CAL. L. REV. 1, 32 n.85 (1995) [hereinafter *Queers, Sissies, Dykes, and Tomboys*] (“Constructionist theories, pioneered by cultural and literary studies and brought into legal culture by Feminism and Critical Race Theory, argue that structures of domination and subordination are manufactured by humanity rather than handed down by some “natural” or inevitable force.”); see also Francisco Valdes et al., *Introduction to CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 3 (Francisco Valdes et al. eds., 2002) (describing CRT’s “bottom line . . . [as] anti-subordinationist social transformation.”).

261. *Queers, Sissies, Dykes, and Tomboys*, *supra* note 260, at 32 n.85. Legal scholar Richard Delgado notes that critical race theory is divided between realist and idealist approaches to racial oppression, with the latter having gained near total dominance in the second wave of critical race theory. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123 (2003). 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.” *Id.* at 123. In contrast, the realist “school holds that while text, attitude, and intention may play important roles in our system of racial hierarchy, material factors such as profits and the labor market are even more decisive in determining who falls where in that system.” *Id.* at 123–24. Importantly, consistent with constructionist theories, both schools view the problem of oppression, and racial oppression in particular, in exclusively immanent terms. *Id.* at 123. As a result, neither approach gives serious attention to how the transcendental problem of human sin contributes to oppression and subordination.

262. See *infra* note 370 and accompanying text.

263. See discussion, *infra* pp. 169–73; *infra* note 274 and accompanying text.

264. See discussion, *infra* p. 170; *infra* note 274 and accompanying text.

result, such scholarship, which would refuse to treat religion like any other social factor, sits uneasily with CRT's constructionist, antisubordination principle.

As far as I am aware, CRT scholars have not engaged the implications of CRT's constructionist conception of oppression and subordination for scholarship that draws on the normative resources of the African American Christian tradition. However, CRT's cousin, Latina and Latino Critical Theory ("LatCrit"), has richly explored and debated whether LatCrit's commitment to an antisubordinationist agenda requires LatCrit theorists to analyze Catholicism's role in subordinating Latino/a identities and communities, as opposed to thinking about the law from the normative perspective of Latino/a Catholicism.<sup>265</sup> Although LatCrit's rich engagement with religion does not examine the relationship between antisubordination and the normative resources of the African American Christian tradition, CRT and LatCrit are committed to the same conception of antisubordination.<sup>266</sup> As a result, examining what LatCrit theorists have said on the question of how antisubordination relates to religion serves to illuminate whether my claim is correct that CRT's conception of subordination operates to marginalize the normative resources of the African American Christian tradition in favor of treating religion as a social factor.

a. *LatCrit, Religion, and Antisubordination*

Before describing LatCrit Theory's engagement with the relationship between its antisubordination agenda and religion among Latino/as, in the context of this Article, it is important to remark on the stark contrast between, on the one hand, LatCrit's rich engagement with religion and, on the other hand, the sparse attention religion has received in CRT scholarship.<sup>267</sup> In my view, together with the contemporary and historical impor-

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265. While often focused on the role of Catholicism in Latino/a communities, LatCrit scholars have emphasized the religious diversity of the Latino/a community. See Laura M. Padilla, *Latinas and Religion: Subordination or Grace?*, 33 U.C. DAVIS L. REV. 973, 974 (2000); see also Guadalupe T. Luna, *Gold, Souls and Wandering Clerics: California Missions, Native Californians and LatCrit Theory*, 33 U.C. DAVIS L. REV. 921, 922-25 (2000).

266. Compare Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing about Race,"* 82 TEX. L. REV. 717, 730 (2004) ("LatCrit theorists wholly embrace CRT's central teachings and mission."), with Elizabeth M. Iglesias & Francisco Valdes, *Afterword—Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 507 (1998) (noting that "anti-subordination analysis . . . serves as the substantive aim and anchor of LatCrit theorizing.") and Mutua, *supra* note 29, at 354 (noting CRT's overall commitment to antisubordination). See generally Francisco Valdes, *Race, Ethnicity and Hispanismo in a Triangular Perspective: The "Essential Latina/o" and LatCrit Theory*, 48 UCLA L. REV. 305, 333 n.86 (2000) ("From inception, LatCrit theorists have embraced antiessentialism and antisubordination as two primary gains of CRT and other genres of outsider jurisprudence.").

267. Iglesias & Valdes, *supra* note 266, at 512 (noting that a "cluster of essays . . . [published in connection with LatCrit II] . . . commence an exploration of religion and spirituality hitherto lacking in outsider legal scholarship.").

tance of religion in African American communities, LatCrit's engagement with religion gives greater plausibility to the explanation offered above that CRT's historical/intellectual trajectory accounts for the marginal role of religion in CRT scholarship. Specifically, one does not find in Latino/a history an analog to the highly influential Black nationalist and Black power critiques of Christianity as a White man's religion.<sup>268</sup> As a result, it is plausible to conclude that, in light of the great importance of religion in both the African American and Latino/a community, CRT's historical/intellectual trajectory helps to explain why, in contrast to the focus LatCrit has given to Latino/a religion, CRT has given negligible attention to African American religion.

While “[f]rom its very inception, LatCrit Theory recognized the salience of spirituality and religion to its anti-subordination analyses,”<sup>269</sup> LatCrit's conception of antisubordination has led important LatCrit scholars to conclude that LatCrit should critique religion from the external perspective of its commitment to antisubordination, as opposed to developing LatCrit scholarship grounded in the internal, normative resources of Latino/a religion.<sup>270</sup> For example, concerned that an uncritical turn to religion can reproduce subordination, in his forward to the first-ever LatCrit Annual Conference, leading legal scholar and LatCrit theorist Francisco Valdes notes:

The pending question for LatCrit theorizing . . . is whether “religion” and/or spirituality provide sources of Latina/o resistance to subordination or whether they serve as sources of Latino/a accommodation of disempowerment. In varied instances or contexts, the answer could be either or both. The task, then, is not a LatCrit assessment of the “correctness” or value attributed or imputed to any particular article of faith or dogma, but a searching analysis of religion's impact on Latina/o lives to help fulfill the LatCrit goal of advancing Latina/o liberation from social or legal oppression. The lesson therefore, is that LatCrit projects focused primarily on religion and spirituality, like those focused primarily on race, ethnicity, class, gender or sexuality, should manifest a broadly-defined anti-subordination sensibility and purpose.<sup>271</sup>

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268. In this connection, it is helpful to note that Black liberation theology, which developed in reaction to Black power movements, focuses on racial oppression, whereas Latin American liberation theology prioritizes class analysis. DWIGHT N. HOPKINS, *INTRODUCING BLACK THEOLOGY OF LIBERATION* 167 (1999).

269. Margaret E. Montoya, *Religious Rituals and LatCrit Theorizing*, 19 *CHICANO-LATINO L. REV.* 417, 417 (1998).

270. Compare *infra* notes 271-73 and accompanying text, with *infra* note 274 and accompanying text.

271. Francisco Valdes, *Foreword: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 *HARV. LATINO L. REV.* 1, 22 (1997).

In other words, according to Valdes, an antisubordination agenda is not focused on grounding scholarship in a religious tradition but on examining religion's relationship to empowerment and subordination.<sup>272</sup> As a result, drawing on the normative resources of a religious tradition is secondary to LatCrit's anchoring commitment to a constructivist antisubordination principle.<sup>273</sup> Indeed, in their Afterword article commemorating LatCrit II, Valdes and co-author Elizabeth Iglesias, express exactly this sentiment, writing:

[W]e conclude that religion, like any other social or political force or institutional arrangement, must be analyzed in terms of and engaged on behalf of the anti-subordination commitment that unifies the LatCrit movements' multiple diversities—with critical attention focused on whether and how religion's historical and contemporary agendas tend to promote and/or obstruct the liberation struggles and anti-subordination imperatives that have coalesced in and around the LatCrit movement.<sup>274</sup>

Iglesias's and Valdes's insistence that LatCrit's commitment to antisubordination requires LatCrit to engage religion like it would any other social phenomenon supports my argument that CRT's constructionist principle of antisubordination marginalizes the normative resources of the African American Christian tradition. Specifically, Iglesias's and Valdes's claim that critical scholarship must "analyze[ ] [religion] in terms of and engaged on behalf of . . . anti-subordination" imperatives teases out the inner logic of LatCrit's and CRT's constructionist antisubordination principle.<sup>275</sup> According to this principle, the polestar of critical scholarship must be a secular conception of antisubordination rather than the normative commitments of a religious tradition.<sup>276</sup>

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272. See *id.*

273. See Iglesias & Valdes, *supra* note 266, at 507 (noting that "anti-subordination analysis . . . serves as the substantive aim and anchor of LatCrit theorizing."); cf. *supra* note 271 and accompanying text.

274. Iglesias & Valdes, *supra* note 266, at 509.

275. *Id.*

276. See *id.*; see also *supra* note 271 and accompanying text. In this connection it is important to note Iglesias and Valdes' expressed openness to an alliance between LatCrit and Latin American Liberation Theology. More specifically, they note "a ready connection between liberation theology and outsider jurisprudence: both embrace and espouse social justice causes and seek material transformation of unjust conditions. From this perspective, the biblical message posited by liberation theology mandates the same sort of anti-subordination praxis that also drives LatCrit theory." Iglesias & Valdes, *supra* note 266, at 543. While it is far beyond the scope of this paper to take up this issue in any detail, Iglesias and Valdes' expressed openness to drawing on liberation theology does not present a significant challenge to my claim that the constructionist conception of antisubordination tends to marginalize the normative resources of the African American Christian tradition. For decades, theologians of diverse traditions have debated the



Although Iglesias and Valdes do not specify why LatCrit's commitment to antisubordination requires critical scholars to treat religion like any other social factor, the reason for their position is quite evident. They be-

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extent to which liberation theology reduces soteriology to an immanent historical process. See, e.g., CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON CERTAIN ASPECTS OF THE "THEOLOGY OF LIBERATION" (1984), available at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19840806\\_theology-liberation\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19840806_theology-liberation_en.html) ("[T]here is a tendency [in liberation theology] to identify the kingdom of God and its growth with the human liberation movement, and to make history itself the subject of its own development, as a process of the self-redemption of man by means of the class struggle. This identification is in opposition to the faith of the Church as it has been reaffirmed by the Second Vatican Council.") (footnotes omitted). But see Mayra Rivera Rivera, *Radical Transcendence? Divine and Human Otherness in Radical Orthodoxy and Liberation Theology*, in INTERPRETING THE POSTMODERN: RESPONSES TO "RADICAL ORTHODOXY" 119, 137 (Rosemary Radford Ruether & Marion Grau eds., 2006) (arguing that some liberation and feminist theologians "believe that the theological promise of transcendence lies not in proposing a reality other than the world but rather in its potential to help us overcome the habit of reducing the "immanent" to the graspable, or more precisely to reduce the created to the *purely immanent*."); ANSELM KYONGSUK MIN, DIALECTIC OF SALVATION: ISSUES IN THEOLOGY OF LIBERATION 22 (1989) ("Against Marxism's purely immanentist horizon, TL [Theology of Liberation] accepts the "eschatological reservation": salvation is not simply reducible to historical liberation, and no achievement of liberation is immune from the eschatological critique."). To the extent that liberation theology can be understood as identifying salvation with liberation in history, one can see the "ready connection" between the constructionist conception of subordination (in which the transcendent is rendered irrelevant) and liberation theology. However, if liberation theology does not reduce soteriology to an immanent historical process, then while LatCrit and liberation theology may be in alliance Iglesias and Valdes' claim that liberation theology and LatCrit are engaged in the "same sort of anti-subordination praxis" becomes more difficult to sustain. Moreover, while here I do not have the space to fully develop the point, even if the constructionist principle of antisubordination is compatible with liberation theology, it is important to bear in mind that Black and Latin American liberation theology are distinct. Specifically, whatever the extent to which Latin American liberation theology can now be said to form part of the religious folk life of Latino/a Catholics, Black liberation theology has only shallowly penetrated Black churches. As a result, showing that the constructionist approach to antisubordination is compatible with Black liberation theology is not yet to show that scholarship grounded in the former furthers the self-understanding of the vast majority of African American Christians. Indeed, as Professor Dale Andrews has noted, the chasm between academic Black liberation theology and Black churches involves the much debated issue of whether Black liberation theology is grounded in Black religious folk life. DALE P. ANDREWS, PRACTICAL THEOLOGY FOR BLACK CHURCHES: BRIDGING BLACK THEOLOGY AND AFRICAN-AMERICAN FOLK RELIGION 50-51 (2002). Specifically, many Black churches reject Black liberation theology's interpretation of the gospel message as social liberation because they see it as neglecting the importance that Christianity gives to personal salvation and spiritual liberation. See *id.* at 2-10, 59-69, 84-87, 130-32. Thus, many Black churches understand Black liberation theology as subjugating "spiritual formation to liberation ethics." See *id.* at 4, 9, 52. In turn, Black liberation theology has disparaged the spirituality and soteriology of Black religious folk life as 'otherworldly.' See *id.* at 4-5, 8-9, 36. As Professor Andrews has noted, "reestablish[ing] the necessary reciprocity between personal faith and social justice is an important part of closing the divide between Black churches and Black theology. *Id.* at 9. As a result, because of the disconnect between Black churches and Black liberation theology, grounding CRT scholarship in the latter should not necessarily be identified with grounding scholarship in the broader African American Christian tradition as it is expressed in Black churches and the folk religion of Black people.

lieve that a secular conception of antisubordination is necessary to check religion's role as a source of subordination.<sup>277</sup> Indeed, describing the church's alleged complicity in various human rights violations, they go so far as to claim that, in light of history, "the cumulative effects of Christianity on [the United States] cannot credibly be said to represent egalitarian respect for difference, or sincere accommodation of diversity on any of the points implicated by the recorded dogma of the various churches spawned by Judeo-Christian imperatives."<sup>278</sup> But, as we now discuss, Iglesias and Valdes do not really support this hasty conclusion nor could they.

While this is not the appropriate place for an extended discussion of this issue, somewhat ironically, Iglesias's and Valdes's argument about Christianity's cumulative effects fails precisely because it disregards an essential teaching of CRT: the importance of historical, contextual analysis. In particular, as British philosopher Keith Ward has argued, it is "misleading . . . to oppose 'religion' to 'culture,' as though they were different and competing forces."<sup>279</sup> Because the two operate together, it is often very difficult to place responsibility for intolerance squarely on religion as opposed to other factors. For example, while Christianity was used to justify colonial conquest,<sup>280</sup> racism,<sup>281</sup> and

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277. Compare *supra* notes 273-76 and accompanying text, with *infra* note 278 and accompanying text.

278. Iglesias & Valdes, *supra* note 266, at 524; see also *id.* at 525 ("[C]ritical candor nevertheless compels acknowledgment that the net effects of Christian presence in this and other non-European continents have been decidedly imperial: Christianity as an institution repeatedly has aided secular campaigns to claim, domesticate and 'detribalize' sovereign indigenous cultures."). It bears noting that Iglesias and Valdes are focused on the experience of indigenous peoples and not African Americans, and so their criticisms are not specifically directed to the subject of my focus, African Americans. Nevertheless, because they incriminate all of the churches spawned by the Judeo-Christian tradition, their criticisms would seem to extend to the Black church. In addition, there is some reason to believe that their criticisms of the Catholic Church are too broad brushed, affording too little attention to the complicated political pressures at play in the Catholic church's involvement in colonial conquest. JOHN FREDERICK SCHWALLER, *THE HISTORY OF THE CATHOLIC CHURCH IN LATIN AMERICA: FROM CONQUEST TO REVOLUTION AND BEYOND* 39-40 (2011) (noting that Spanish monarchs requested authority from the Pope to take native land); VINCENT CARROLL, *CHRISTIANITY ON TRIAL: ARGUMENTS AGAINST ANTI-RELIGIOUS BIGOTRY* (2002).

279. KEITH WARD, *IS RELIGION DANGEROUS?* 51 (2007).

280. SHARON KORMAN, *THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 50-51 (1996) (noting that in the sixteenth century "the spreading of Christianity was [widely considered] a sufficient justification for the acquisition of colonial empires by conquest.").

281. Desmond M. Tutu, *The First Word: To be Human is to be Free, in CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 7 (John Witte, Jr. & Frank S. Alexander eds., 2010) (noting that Christianity has been used to justify racism in both the United States and South Africa); see also FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTER-RACIAL MARRIAGE, & AMERICAN LAW* 7 (2009) (noting that among white American Protestants the curse of Canaan and the perpetual enslavement were read together to justify racial

slavery,<sup>282</sup> economic interests also partly motivated all of these.<sup>283</sup> In addition, while Christianity was interpreted to help to justify racism and slavery, pseudo-science and the Enlightenment thought of thinkers, such as Immanuel Kant, also played a critical role.<sup>284</sup>

More generally, while “[i]t is an error to see religion just in social terms . . . [i]t is equally an error to think that religions add nothing to the social context. They do add something, but what they add depends on the context and who is doing the adding.”<sup>285</sup> Accordingly, instead of saying that the cumulative effects of Christianity “cannot credibly be said to represent ‘egalitarian respect for difference’ or ‘sincere accommodation of diversity,’” Valdes and Iglesias should have been careful to point out the great difficulty in determining whether Christianity was actually the cause of the moral wrongs that they identify.<sup>286</sup> One must instead look to context and be mindful of the fact that Christianity cannot be easily separated from extra-religious forces, such as economic and political interests.<sup>287</sup>

Looked at this way, it is not difficult to see that Iglesias’s and Valdes’s suggestion that Christianity’s cumulative effects have been intolerant of difference both fails to adequately grapple with the difficulties of defining Christianity’s content across American history and to account for confounding variables.<sup>288</sup> In particular, because Christianity’s precise content and impact on society is historically and socially contingent, and because Christianity often operates at the same time in history in different moral

slavery); *Id.* at 89, 109-11 (noting that Christianity was used to justify anti-miscegenation statutes and segregation).

282. Albert J. Raboteau, *African-Americans, Exodus and the American Israel*, in *AFRICAN-AMERICAN CHRISTIANITY: ESSAYS IN HISTORY* 2 (Paul E. Johnson ed., 1994) (“From the beginning of the Atlantic slave trade, Europeans claimed that the conversion of slaves to Christianity justified the enslavement of Africans.”); see also MICHAEL O. EMERSON & CHRISTIAN SMITH, *DIVIDED BY FAITH: EVANGELICAL RELIGION AND THE PROBLEM OF RACE IN AMERICA* 34-37 (2000) (reviewing scriptural justifications offered to support slavery).

283. MARTIN A. KLEIN, *HISTORICAL DICTIONARY OF SLAVERY AND ABOLITION* 303 (2002) (“[M]ost writers would agree that slavery is an economic institution.”); PAUL D. MORENO, *BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY* 70 (2007) (“Segregation appealed most to politicians, who could indulge white voters’ racial prejudices without having to pay for it, and to white workers who benefited from exclusion of black competition.”); JYOTI PURI, *ENCOUNTERING NATIONALISM* 79 (2003) (noting the role of economic motivations in colonialism); David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 *AM. U. L. REV.* 85, 94 (1993) (noting economic motivations for excluding blacks from unions).

284. See generally Robert Bernasconi, *Kant as an Unfamiliar Source of Racism*, in *PHILOSOPHERS ON RACE: CRITICAL ESSAYS* 145-66 (2010).

285. WARD, *supra* note 279, at 49.

286. Compare *supra* note 278 and accompanying text, with *supra* notes 279-85 and accompanying text.

287. See *supra* notes 279-85 and accompanying text.

288. Compare *supra* note 278 and accompanying text with *supra* notes 279-84 and accompanying text.

directions depending on who is acting in its name, it is very difficult, indeed impossible, to support the broad conclusion that Christianity's net effects "cannot credibly be said to represent egalitarian respect for difference."<sup>289</sup> For example, how does one calculate the impact, on the one hand, of the abolition movement, and on the other hand, proof text justifications for slavery? Thus, while one can show connections between Christianity and pro- and anti-slavery forces, it is difficult to imagine, especially in light of numerous confounding variables, how one could calculate the relative contribution of these connections to a larger analysis of Christianity's cumulative impact in the United States on "egalitarian respect for difference."<sup>290</sup>

Nevertheless, I, of course, agree with Iglesias's and Valdes's weaker claim that religion can and has been a source of subordination<sup>291</sup> and believe that there is immense value in the kind of critical perspective that they urge. However, I reject any suggestion that antisubordination work must treat religion like any other social factor. In my view, arguments developed from the internal point of view of a religion can perform powerful work on behalf of oppressed people—a fact which Martin Luther King, Jr.'s "Letter From A Birmingham Jail" and the broader civil rights movement demonstrate quite clearly.<sup>292</sup> That said, I would nevertheless defend the value of two kinds of scholarship: one that engages religion as a social factor as part of a secular antisubordination agenda, and one that focuses on engaging the law from perspectives internal to religious traditions.

b. *An Exclusively Constructionist Conception of Subordination Marginalizes the African American Christian Tradition*

I now want to briefly indicate why an exclusively constructionist conception of subordination marginalizes the African American Christian tradition. In contrast to CRT's and LatCrit's exclusively constructivist understanding of subordination, the African American Christian tradition views oppression as both the product of constructed human arrangements and as the product of the spiritual, transcendental problem of human sin.<sup>293</sup> Thus, *contra* the constructivist conception of subordination, in a certain sense it would not be far from the mark to say that, although particular structures of domination and subordination are in no way natural or inevi-

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289. Iglesias & Valdes, *supra* note 266, at 524.

290. *Id.*

291. *Id.*

292. See generally Martin Luther King, Jr., *Letter From Birmingham City Jail*, THE KING CENTER, available at <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0#>.

293. Shelton & Emerson, *supra* note 8, at 76 (reporting Black theologian James Cone's statement that for Black Christians, "[e]verybody is a sinner, and black Christians see that sin in the failure of the ethics.").

table, the view of human nature as fallen and subject to sin means that domination and subordination will find expression in human structures.<sup>294</sup> Accordingly, from the perspective of the African American Christian tradition, it is incomplete to claim, as some CRT scholars have, that “the struggle against subordination must be understood as a struggle for power within the institutional arrangements through which power is legally organized and deployed.”<sup>295</sup> It is also incomplete to claim, “that structures of domination and subordination are manufactured by humanity rather than handed down by some ‘natural’ or inevitable force.”<sup>296</sup> In light of the problem of sin, in addition to struggling to redistribute power within institutions, it is necessary to acknowledge and address corruption at the individual level. However, because CRT’s constructivist position implicitly rejects the notion that individual corruption is in part independent of structural oppression,<sup>297</sup> CRT’s antisubordination agenda simply cannot accommodate the robust conception of individual sin that is central to the African American Christian tradition and other Christian traditions that adhere to classical Christian doctrines of sin. As a result, to the extent that the African American Christian tradition understands individual sin to be a source of oppression and subordination, arguments developed on the basis of CRT’s constructionist conception of subordination fail to cultivate self-understanding among African American Christians.<sup>298</sup>

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294. See *infra* note 370.

295. Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1048 (2000).

296. *Queers, Sissies, Dykes, and Tomboys*, *supra* note 260, at 32 n.85; see also Reginald L. Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1382–88, 1402–03 (2004) (critiquing CRT for its commitment to a principle of “structural determinism” in which “a limited range of causal social factors” explain racism and arguing that within CRT’s theory of structural determinism ordinary people lack agency and elite whites construct reality through dominant narratives).

297. See *Queers, Sissies, Dykes, and Tomboys*, *supra* note 260, at 32 n.85.

298. It is important to remark here upon potential implications of CRT’s commitment to anti-essentialism for my emphasis on self-knowledge and the African American Christian tradition. As Iglesias and Valdes note in the context of engaging religion among Latinos, anti-essentialism teaches that scholarship claiming to proceed from the African American Christian tradition may marginalize voices that fall outside of the mainstream Black Christian tradition. See Iglesias & Valdes, *supra* note 266, at 508–09. However, in my view the dangers of essentialism are best dealt with by both making clear that the African American Christian tradition is complex and varied and by clearly stating the theological premises from which a piece of scholarship proceeds. Indeed, as I have already mentioned, because of the complexity of the African American Christian tradition, the political implications of developing a more robust literature examining race and law from the perspective of the African American religious tradition are not clear. See discussion, *supra* p. 129. Accordingly, a major benefit of developing such a literature is to increase our understanding of how a critically important source of normative meaning and judgment in the Black community bears on questions of race and law. Likewise, precisely because a particular piece of scholarship examining the law from the perspective of the African American

Despite my conclusion that CRT's exclusively constructionist conception of subordination cannot easily accommodate traditional Christianity's insistence that individual sin is, in part, responsible for oppression and subordination, legal scholar and Georgetown Law Professor Anthony Cook has produced a body of critical race scholarship drawing on the African American Christian tradition as exemplified in the life and work of Dr. Martin Luther King, Jr.<sup>299</sup> However, as I argue in the next section, neither Cook's foundational effort to interpret King in parallel with CLS and CRT<sup>300</sup> nor his subsequent work manages to reconcile CRT's naturalistic, constructionist antisubordination agenda with King's and the African American Christian tradition's emphasis on the role of personal sin in producing oppression and subordination. In fact, Cook's foundational piece<sup>301</sup> (upon which much of his corpus builds) actually marginalizes those aspects of King's thought that are arguably most deeply and squarely rooted in the Christian tradition.

C. *A Critique of Cook's Foundational Effort to Interpret King in Parallel with CRT and CLS*

In his path-breaking Harvard Law Review article, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.* ("Beyond CLS"), Cook lays the foundation for a corpus that constitutes the most sustained effort to examine American law and legal scholarship from the perspective of the African American Christian tradition.<sup>302</sup> In this seminal piece, Cook is primarily focused on demonstrating how King's reconstructive theology provides guidance on how critical scholars can go beyond critical legal studies' frequent failure to offer more than a "theoretical deconstruction" of liberalism.<sup>303</sup> As a result, *Beyond CLS* is primarily con-

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Christian tradition will be based on particular theological premises, it cannot be said to further the self-understanding of all African American Christians. For this reason, furthering the self-understanding of African American Christians requires the development of a substantial body of scholarship grounded in the diverse theological perspectives that make up the African American Christian tradition.

299. See sources cited *supra* note 21.

300. Cook, *Beyond Critical Legal Studies*, *supra* note 15.

301. *Id.*

302. *Id.*

303. Put succinctly, Cook argues that Dr. King exemplified the methods that CLS should include: theoretical deconstruction, experiential deconstruction, reconstruction, and transformative action. *Id.* at 1014 ("Although many critical theorists engage primarily in theoretical deconstruction, and some appreciate certain forms of experiential deconstruction, few have embraced either a full experiential deconstruction or the third and fourth dimensions of philosophical praxis— reconstructive theorizing and socially transformative struggle.") (footnotes omitted). First, Cook argues that Dr. King theoretically deconstructed the conservative evangelical Christianity that operated to legitimate authority, including slavery and Jim Crow. *Id.* at 1023. In particular, he argues that King challenged conservative evangelical Christianity's premise that human nature is fundamentally evil, and thereby defeated arguments that challenging Jim Crow

cerned with demonstrating that King's life and thought offer lessons on further developing the project of critical legal scholarship; its main focus is not on interrogating the compatibility between, on the one hand, King and the African American Christian tradition's emphasis on personal sin, and, on the other hand, critical legal scholarship's exclusively naturalistic, constructionist conception of subordination.<sup>304</sup> In particular, according to Cook, like CLS, King engages in theoretical deconstruction.<sup>305</sup> But unlike CLS, King then engages in a robust form of what Cook calls "experiential deconstruction"—a deconstructive activity that examines the specific experiences of oppressed people in order to gain "knowledge of the full range of conditions under which they remain oppressed."<sup>306</sup> Furthermore, by employing experiential deconstruction, critical scholars can provide a basis upon which "to reconstruct community from the debris of theoretical deconstruction,"<sup>307</sup> which in turn provides "constructive goals" capable of informing the struggle for transformative social change.<sup>308</sup> Thus, just as King offered a reconstructive vision of community, which he called the Beloved Community, and engaged in transformative social struggle in order to bring about his vision of society, by going beyond theoretical deconstruction and to experiential deconstruction, CLS can develop a reconstructive vision of community that will inform the struggle for social change.<sup>309</sup> However, in contrast to the focus in CLS on "rights-trashing"<sup>310</sup> and CLS's frequent failure to include in its analyses the perspectives

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through civil disobedience presented a dangerous threat to law and order. *Id.* at 1026-28. Second, drawing on the concrete reality of racial oppression as well as pragmatic and revolutionary Black Christianity, King experientially deconstructed conservative evangelical Christianity's opposition to direct action against Jim Crow. *Id.* at 1030-33. Third, Cook argues that King's notion of the Beloved Community constitutes an example of the sort of reconstructive work that CLS needs. *Id.* at 1034. Finally, Cook points to King's leadership of the civil rights movement as an example of "transformative social struggle." *Id.* at 1043.

304. See *supra* notes 260-63, 296, 303 and accompanying text.

305. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 987-88 (arguing that King, like CLS, was engaged in a project of "understand[ing] the hegemony of repressive ideologies and . . . deconstruct[ing] the limits they appear to set on the possibilities of change[.]" but that CLS is primarily focused on theoretical deconstruction while King engages in theoretical deconstruction but goes beyond it).

306. *Id.* at 1011-12.

307. *Id.* at 1011, 1030.

308. *Id.* at 992, 1011 (arguing that experiential deconstruction and reconstructive vision "may . . . provide the basis and catalyst for transformative social change.").

309. *Id.* at 1010-12.

310. Athena D. Mutua, *The Rise, Development, and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 347-48 (2006) ("At the level of theory, race crits questioned one of the major theoretical critiques of CLS scholarship, the trashing of rights."); Gregory S. Parks & Shayne E. Jones, "Nigger": A Critical Race Realist Analysis of the N-Word Within Hate Crimes Law, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1307 (2008) ("Critical Race Theorists do not endorse rights-trashing, like the crits.").

and experiences of racial minorities,<sup>311</sup> King insisted on the importance of individual rights and critiqued American law and society from the perspective of the experiences of Black people.<sup>312</sup> As a result, while Cook interprets King in parallel with CLS, his argument creates an even closer parallel between King and the then inchoate CRT movement.

However, as I argue below, Cook's effort to interpret King in close parallel with CLS and CRT is unpersuasive. Moreover, while Cook's argument may mark a significant contribution insofar as his understanding of King enables him to construct a blueprint of how CLS can go beyond theoretical deconstruction, his effort to interpret King in parallel with CLS and CRT fails to address the divide between, on the one hand, King and the larger African American Christian tradition's emphasis on the importance of personal sin and, on the other hand, CLS and the then inchoate CRT movement's exclusively naturalistic conception of subordination and the anthropology that undergirds it.<sup>313</sup> More precisely, Cook elides the chasm between, on the one hand, King's emphasis on the need to address both structural and individual, spiritual corruption and, on the other hand, CLS's emphasis on structural change and utter lack of attention to the role that spiritual purification has in ending oppression.<sup>314</sup> As a result, Cook's argument develops a much stronger parallel between King and CLS than actually exists and thereby minimizes the tensions between CLS's exclusively constructionist approach to antiracism and that of the African American Christian tradition.<sup>315</sup> More importantly in the context of this Article, Cook's unpersuasive effort to interpret King in close parallel with CLS and CRT does not undermine my claim that CRT's commitment to a constructionist conception helps to explain the marginal role that the African American Christian tradition has played in CRT. Because a detailed examination of Cook's argument is required to support my claim that Cook fails to persuasively interpret King in close parallel with CLS and CRT, it is to that examination that I now turn.

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311. Compare Crenshaw, *Twenty Years*, *supra* note 112 and accompanying text, with CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 154, at xxiii–xxvi (noting the whiteness of the CLS movement and the effort of scholars of color to develop a race-consciousness form of critical scholarship).

312. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1031–35.

313. Compare discussion, *infra* pp. 193–204 (arguing that Cook elides the chasm between King's emphasis on the necessity of spiritual transformation and CLS's exclusive emphasis on structural change), with Peter Gabel, *Critical Legal Studies as a Spiritual Practice*, 36 PEPP. L. REV. 515, 516 (2009) (noting that “it is absolutely the case that CLS—or at least what came to be known as the dominant strain within CLS—refused to embrace th[e] transcendent spiritual impulse, to stand behind it, or to speak about it.”).

314. Compare *supra* note 313 and accompanying text, with discussion, *infra* pp. 182–92.

315. Compare *supra* note 313 and accompanying text, with discussion, *infra* pp. 182–92.



### 1. Implausibly Interpreting King as a Theoretical Deconstructionist

Cook's effort to parallel King and CLS is anchored in his effort to interpret King as sharing CLS's method of theoretical deconstruction.<sup>316</sup> More precisely, Cook offers a CLS-style theoretical deconstruction of the account of human nature that underlies Lockean liberalism and interprets King as having offered a parallel set of arguments deconstructing the account of human nature that underlies conservative evangelicalism.<sup>317</sup> However, as I argue in the next subsection, Cook's effort to interpret King as having theoretically deconstructed human nature in the manner of a CLS-style critique runs into difficulty. More specifically, the evidence upon which Cook relies does not persuasively support Cook's effort to characterize King as having made arguments that closely parallel CLS-style theoretical deconstructions.<sup>318</sup> Furthermore, based upon the evidence, it is implausible to describe King as holding the metaphysical commitments that underlie the CLS-style critique of human nature that Cook attempts to attribute to him.<sup>319</sup> However, before reaching Cook's discussion of King, I first review the CLS-style critique of Lockean liberalism against which Cook attempts to parallel him.<sup>320</sup>

#### a. *A CLS-style Critique of Lockean Liberalism*

After explaining that “[t]heoretical deconstruction identifies underlying assumptions, exposes those presuppositions as value choices of the theorist, and demonstrates the indeterminacy of those values—that no one vision of community is logically compelled by the values chosen”—Cook offers three CLS-style arguments theoretically deconstructing the account of human nature that underlies Lockean liberalism's conception of community.<sup>321</sup> More precisely, while Lockean liberalism offers a vision of community built upon characterizing human beings as individual, rational appropriators of property, incoherency, universality, and indeterminacy critiques show that we are free to reject Locke's view of human nature and the vision of community that he believes that view requires.<sup>322</sup>

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316. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 987-88 (arguing that King, like CLS, was engaged in a project of “understand[ing] the hegemony of repressive ideologies and . . . deconstruct[ing] the limits they appear to set on the possibilities of change[.]” but that CLS is primarily focused on theoretical deconstruction while King engages in theoretical deconstruction but goes beyond it.).

317. Compare Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 993-1000 (offering a CLS-style theoretical deconstruction of Lockean liberalism), *with id.* at 1023-28 (arguing that King theoretically deconstructed conservative evangelicalism).

318. See discussion, *infra* pp. 182-92.

319. See discussion, *infra* pp. 182-204.

320. See discussion, *infra* pp. 181-82.

321. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 993-994.

322. *Id.* at 996.

According to Cook's incoherency critique, because Locke "deduces what he considers a natural and necessary social order from an incoherent conception of human nature, his conception of social order need not be accepted as legitimate."<sup>323</sup> However, even if Locke's theory of human nature were coherent, Cook argues that "what one discovers as a universal attribute of human behavior depends largely on who is searching, what she hopes to find, and the broader social context in which the search takes place."<sup>324</sup> As a result, according to the universality critique, we need not accept "Locke's characterization of humans as universally rational appropriators of private property" and are therefore free to reject Locke's vision of community.<sup>325</sup> Lastly, according to the indeterminacy critique, even if we accept Locke's vision of human beings as rational appropriators of private property, we are not compelled to accept his vision of community as "a pervasive system of private ownership."<sup>326</sup> We might instead conclude that the natural impulses of individual, private-property appropriators could be satisfied "through the development of small scale cooperatives in which individuals share in the ownership and responsibilities attending property with others of the community."<sup>327</sup> Thus, according to the indeterminacy critique, "[w]e remain free to make our own world, and are not compelled to accept mechanically the one" that Locke or others claim to derive from first principles.<sup>328</sup>

As I now argue, Cook unpersuasively interprets King as having offered a trio of theoretical deconstructions whose mode and method parallel those that Cook offers of Lockean liberalism.<sup>329</sup>

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323. *Id.* at 996-98. Cook's argument that Locke's view of human nature is incoherent is built upon Cook's observation that "Locke's conceptions of human nature appear[s] to be divided between the 'industrious and the rational' and the 'quarrelsome and contentious.'" *Id.* at 992. Specifically, "[g]iven Locke's initial description of the state of nature [in which human beings are fundamentally good]," Cook critiques Locke for failing to explain how "quarrelsome and contentious" people emerged from the state of nature who necessitated the institution of a civil order organized around a view of human nature as fundamentally evil. *Id.* at 997-98. As a result, Locke's vision of civil society is incoherently premised upon the view that human nature is fundamentally evil, and so "need not be accepted as natural or necessary." *Id.* at 998.

324. *Id.* at 999.

325. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 999.

326. *Id.*

327. *Id.* at 1000.

328. *Id.*

329. See *supra* note 317 and accompanying text (noting that Cook offers a CLS-style theoretical deconstruction of Lockean liberalism that parallels the theoretical deconstruction of conservative evangelicalism that Cook attributes to King); see also discussion, *infra* pp. 182-94 (analyzing Cook's argument that King theoretically deconstructed conservative evangelicalism).

b. *Why Cook's Effort to Interpret King as a CLS-Style Theoretical Deconstructionist is Unpersuasive*

I begin my critique of Cook's effort to interpret King as offering CLS-style theoretical deconstructions with Cook's effort to characterize King as having offered an "incoherency" critique of conservative evangelical Christianity's account of human nature. Cook develops this argument from King's famous "Letter From a Birmingham Jail"<sup>330</sup> responding to eight Alabama clergy who had released a public statement criticizing King for organizing "unwise and untimely" civil rights demonstrations and inciting "hatred and violence."<sup>331</sup> According to the clergymen, racial issues are properly resolved in the courts "and not in the streets."<sup>332</sup> Based on the following excerpt from King's "Letter From a Birmingham Jail," Cook characterizes King as theoretically deconstructing the clergy's contention that the fundamental evilness of human nature requires privileging law and order over freedom:

[I have] almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; . . . who paternalistically feels that he can set the timetable for another man's freedom . . . . I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice, and that when they fail to do this they become dangerously structured dams that block the flow of social progress.<sup>333</sup>

As Cook interprets this excerpt of King's famous epistle, King is offering an incoherency critique that "expose[s] the white clergy's preference of order over freedom and evil over good and demonstrate[s] that this preference lacked an objective foundation."<sup>334</sup> More precisely, according to Cook, if human nature is fundamentally evil, and freedom therefore requires law and order, then order also requires freedom.<sup>335</sup> However, because human beings would be ungovernable if they were not capable of "substantial good," order presupposes freedom, and it therefore presup-

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330. See generally King, *supra* note 292.

331. *Public Statement by Eight Alabama Clergymen*, available at [http://www.massresistance.org/docs/gen/09a/mlk\\_day/statement.html](http://www.massresistance.org/docs/gen/09a/mlk_day/statement.html).

332. *Id.*

333. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1024 n.126 (quoting M. King, *Letter from Birmingham City Jail* (1963), reprinted in A TESTAMENT OF HOPE).

334. *Id.* at 1024.

335. *Id.*

poses the human goodness that the clergy's view of human nature as fundamentally evil denies.<sup>336</sup>

However, there are two problems with Cook's effort to characterize King as offering this incoherency critique. First, King's dispute with the clergy did not on its face concern whether human nature is fundamentally evil or fundamentally good.<sup>337</sup> Indeed, neither the clergy nor King made any reference to the connection between, on the one hand, conservative evangelical Christianity's view of human nature as fundamentally evil and, on the other hand, the relationship between law, order, and freedom.<sup>338</sup> As a result, Cook's effort to interpret King as offering this critique relies upon the unusual claim that King was theoretically deconstructing as incoherent a position that neither he nor the clergy explicitly acknowledged was at issue. But even if one were to accept this unusual instance of theoretical deconstruction, there is a second, more substantive problem with Cook's argument. Even if the dispute between King and the clergy were in fact (that is, implicitly) really about the relationship between a particular conception of human nature and the relationship between law, order, and freedom, Cook's critique would not be persuasive. For contrary to Cook's critique, conservative evangelical Christianity's view of human nature as fundamentally evil is *consistent* with the substantial good associated with human governability.<sup>339</sup> Specifically, the Calvinist doctrine of total depravity, which Cook sees as undergirding conservative evangelical Christianity's view of human nature,<sup>340</sup> does "not intend[ ] to deny human ability outwardly to uphold the law, but rather to indicate a pervasive inward distortion of character tainting all human acts and rendering the person utterly unworthy before God."<sup>341</sup> In theological terms, according to Calvinism, although the *imago Dei* in human beings has been distorted, it

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336. *Id.*

337. Compare Letter From Birmingham City Jail, *supra* note 292, with Public Statement, *supra* note 331.

338. However, Cook's argument assumes that King's Letter to a Birmingham Jail involves a dispute about human nature. See Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1025, 1043 ("Even if the [white clergy's] privileging of order over freedom and the conception of human nature as fundamentally evil over its opposite conception were not seen as incoherent, King realized that these privileged conceptions need not be accepted as universally valid. . . . Finally, when he realized the limitations of debating various theories of human nature, King synthesized opposites and embraced a Christian existentialism that permitted struggle for the Beloved Community within the limitations imposed by our incomplete knowledge of what we would transform and how we would transform it.").

339. See *infra* note 341 and accompanying text.

340. See Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1015-16 nn.88-89 and accompanying text.

341. Compare RICHARD A. MULLER, CALVIN AND THE REFORMED TRADITION: ON THE WORK OF CHRIST AND THE ORDER OF SALVATION 60 (2012), with Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 985, 1015 n.88.

has not been lost.<sup>342</sup> Accordingly, although human action is never perfectly good, human beings are able to perform good acts. As a result, even if King's dispute with the clergy were about human nature (which it was not), the incoherency critique that Cook attributes to King would constitute a very weak theological argument. In my view, in light of the speculative nature of Cook's argument and the fact that King held a Ph.D. in systematic theology, it is implausible to attribute such a theologically weak argument to King.

Before offering what I believe to be a more persuasive interpretation of the argument that King was developing in the excerpt upon which Cook relies, I want to first emphasize that, contrary to Cook's claim, the clergymen offer a pragmatic position that is more pedestrian than any argument positing that the fundamental evilness of human nature entails that freedom requires law and order.<sup>343</sup> In short, as opposed to offering a philosophically complex argument about the relationship between human nature and freedom and law and order, the clergy essentially (and wrongly) argue that recent developments in Birmingham provide reason to be optimistic that court action, and not civil disobedience, is the appropriate approach to resolving racial tensions.<sup>344</sup> Moreover, although the clergy do urge the citizens of Alabama to maintain law and order, contrary to Cook's argument, they do not argue for the claim that human nature is such that freedom requires law and order,<sup>345</sup> but focus on blaming King for the violence that erupted following what the clergy characterize as "unwise and

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342. See MULLER, *supra* note 341, at 59–60.

343. See Letter from C.C.J. Carpenter et al., *A Call for Unity*, Apr. 12, 1963 ("In Birmingham, recent public events have given indication that we all have opportunity for a new constructive and realistic approach to racial problems . . . We do not believe that these days of new hope are days when extreme measures [civil disobedience] are justified in Birmingham."), available at <http://www.newseum.org/education/teacher-resources/lesson-plans/the-first-amendment-and-social-change—mlk-s-letter-from-birmingham-jail-pdf.pdf>.

344. *Id.*

345. It bears noting that the eight clergy who wrote King were among eleven clergy who in January 16, 1963 issued a statement entitled, "An Appeal for Law and Order and Common Sense." S. JONATHAN BASS, *BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE "LETTER FROM BIRMINGHAM JAIL"* 233–34 (2001). In that statement, the clergy argue "[t]hat constitutions may be amended or judges impeached by proper action, but our American way of life depends upon obedience to the decisions of courts of competent jurisdiction in the meantime." *Id.* at 234. They therefore appear to argue that freedom (i.e., "our American way of life") depends on law and order. However, this argument is addressed not to King but to citizens of Alabama in the wake of defiant, rebellious and anarchic opposition to Court decisions desegregating public schools and colleges in Alabama. Moreover, in contrast to the statement to citizens of Alabama, the clergymen's letter to King expressly notes that the "extreme measure" of civil disobedience is unjustified in light of recent events in Alabama. It would therefore be a mistake to interpret their statement as drawing an exact equivalence between the defiant and anarchic opposition of southern segregationists (of which they categorically disapprove) and their contextual criticism of King's leadership of civilly disobedient civil rights demonstrations as "unwise and untimely." *Id.* at 235–36.

untimely” civil rights demonstrations.<sup>346</sup> Thus, as King argues in his Letter From a Birmingham Jail, they blame the victims rather than the perpetrators of violence.<sup>347</sup>

In response to the clergy’s criticisms, rather than offering the incoherency critique that Cook ascribes to him, King argues that the clergy are mistaken about the purpose of law and order, and that they are objectively wrong.<sup>348</sup> Appealing to a Christian understanding of natural law, King argues that segregation laws are unjust and explains why breaking an unjust law while willingly accepting the penalty actually expresses the highest “respect for law.”<sup>349</sup> He then argues “that law and order exist for the purpose of establishing justice,” and that nonviolent direct action exposes the injustice of an “obnoxious negative peace,” and it thereby helps to bring about “a substance-filled positive peace.”<sup>350</sup> As a result, it is far more plausible to understand King as arguing that natural law and the purpose of law and order lead to a different conclusion than the one for which the clergy advocate, than it is to read King as offering an incoherency critique that argues from a claim about human nature that the clergy’s preference for law and order and opposition to civil disobedience could be inverted and therefore lacks an objective foundation. Thus, in contrast to Cook’s effort to characterize King as offering a CLS-style response to the clergy’s preference for law and order, King’s response actually runs contrary to CLS’s understanding of the nature of law and reflects Western Christianity’s traditional belief in the existence of a natural, God-given law.<sup>351</sup>

Cook’s effort to attribute a CLS-style universality critique to King is equally unpersuasive. According to Cook, by drawing on the liberal evangelical and social gospel view of human nature, King “replac[ed] conservative evangelicalism’s conception of a fundamentally evil human nature with a conception of a fundamentally good human nature, [and thereby] demonstrated that the conception of human nature as fundamentally evil need not be accepted as universally valid.”<sup>352</sup> Before reaching the merits of this argument, it is necessary to first say that it is difficult to identify the nature of Cook’s argument regarding his effort to interpret King as having

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346. *Id.* at 235–36.

347. Martin Luther King, Jr., *Letter from Birmingham City Jail* in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 295–96 (James M. Washington ed., 1991).

348. *See id.*

349. *Id.* at 293–94.

350. *Id.* at 295.

351. *See id.* at 293 (noting King’s agreement with St. Augustine’s statement that “An unjust law is no law at all” and explaining that King advocates breaking Jim Crow laws because they are unjust and citing St. Thomas Aquinas for the proposition that “an unjust law is a human law that is not rooted in eternal and natural law.”).

352. Compare Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1025–26, with *id.* at 1043.

offered the universality critique that Cook attributes to him. As I will argue, on the one hand, based upon the evidence he cites, it may be that Cook is attempting to impute to King the foregoing CLS-style universality critique through reconstructing or speculating about King's intellectual process.<sup>353</sup> Yet, on the other hand, the form and nature of Cook's argument suggests that he is characterizing King as having actually offered the universality critique of conservative evangelicalism that he ascribes to King.<sup>354</sup> Because it is difficult to be sure which of the two arguments Cook intends to make, I address each of them and argue that neither is persuasive.

Let us first examine the possibility that Cook is attempting to ascribe to King a CLS-style universality critique through reconstructing or speculating about King's intellectual process. The starting point for this interpretation of Cook's argument is the evidentiary material around which Cook develops his argument. Specifically, rather than citing King's "Letter From a Birmingham Jail" or other sources from King's vast body of writings and speeches to support his interpretation, Cook builds his argument around King's exposure as a graduate student to both liberal evangelicalism and Walter Rauschenbusch's social gospel's view of human nature as fundamentally good and their related claims that social institutions, rather than human nature, are the source of evil.<sup>355</sup> Cook then seems to conjecture that this exposure as a student enabled King to realize that conservative evangelical Christianity's:

privileging of order over freedom and the conception of human nature as fundamentally evil . . . need not be accepted as universally valid . . . [but] might viewed as historically contingent and conditioned, and thus subject to change if individuals are willing to engage in transformative struggles to alter the conditions under which they appear coherent.<sup>356</sup>

This in turn enabled King "to challenge the view of human nature that counseled African-Americans to be patient in the face of oppression."<sup>357</sup> In sum, then, in light of the fact that Cook does not point to any evidence that King actually offered the universality critique that he interprets him as having offered, it is possible to interpret Cook as arguing that King's intellectual development entailed his offering the universality critique that Cook ascribes to him.

However, there are two reasons that I hesitate to read Cook as making this argument. First, such an argument would consist of speculation

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353. See discussion, *infra* pp. 186-87.

354. See discussion, *infra* pp. 187-89.

355. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1025-26.

356. *Id.* at 1025.

357. *Id.* at 1026-27.

about the intellectual process that King may or may not have engaged in to challenge the notion that because human nature is fundamentally evil law and order should be privileged over freedom, African Americans should “be patient in the face of oppression.”<sup>358</sup> Second, and perhaps even more problematic, such an argument would entail serious logical difficulties. Specifically, if King did not actually offer the universality critique and Cook is instead reconstructing King’s intellectual process, the argument would run as follows: King was aware that both liberal evangelicalism and the social gospel held an optimistic view of human nature, and so King realized that conservative evangelical Christianity’s conception of human nature does not need to be accepted as universally valid. However, such an argument cannot be sustained, for it entails conflating differing beliefs over whether human nature is fundamentally good or fundamentally evil with the very different issue of whether or not the conception of human nature as fundamentally evil is universally valid. Put differently, the fact that King knew that liberal evangelicalism and the social gospel hold a different view of human nature than does conservative evangelicalism does not entail the epistemological skepticism that the universality critique implies. As a result, although exposure to an optimistic view of human nature may have given King a reason to question whether the pessimistic view of human nature was correct, it would not have given him a reason to make a CLS-style argument that the pessimistic view of human nature “need not be accepted as universally valid.”<sup>359</sup> Accordingly, this interpretation of Cook’s argument in support of reading King as having offered a CLS-style universality critique fails on its own terms.

However, there is another way that we might interpret Cook’s effort to interpret King as having made this critique. As mentioned above, this alternative interpretation of Cook’s argument characterizes King as actually having offered the universality critique of conservative evangelicalism as an alternative to the incoherency critique that Cook finds in King’s “Letter From a Birmingham Jail.” While this argument thus avoids speculating about King’s thought process and for that reason is, in my view, a better interpretation of Cook’s text, it has a severe problem of its own: it anachronistically attributes to the mature King a view of human nature that he rejected as a graduate student.<sup>360</sup> Despite its anachronistic nature, both the structure of Cook’s argument and certain of his statements strongly weigh in favor of this interpretation of his argument.<sup>361</sup>

To begin, consider that the form of Cook’s effort to interpret King as offering a universality critique on the heels of his argument for the King-

358. *Id.* at 1026-27.

359. *Id.* at 1025.

360. MARTIN LUTHER KING, JR., *Pilgrimage to Nonviolence*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITING AND SPEECHES OF MARTIN LUTHER KING, JR. 35, 36 (James W. Washington ed., 1991) [hereinafter KING, JR., *Pilgrimage to Nonviolence*].

361. See discussion, *infra* pp. 188-91.



incoherency critique strongly implies that King offered the universality critique as an alternative argument to an incoherency critique of conservative evangelicalism's view of human nature. Specifically, Cook begins the universality-argument by writing, "[e]ven if the privileging of order over freedom and the conception of human nature as fundamentally evil over its opposite conception were not seen as incoherent, King realized that these privileged conceptions need not be accepted as universally valid."<sup>362</sup> This clearly suggests that King viewed the universality critique as an alternative to the incoherency critique that Cook interprets him as having offered in his "Letter From a Birmingham Jail." Cook thereby implies that King offered the universality critique contemporaneously with the arguments contained in his "Letter From a Birmingham Jail."

But there are at least two additional and, in my view, stronger reasons to conclude that Cook intends to argue that for King the universality critique actually constituted an alternative to the incoherency critique that Cook claims to identify in the "Letter From a Birmingham Jail." First, at the close of his argument characterizing King as offering the universality critique, Cook appears to allude to King's response in his "Letter From a Birmingham Jail" to the clergy's criticism that King's demonstrations were untimely.<sup>363</sup> In particular, he argues that King used liberal evangelicalism and the social gospel's optimistic conception of human nature to formulate a universality critique that "challenge[d] the view of human nature that counseled African-Americans to be patient in the face of oppression."<sup>364</sup> Second, and more significantly, at a later stage of his argument, Cook describes King as rejecting the optimistic view of human nature after having offered his incoherency, universality, and indeterminacy critiques.<sup>365</sup> Cook thus implies that King rejected the optimistic view of human nature only after his incoherency and indeterminacy critiques, both of which Cook constructs around King's "Letter From a Birmingham Jail."<sup>366</sup> As a

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362. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1025.

363. Compare *id.* at 1024 (quoting, King, Letter from Birmingham City Jail reprinted in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 293 (James W. Washington ed., 1991) "[T]he white moderate who is more devoted to 'order' than to justice; . . . who paternalistically feels that he can set the timetable for another man's freedom."), with *id.* at 1026-27 (arguing that King "challenge[d] the view of human nature that counseled African-Americans to be patient in the face of oppression.").

364. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1026-27.

365. *Id.* at 1028 ("The incoherency, universality, and indeterminacy critiques gave King the intellectual freedom to posit a radically different conception of human nature that focused more on reconstructive struggle than theoretical deconstruction. Although he initially rejected conservative evangelicalism and its pessimistic view of human nature, King later realized that the optimistic view of human nature upon which evangelical liberalism and the social gospel constructed their utopias posed significant dangers. The indeterminacy critique suggested, and historical experience made clear, that evil and oppression could as easily follow from an optimistic faith in human nature as from a more orthodox conception of human depravity.").

366. It bears noting that Cook appears to support his reading of King as holding a positive, metaphysical view of human nature until late in his career by citing David L. Lewis's statement

result, there is a strong basis to conclude that the best interpretation of Cook's argument is the one that has King offering a universality critique that is predicated on the fundamental goodness of human nature as an alternative to the incoherency argument that Cook believes King to have offered in his "Letter From a Birmingham Jail."

However, if that is the case, Cook's effort to interpret King as offering a universality critique has a serious difficulty: King abandoned the optimistic view of human nature as a graduate student.<sup>367</sup> Specifically, as a graduate student in the early 1950s, King rejected (and never readopted) the liberal evangelical and social gospel view that human nature is fundamentally good, and concluded that human nature is neither fundamentally good nor fundamentally evil but a synthesis of the two extremes.<sup>368</sup> Indeed, King writes that while social gospel founder Walter Rauschenbusch's book "Christianity and the Social Crisis . . . left an indelible imprint on [his] thinking," he felt, as a graduate student, "that [Raus-

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that "[King's] abiding faith (until late in his career, at least) in the fundamental decency of his fellow man directed his philosophical speculations far more than cold realism could have."<sup>367</sup> Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1029 n.143-44 (quoting DAVID L. LEWIS, KING: A BIOGRAPHY 76 (2d ed. 1978)). However, for two reasons this citation is problematic. First, King's own account of the development of his views on human nature simply does not support the view that King held a positive, metaphysical view of human until late in his career. *See* sources cited, *infra* note 368. Second, perhaps as evidenced by Cook's use of a "cf" signal, it is not clear that Lewis is talking about King's metaphysical views of human nature at all. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1028 n.144. Specifically, even if King's faith in the decency of his fellow man in fact changed toward the end of his career, there is no evidence that such a change marked an alteration in his metaphysical views about human nature. Rather, the most plausible interpretation of the evidence is that late in his career King began to see that appealing to white America's conscience (in an empirical as opposed to metaphysical sense) was insufficient and had to be combined with an attention to developing power. *See* DAVID L. LEWIS, KING: A BIOGRAPHY 85-86, 364-65 (2d ed. 1978) (citing King's book, "Where Do We Go From Here: Chaos or Community?" and noting that by 1966 King had lost the great faith that he had after Montgomery in the decency of white America's conscience), and MARTIN LUTHER KING, JR., *Where Do We Go From Here: Chaos or Community?*, in A TESTAMENT OF HOPE 587, 592, 598 (James M. Washington ed., 2010) (noting that some advocates of Black power dismiss appeals to conscience and conceding that the civil rights movement had neglected the importance of developing power but arguing that appeals to conscience must be combined with structural changes and power redistribution that enable Blacks to pursue their self-interest). Furthermore, in light of King's belief that human nature was neither fundamentally good nor fundamentally bad but had the potential for both, consistent with his own account of his views of human nature, King could hold that white Americans' conscience was not fundamentally decent in an empirical sense. *See infra* note 368 and accompanying text; *see also* MARTIN LUTHER KING, JR., *Love, Law and Civil Disobedience*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 48 (James W. Washington ed., 1991) [hereinafter KING, JR., *Love, Law, and Civil Disobedience*].

367. *See infra* notes 368-69 and accompanying text.

368. KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 35-36; *see also* K. SMITH & I. ZEPP, JR., *SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR.* 70 (1998); JOHN J. ANSBRO, *MARTIN LUTHER KING, JR., NONVIOLENT STRATEGIES AND TACTICS FOR SOCIAL CHANGE* 87-88 (2000).

chenbusch] had fallen victim to the nineteenth century ‘cult of inevitable progress,’ which led him to an unwarranted optimism concerning human nature.”<sup>369</sup> Moreover, as a graduate student, King disagreed with Rauschenbusch that evil was social rather than personal and felt that Rauschenbusch “came perilously close to identifying the kingdom of God with a particular social and economic system.”<sup>370</sup>

Accordingly, in light of King’s own account of the development of his views on human nature, Cook’s reading of the mature King offering a universality critique premised on a view of human nature as fundamentally good does not find support in the evidence.<sup>371</sup> As a result, Cook’s effort to interpret King as offering a universality critique parallel to the universality critique that Cook offers of Lockean liberalism is unpersuasive. However, as will I argue below, this false parallel creates the erroneous impression that King’s mature views were quite close to the view of some CLS scholars that, because human nature is fundamentally good and “alienation and fear” are socially produced, structural reform can enable human beings to achieve a vision of community that reflects the positive view of human nature.<sup>372</sup> In contrast, as I argue below in Section c.2.a, although King understood the importance of structural reform, because of his belief in the reality of personal sin, unlike CLS, he emphasized the absolute necessity of internal, spiritual transformation in achieving the alternative vision of society that he called the “Beloved Community.”<sup>373</sup>

As his final argument interpreting King as having offered a CLS-style theoretical deconstruction of conservative evangelical Christianity, Cook attempts to ascribe an indeterminacy critique to King.<sup>374</sup> According to Cook, even assuming the correctness of conservative evangelicalism’s view of human nature as fundamentally evil, “King realized [such a view of

369. *Id.* at 37; Stephen B. Oates, *The Intellectual Odyssey of Martin Luther King*, 22 MASS. REV., no. 2, 1981, at 301–20, 315.

370. King, Jr., *Pilgrimage to Nonviolence*, *supra* note 360, at 37. It bears noting that the traditional Christian conception of sin endorses the notion that sin can be expressed in social structures. Maurizio Ragazzi, *The Concept of Social Sin in Its Thomistic Roots*, 7 J. MARKETS & MORALITY 363–64, 380–81, 385 (2004). However, unlike Rauschenbusch’s social gospel, the classical Christian tradition rejects an optimistic view of human nature and the accompanying claim that sin is socially transmitted and holds that the source of sin is fallen human nature itself. *Id.* at 369; see also THOMAS AQUINAS, SUMMA THEOLOGICA I-II, 83, 2 (FATHERS OF THE ENGLISH DOMINICAN PROVINCE TRANS., BENZINGER BROS. 1947); RONALD E. HEINE, CLASSICAL CHRISTIAN DOCTRINE: INTRODUCING THE ESSENTIALS OF THE ANCIENT FAITH 116–18 (2013). As a result, for classical Christianity, although sin has social effects, sin is always personal. Ragazzi, *supra* note 370, at 369, 379–81. Thus, King could reject Rauschenbusch’s conception of sin as social as opposed to personal and still insist write that Rauschenbusch “gave to American Protestantism a sense of social responsibility that it should never lose.” King, Jr., *Pilgrimage to Nonviolence*, *supra* note 360, at 37..

371. See Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1027.

372. See *id.* at 998–99, 1007, 1010; *id.* at 1025–1027.

373. See discussion, *infra* pp. 194–204.

374. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1027–28.

human nature] . . . d[oes] not mechanically determine [a] specific vision[ ] of community. How we live[ ] in community remain[s] a matter of choice that implicate[s] a host of competing values.”<sup>375</sup> Cook cites King’s appeal to natural law as a basis for the argument that, even assuming that human nature’s fundamental evilness requires deference to state authority, human beings must nevertheless respect the law of God.<sup>376</sup> According to Cook, this means that for King, the first principle of a fundamentally evil human nature does not compel any specific vision of community, including the community posited by conservative evangelicalism in which civil disobedience should be rejected in favor of deference to the state.<sup>377</sup> As a result, King offered a CLS-style indeterminacy critique.<sup>378</sup>

However, Cook’s argument is unpersuasive. First, Cook’s framing of the issue implausibly characterizes King’s “Letter From a Birmingham Jail” as responding to the notion that human nature’s fundamental evilness requires deference to the state.<sup>379</sup> However, as I have argued above, Cook’s effort to interpret the dispute between King and the clergymen to whom his Letter responds as being about the relationship between a pessimistic view of human nature and law, order and freedom is unpersuasive.<sup>380</sup> Second, even accepting Cook’s characterization of the dispute, his effort to ascribe to King the above indeterminacy critique has fatal difficulties. Specifically, the very passage of King’s famous epistle that Cook cites to support his argument actually belies the critique that he is attempting to attribute to King.<sup>381</sup> In that passage, King writes:

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law . . . not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority, and the segregated a false sense of inferiority. . . . So segregation is not only politically, economically and sociologically unsound, but it is morally wrong and sinful.<sup>382</sup>

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375. *Id.* at 1027.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.* at 1027-28.

380. See discussion, *supra* pp. 182-84.

381. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1027.

382. *Id.* (quoting King, Jr., *Letter from Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293 (ed. James W. Washington) (1991)).

First, as far as I can tell, this passage has nothing to do with an argument that a view of human nature as fundamentally evil does not “mechanically determine a specific vision of community.”<sup>383</sup> Second, contrary to Cook’s interpretation, far from putting forward an indeterminacy critique that “first principals” cannot “mechanically determine a specific vision of community,” King is clearly arguing that first principles of both natural law and theology together dictate that human community should not be segregated.<sup>384</sup> Therefore, contrary to Cook’s claim that King offered an indeterminacy critique illustrating that first principals cannot compel a specific vision of community, King actually appears to argue that first principals compel a desegregated vision of community.<sup>385</sup> Moreover, immediately prior to the passage upon which Cook relies, King argues that, “one has a moral responsibility to disobey unjust laws,”<sup>386</sup> and expresses agreement with St. Augustine that “an unjust law is no law at all.”<sup>387</sup> Upon these first principals, as well as the theological first principal that sin is separation, King later concludes that “he can urge men to obey the 1954 decision of the Supreme Court, for it is morally right, and [that he] can urge them to disobey segregation ordinances, for they are morally wrong.”<sup>388</sup> Again, far from offering an indeterminacy critique—the thrust of which illustrates that first principles cannot compel a specific vision of community—King resolutely argues that first principals of natural law compel him to reject a segregated vision of community in favor of a desegregated one.<sup>389</sup>

## 2. The Significance of Misinterpreting King as a CLS-style Theoretical Deconstructionist

According to Cook, “[t]he incoherency, universality, and indeterminacy critiques gave King the intellectual freedom to posit a radically different conception of human nature that focused more on reconstructive struggle than theoretical deconstruction.”<sup>390</sup> Moreover, Cook argues that

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383. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1027.

384. Compare *id.*, with *supra* note 382 and accompanying text.

385. See Martin Luther King, Jr., *Letter from Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293-94 (James M. Washington ed., 1991).

386. Martin Luther King, Jr., *Letter From Birmingham City Jail*, THE KING CENTER, 6 available at <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0#>.

387. Martin Luther King, Jr., *Letter from Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293 (James M. Washington ed., 1991).

388. Martin Luther King, Jr., *Letter From Birmingham City Jail*, THE KING CENTER, 7 available at <http://www.thekingcenter.org/archive/document/letter-birmingham-city-jail-0#>.

389. Martin Luther King, Jr., *Letter from Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293-94 (James M. Washington ed., 1991).

390. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1028.

King's use of theoretical deconstruction ultimately led him to realize that "the optimistic view of human nature upon which evangelical liberalism and the social gospel constructed their utopias posed significant dangers."<sup>391</sup> However, there are significant problems with these claims and the evidence that Cook uses to support them.

First, King did not offer the theoretical deconstructions that Cook interprets King as having offered.<sup>392</sup> Second, while Cook argues that King came to reject the optimistic view of human nature as a result of the freedom provided by the CLS-style critiques that Cook ascribes to him, as I have already indicated, King had actually rejected the optimistic view of human nature as a graduate student.<sup>393</sup> However, Cook's iteration of King's intellectual development obscures this fact and implies a very different chronology of King's intellectual development.<sup>394</sup>

Describing the evolution of King's views after his "Letter From a Birmingham Jail" and incorporating various quotes from King's account of his intellectual development as contained in his essay, "Pilgrimage to Nonviolence," Cook writes:

[T]he more King "observed the tragedies of history and man's shameful inclination to choose the low road," the more he came to see the "depths and strength of sin." His experiences convinced him that evangelical "liberalism had been all too sentimental concerning human nature and that it leaned toward a false idealism" that failed to see that "reason is darkened by sin" and "is little more than an instrument to justify man's defensive ways of thinking."<sup>395</sup>

However, in the quotes that Cook relies upon, King is not writing about his post-Birmingham intellectual development but about his development as a graduate student.<sup>396</sup> It is therefore impossible that the CLS-style critiques that Cook claims to identify in King's "Letter From a Birmingham Jail" led him to reject the optimistic view of human nature.<sup>397</sup> Moreover, and even more dispositive, King's own account of his intellectual development makes clear that it was his reading of the theologian Reinhold Niebuhr as a graduate student—and not CLS-style theoretical critiques—

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391. *Id.*

392. *See* discussion *supra* Part II.C.1.b.

393. *Compare supra* notes 356-57 and accompanying text, *with supra* notes 365-69 and accompanying text.

394. *See supra* note 362 and accompanying text.

395. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1028 (quoting KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 36-40).

396. KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 35-36.

397. *See supra* note 365-366 and accompanying text.

that led King to reject the optimistic view of human nature.<sup>398</sup> As I explain in the next subsection, Cook's unsustainable and anachronistic account of King's intellectual development leads him to interpret King's vision of the Beloved Community in terms that closely parallel CLS's and CRT's emphasis on structural reform. However, Cook's effort to interpret King in these terms ignores and neglects King's insistence on the importance of individual spiritual transformation in achieving the Beloved Community.<sup>399</sup>

a. *Spiritual Transformation is Critical to King's Understanding of Both Human Nature and the Beloved Community*

Due to his claim that King rejected the optimistic view of human nature as the result of CLS-style theoretical deconstructions that King never actually offered,<sup>400</sup> Cook's argument misunderstands how King's doctrine of human nature leads him to struggle on behalf of what he called the "Beloved Community."<sup>401</sup> More specifically, in arguing that it was CLS-style theoretical deconstruction that gave King the intellectual freedom to reject the optimistic view of human nature, Cook reads King in a CLS-style mode that rightly emphasizes the importance of structural reform in achieving the Beloved Community but which fails to capture the fact that King's commitment to the Beloved Community was undergirded by a belief in the possibility of spiritual growth. Because the nature of my argument here requires a comparative examination of Cook's account of King's commitment to the Beloved Community and the one that I set forth below, developing this argument requires a careful examination of both accounts. To begin, I now set forth Cook's account of King's rejection of the optimistic view of human nature.

Cook correctly notes that King rejected both Karl Barth's neoorthodox view emphasizing that human nature is intractably sinful and that "utopian aspirations" are therefore "relatively futile," as well as liberal ev-

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398. KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 35-36 (noting his turn away from the optimistic view of human nature after reading the works of Reinhold Niebuhr during his senior year at Crozer Seminary).

399. See discussion, *infra* pp. 194-204.

400. Compare Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1028 ("The incoherency, universality, and indeterminacy critiques gave King the intellectual freedom to posit a radically different conception of human nature that focused more on reconstructive struggle than theoretical deconstruction. Although he initially rejected conservative evangelicalism and its pessimistic view of human nature, King later realized that the optimistic view of human nature upon which evangelical liberalism and the social gospel constructed their utopias posed significant dangers. The indeterminacy critique suggested, and historical experience made clear, that evil and oppression could as easily follow from an optimistic faith in human nature as from a more orthodox conception of human depravity."), *with* discussion, *supra* pp. 182-92 (arguing that Cook's interpretation of King as having offered a trio of CLS-style theoretical deconstructions is unpersuasive).

401. See discussion, *infra* pp. 194-204.

angelicalism and the social gospel's optimistic view of human nature and the utopian idealism that such a view entailed.<sup>402</sup> Moreover, as Cook rightly notes, "King described as 'perilous' the assumption by some liberal theologians that sin was but a mere 'lag of nature that can be progressively eliminated as man climbs the evolutionary ladder.'"<sup>403</sup> Moreover, although King concluded that the individual's "estrangement from perfection was fundamental," King believed that struggling to achieve what he called the "Beloved Community" "could transform social relations."<sup>404</sup> Thus, according to Cook, for King "[o]nly struggle to achieve the Beloved Community allows us to experience our essential nature [our capacity for goodness] and to change our limited knowledge and understanding of the world."<sup>405</sup>

However, while Cook acknowledges that King came to reject the optimistic view of human nature and the liberal theological position that sin can be progressively eliminated, Cook interprets King's understanding of struggle to bring about the Beloved Community in terms that emphasize King's belief in the need for structural change.<sup>406</sup> However, Cook's interpretation fails to adequately address the connection between King's Christian existentialist view of human nature and the possibility of spiritual growth.<sup>407</sup> More specifically, contrary to critical portions of Cook's argument, King came to reject the optimistic view of human nature after reading Reinhold Niebuhr as a graduate student.<sup>408</sup> But importantly, King did not completely embrace Niebuhr's Christian realism either.<sup>409</sup> As Kenneth L. Smith and Ira G. Zepp, Jr. have written:

[T]he one major weakness King found in Niebuhr was his inability "to deal adequately with the relative perfection which is the fruit of Christian life." For King this meant that Niebuhr did not deal satisfactorily with the possibilities of spiritual growth, Christian values in personality, and how *agape* is actually realized in human nature and history.<sup>410</sup>

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402. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1028-29.

403. *Id.* at 1030 (quoting J. ANSBRO, MARTIN LUTHER KING, JR.: THE MAKING OF A MIND (1982)).

404. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1030.

405. *Id.*

406. *See id.* at 1034; *see also* discussion, *infra* pp. 195-202.

407. *See* discussion, *infra* pp. 195-202.

408. KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 35-36.

409. K. SMITH & I. ZEPP, JR., SEARCH FOR THE BELOVED COMMUNITY: THE THINKING OF MARTIN LUTHER KING, JR. 83 (1986).

410. *Id.* (quoting King Jr., *Reinhold Niebuhr's Ethical Dualism*, 14 (a term paper written for L. Harold DeWolf: Boston Collection) (italics in original)).



Thus, as Smith and Zepp emphasize, King's "optimism regarding the possibility of realizing the Beloved Community" stemmed from his belief in the possibility of spiritual growth.<sup>411</sup> However, because Cook's argument neglects the importance that King attaches to spiritual formation, his argument fails to address the tension between, on the one hand, CRT's exclusively constructionist conception of subordination and, on the other hand, King's and the broader African American Christian tradition's emphasis on the importance of personal sin.<sup>412</sup> Furthermore, on this rendering of King's views, Cook is able to interpret him in a broad CLS-frame that happens to coincide with the importance that CRT attaches to individual rights (and therefore rejects CLS's emphasis on right-trashing) but which marginalizes the vision of Christian spiritual formation that undergirds King's reconstructive vision of community.<sup>413</sup>

In order to set forth the manner in which Cook parallels King with CLS and CRT, I wish to briefly return to Cook's CLS-style critique of Lockean liberalism.<sup>414</sup> In that critique, Cook notes that although CLS largely lacks a positive, reconstructive vision of community, "its negative critique implies such a vision, and its analysis occasionally supports such alternatives."<sup>415</sup> According to Cook, such an "alternative vision begins with a different conception of the self."<sup>416</sup> Moreover, in a line of argument that appears to be of one piece with Valdes's observation that CRT "argue[s] that structures of domination and subordination are manufactured by humanity rather than handed down by some 'natural' or 'inevitable force,'"<sup>417</sup> Cook notes that some CLS scholars' alternative conception of human nature "implies that liberal theory has mistaken the symptoms of the individual's condition for its causes."<sup>418</sup> Thus, "[t]he individual is not, by nature, an autonomous and acquisitive being desiring to dominate others and appropriate property. Rather, her alienation and loneliness are socially produced."<sup>419</sup> In other words, while we may believe that individuals are wired to act to dominate others, what we call human nature is produced by social arrangements. As a result, "nothing about law or our present social order is sacrosanct or compelled by forces independent of our own capacities to envision and construct alternative forms of commu-

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411. See SMITH & ZEPP, JR., *supra* note 409, at 81-82.

412. See discussion, *infra* pp. 202-04; see also *supra* note 293 and accompanying text (noting the emphasis on sin in the African-American Christian tradition); KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360, at 35-36 (discussing his view of "the reality of sin on every level of man's existence.").

413. See discussion, *infra* pp. 198-202.

414. See discussion, *supra* pp. 181-82.

415. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1007.

416. *Id.*

417. *Queers, Sissies, Dykes, and Tomboys*, *supra* note 260, at 32 n.85.

418. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1007.

419. *Id.*

nity.”<sup>420</sup> Thus, according to Cook, CLS’s negative critique implies that “we are free to envision and construct alternative forms of community that represent a more accurate or at least more plausible conception of human nature one believed to be fundamentally good, which may replace ‘our pervasive alienation and fear of one another with something more like mutual trust.’”<sup>421</sup> Succinctly summarizing what he takes to be CLS’s faith in restructuring, Cook writes:

CLS scholars purport to show that our social-political world, from which law is inseparable, is of our own making. Just as there is nothing determinate, necessary, or natural about the application of legal rules, the way we live and relate to others is also a matter of choice. We can choose to structure our institutions in hierarchy and dominance, and limit our understanding of others and ourselves to the distorted roles and images generated by social rules and laws. Or we can choose to alleviate the alienation and loneliness that stifle our societal needs and impulses by restructuring those institutions and practices that distance us from others and cause us to perceive others with trepidation and suspicion.<sup>422</sup>

As I have intimated, Cook interprets King in parallel with CLS’s faith in an exclusively structural approach to subordination and oppression but interprets him in even closer parallel to the then inchoate CRT movement.<sup>423</sup> According to Cook’s argument, like CRT, King both shares CLS’s method of theoretical deconstruction and (in contrast with CLS’s right-trashing) insists on the importance of individual rights.<sup>424</sup> However, as I argue below, Cook misunderstands King’s doctrine of human nature and, as a consequence, interprets his belief in the possibility of the “Beloved Community” in a legalistic register that marginalizes King’s emphasis on the importance of spiritual formation but which thereby creates the impression that he shares CRT’s naturalistic, constructionist approach to subordination.<sup>425</sup>

To understand how Cook parallels King and the then inchoate CRT movement, it is necessary to examine the foundation upon which he develops it: his understanding of the relationship between King’s mature doctrine of human nature and King’s reconstructive vision of society, the Beloved Community.<sup>426</sup> According to Cook, even after King rejected the

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420. *Id.* at 1009-10.

421. *Id.* at 1010.

422. *Id.* at 990-91.

423. See discussion, *supra* p. 180; see also discussion, *infra* pp. 197-200.

424. See discussion, *infra* pp. 197-200; see also discussion, *supra* note 316.

425. See discussion, *infra* pp. 197-202.

426. Cook, *Beyond Critical Legal Studies*, *supra* note 15, 1029-36.

optimistic view of humankind in favor of the “middle ground” of a Christian existentialism “that saw human nature as a struggle between good and evil,”<sup>427</sup> “[m]any of the communal and cooperative dimensions of King’s theory of the state depended on the optimistic view of human nature posited by evangelical liberalism and the social gospel.”<sup>428</sup> Thus, “many of the communal and cooperative dimensions of King’s theory of the state” depend upon the liberal evangelical and the social gospel claim that human nature is intrinsically good and that evil/sin exists in social institutions.<sup>429</sup>

However, because King rejected the view that human nature is intrinsically good,<sup>430</sup> Cook needs some way to explain his claim that “many of the communal and cooperative dimensions of King’s theory of the state” nevertheless depend upon this view.<sup>431</sup> He finds this explanation in what he argues to be King’s understanding of the role of individual rights.<sup>432</sup> In particular, Cook claims that, although King concluded that the individual’s “estrangement from perfection was fundamental,” individual rights acted as a “hedge against” the dangers of a naïve optimism.<sup>433</sup> Thus, although King rejected the optimistic view of human nature, he followed liberal evangelicalism and the social gospel insofar as he believed that struggling to achieve what he called the “Beloved Community” “could transform social relations.”<sup>434</sup> As a result, while individual rights were needed as a “hedge against” the dangers of collective action in light of the reality of sin,<sup>435</sup> according to Cook, King believed that “[i]ndividuals could harness the powers of the state to usher in a Beloved Community here on earth.”<sup>436</sup> In other words, as Cook writes, for King,

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427. *Id.* at 1029.

428. *Id.* at 1034.

429. *Id.* at 1025-26, 1034.

430. *See supra* note 368 and accompanying text.

431. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1034. It bears noting that Cook himself acknowledges that King’s mature theory of the state was not “based on the optimistic view of human nature found in some CLS theories and the progressive Christian theories of evangelical liberalism and the social gospel.” *Id.* at 1038. Yet Cook nevertheless maintains that “many of the communal and cooperative dimensions King’s theory of the state” depend upon the view of human nature as fundamentally good. *Id.* at 1034. As a result, Cook needs a way to explain how both of these claims can be true.

432. *See id.* at 1029-36.

433. *See id.* at 1030, 1034.

434. *Id.* at 1030.

435. *Id.* at 1034, 1036.

436. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1034. While Cook suggests that King believed that the “powers of the state” could be used to “usher” in a Beloved Community here on Earth,” he also notes King’s belief that “[t]he individual was always in the process of becoming and could never fully realize the ideal of the Beloved Community in history . . . [but that] the struggle to actualize the ideal in history could transform social relations.” *Id.* at 1029, 1030. While Cook does not specify precisely what it means to say that King believed “the individual was always in the process of becoming,” he appears to be referring to a person’s capacity to express their essential nature of goodness. *Id.* at 1030. Yet perhaps because he does

“rights provided limitations on collective action while broadening the scope of personal duty to permit movement toward a more socially conscious community.”<sup>437</sup>

Accordingly, on Cook’s interpretation, King’s mature Christian existentialist view of human nature as a struggle between good and evil corresponds to King’s belief that struggle to achieve the Beloved Community can transform social relations, even while individual rights are necessary to protect against our imperfect attempts to realize that community.<sup>438</sup> Thus, Cook argues that King’s vision of the Beloved Community reflects the optimism of both evangelical liberalism and the social gospel but with a twist that accommodates King’s insistence on the reality of sin: individual rights function as a hedge against the dangers that can flow from efforts to reform the state in the image of an optimistic view of human nature.<sup>439</sup> It is on the basis of this interpretation that Cook is able to argue that “[m]any of the communal and cooperative dimensions of King’s theory of the state [i.e., his vision of the Beloved Community] depended on the optimistic view of human nature posited by evangelical liberalism and the social gospel,” even while acknowledging that King actually rejected the view of human nature that Cook see as nevertheless undergirding his vision of the Beloved Community.<sup>440</sup>

As I indicated above, in his critique of Lockean liberalism, Cook argues that CLS’s negative critique implies that “we are free to envision and construct alternative forms of community that represent a more accurate or at least more plausible conception of human nature one believed to be fundamentally good, which may replace ‘our pervasive alienation and fear of one another with something more like mutual trust.’”<sup>441</sup> Likewise, as we have seen, on Cook’s interpretation, King also works toward an al-

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not discuss King’s belief in the possibility of spiritual growth, he does not suggest that “the process of becoming” entails actual growth in an individual’s capacity to express goodness. He instead describes King’s view of “human nature as fragmented by an alienated and anxiety-filled existence that severely circumscribed one’s ability to know, much less change, the world,” and argues that under this view “individual rights represent[ ] . . . a hedge against our imperfect attempts to reconcile our existential and essential selves . . . .” *Id.* at 1034. Thus, according to Cook, while “[m]any of the communal and cooperative dimensions of King’s theory of the state depended on the optimistic view of human nature posited by evangelical liberalism and the social gospel,” King understood individual rights as acting as a hedge against the dangers of predicating a theory of the state or vision of community on such a view of human nature. *Id.* However, as I argue in the text, King’s vision of the Beloved Community is predicated, not on liberal evangelicalism and the social gospel’s understanding of human nature but on a doctrine of human nature that simultaneously emphasizes the possibility of spiritual growth and the reality of personal sin. See discussion, *infra* pp. 478–87.

437. *Id.* at 1036.

438. See *id.* at 1030–31, 1034–35.

439. See *supra* notes 432–37 and accompanying text.

440. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1034, 1038.

441. *Id.* at 1010.

ternative vision of community predicated on the view that human nature is fundamentally good, with the difference being that, because he actually rejects the view that human nature is fundamentally good, he emphasizes the importance of individual rights.<sup>442</sup> As a result, on Cook's reading, King is made to stand in parallel with CLS but in even closer parallel to the then inchoate CRT movement: like CRT he shares CLS's method of theoretical deconstruction,<sup>443</sup> but unlike CLS and like CRT he insists on the importance of individual rights.<sup>444</sup>

Thus, as a part of his effort to illustrate how King constitutes a model of how critical scholarship can go beyond theoretical deconstruction, Cook implies that an analogy exists between, on the one hand, the then inchoate CRT movement's insistence on the importance of rights (as against CLS's rights-trashing),<sup>445</sup> and on the other hand, King's approach to the role that rights play in his struggle to realize the Beloved Community.<sup>446</sup> However, while King clearly insists on the importance of rights,<sup>447</sup> on Cook's interpretation, King's approach to the Beloved Community is unduly legalistic and includes no focus on the paramount importance that King assigned to spiritual transformation.<sup>448</sup> As we discuss in more detail below, the result is that Cook's effort to parallel King with CLS and CRT marginalizes a significant aspect of the Christian normative order that underwrites King's vision of the Beloved Community.<sup>449</sup>

As noted above, according to Cook, King understood rights and duties as complementary, such that "rights provide[ ] limitations on collective action while broadening the scope of personal duty to permit movement toward a more socially conscious community."<sup>450</sup> Moreover, consistent with his middle position on human nature, for King, "[i]ndividual rights represented . . . [both] a hedge against our imperfect attempts to reconcile our existential and essential selves [(respectively, our capacity for evil and good)] . . . [and] called for individual action, but

442. See *supra* notes 430-39 and accompanying text.

443. See discussion, *supra* pp. 181-92.

444. Compare Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1035 ("Unlike some CLS scholars, King understood the importance of a system of individual rights."), with *supra* note 168 and accompanying text (noting CRT's emphasis on rights).

445. Compare *supra* note 444 and accompanying text, with *supra* note 320 and accompanying text.

446. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1035-36.

447. See *id.* at 1035 (quoting MARTIN LUTHER KING, JR., *The American Dream, in A TESTAMENT OF HOME: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 213 (James W. Washington ed., 1991) ("It may be true that the law can't make a man love me, but it can keep him from lynching me, and I think that's pretty important also.")).

448. See discussion, *infra* pp. 200-04.

449. See discussion, *infra* pp. 202-04.

450. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1036.

action consistent with a more humane and contextual rule of law.”<sup>451</sup> Furthermore, while King “called for the immediate transformation of American institutions and practices . . . he rejected the use of violence in this transformative struggle. He refused to place the goal of a reconstructed community above the means used to achieve it.”<sup>452</sup>

Although Cook rightly observes that King “refused to place the goal of a reconstructed community above the means used to achieve it,”<sup>453</sup> his argument suggests that the basis of King’s refusal is the limitations that rights place on collective action.<sup>454</sup> However, Cook provides no support for this proposition and, as far as I am aware, there is no evidence that King actually held this view. To the contrary, King would not place the goal of a reconstructed community above the means used to achieve it because, for him, the means of achieving and the end of the Beloved Community are inextricably related.<sup>455</sup> Specifically, because for King the Beloved Community is not just a change in social structures but a “qualitative change in our souls,”<sup>456</sup> achieving the Beloved Community requires not only “avoid[ing] external physical violence, but also internal spiritual violence.”<sup>457</sup> Thus, although King described the nonviolent movement as a struggle against an evil and unjust system,<sup>458</sup> and therefore advocated for

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451. Compare *id.* at 1029 n.143 (quoting KING, JR., *Pilgrimage to Nonviolence*, *supra* note 360) (explaining the difference between the existential and essential self as our capacity, respectively, for good and bad), with Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1034, 1036.

452. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1036.

453. *Id.*

454. See *id.* (“King’s conception of duty complemented his conception of rights; it called for individual action, but action consistent with a more humane and contextual rule of law.”); see also *supra* note 450 and accompanying text.

455. KING, JR., *Love, Law, and Civil Disobedience*, *supra* note 366, at 45 (arguing that the “means must be as pure as the ends . . . we must see that the end represents the means in process and the ideal in the making. In other words, we cannot believe, or we cannot go with the idea that the end justifies the means because the end is preexistent in the means.”); see also SMITH & ZEPP, JR., *supra* note 409, at 145-46 (1986).

456. MARTIN LUTHER KING, JR., *Nonviolence: The Only Road to Freedom*, in A TESTAMENT OF HOME: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 58 (James W. Washington ed., 1991) [hereinafter KING, JR., *The Only Road to Freedom*].

457. MARTIN LUTHER KING, JR., *The Current Crisis in Race Relations*, in A TESTAMENT OF HOME: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 87 (James W. Washington ed., 1991) [hereinafter KING, JR., *The Current Crisis in Race Relations*] (stating that nonviolence means not only “[a]void[ing] external physical violence, but also internal spiritual violence . . . [and] [a]t the center of nonviolence stands the principle of love.”). It bears noting that in subsequent work Cook emphasizes that spiritual transformation is essential to King’s vision of the Beloved Community. See discussion, *infra* pp. 204-08. However, while in this later work Cook emphasizes the importance that King attaches to spiritual transformation, he does not examine the implications of King’s emphasis on spiritual formation for his earlier argument paralleling King and CLS. See *id.*

458. KING, JR., *Love, Law, and Civil Disobedience*, *supra* note 366, at 47 (describing the nonviolent movement as directed toward defeating an unjust and evil system).

structural reform, he also emphasized the necessity of spiritual transformation, writing:

[o]nly a refusal to hate or kill can put an end to the chain of violence in the world and lead us toward a community where men can live together without fear. Our goal is to create a beloved community and this will require a qualitative change in our souls as well as a quantitative change in our lives.<sup>459</sup>

In other words, because achieving the Beloved Community involves not just changing an evil and unjust system but changing—on a spiritual level—the way we relate to one another, internal and external nonviolence are essential to bringing about the Beloved Community. As such, contrary to Cook's interpretation, for King the duty of bringing about the Beloved Community is not somehow circumscribed by the limitations that rights place on collective action. To the contrary, because for King the Beloved Community is achieved only through internal and external nonviolence, there is no conflict between the struggle to achieve the Beloved Community and the limitations that rights place on collective action.<sup>460</sup> As a result, the language of rights and duties is simply not the appropriate way to think about King's refusal to resort to violence in his struggle on behalf of the Beloved Community.

However, while the language of rights and duties fails to capture King's understanding of the relationship between nonviolence and the Beloved Community, by interpreting King in these terms, Cook's argument conceals the radically different frameworks from which King, on the one hand, and CLS and CRT, on the other, seek to address subordination and oppression.<sup>461</sup> More specifically, because CLS and CRT believe that subordination reflects social structures and not anything endemic to human nature, whereas King believes that oppression originates from the spiritual problem of human sin, CLS/CRT and King approach the problem of oppression from radically different metaphysical assumptions.<sup>462</sup> Put differently, whereas CLS and CRT's constructivist position proceeds from the

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459. KING, JR., *The Only Road to Freedom*, *supra* note 456, at 58; Oates, *supra* note 369, at 301-20, 315.

460. See KING, JR., *The Current Crisis in Race Relations*, *supra* note 457, at 45-46.

461. See *infra* notes 469-70 and accompanying text.

462. KING, JR., *The Only Road to Freedom*, *supra* note 456, at 58; Oates, *supra* note 369, at 301-20, 315 (noting that for King, "[e]vil was essentially personal, but it could be conquered and social salvation attained through 'man's willing acceptance of God's Almighty gift' [(h)is incandescent love and good will]"). Hence all men were 'potential sons of God.'). In addition, unlike the suggestion that alone the right social structures can resolve alienation and fear in human community, see discussion, *supra* pp. 196-97, King held that fear "may be cured only by a positive religious faith." MARTIN LUTHER KING, JR., *The Strength to Love*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 514-17 (James W. Washington ed., 1991) [hereinafter KING, JR., *The Strength to Love*].

assumption that the absence of inherent meaning in the world allows us to restructure human community on the basis of an alternative vision of human nature,<sup>463</sup> King's nonviolent struggle for the Beloved Community is rooted in the normative vision of the African American Christian tradition, which proceeds from a belief that there is a divine order that underpins the visible world and which justifies his hope that justice will eventually prevail.<sup>464</sup> As King writes:

It is this deep faith in the future that causes the nonviolent resister to accept suffering without retaliation. He knows that in his struggle for justice he has cosmic companionship. This belief that God is on the side of truth and justice comes down to us from the long tradition of our Christian faith. There is something at the very center of our faith which reminds us that Good Friday may reign for a day, but ultimately it must give way to the triumphant beat of the Easter drums."<sup>465</sup>

Accordingly, contrary to the view that the absence of inherent meaning or a fixed, pre-given human nature allows us to restructure human community based upon an alternative vision of human nature, King roots nonviolent struggle to achieve a better community in both his belief in the possibility of spiritual growth and in "the conviction that the universe is on the side of justice."<sup>466</sup> Indeed, underscoring his spiritual understanding of the civil rights movement, King states: "[t]his is a spiritual movement, and we intend to keep these things in the forefront. We know that violence

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463. RAYMOND BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS 169 (1994); Raymond A. Belliotti, *Critical Legal Studies: The Paradoxes of Indeterminacy and Nihilism*, 113 PHIL. AND SOC. CRITICISM 145, 149-51 (1987); see also Paul J. Gudel, *The Skepticism of Critical Legal Studies and the Function of Moral Discourse* 40 (2010) (unpublished manuscript), available at [http://works.bepress.com/paul\\_gudel/6](http://works.bepress.com/paul_gudel/6) ("If CLS does deserve to be labeled 'nihilistic,' it is not because it rejects the fundamental principles of conventional or mainstream legal analysis. It is because its skeptical epistemology undermines its own moral pretensions.") (footnotes omitted); DAVID FAGELSON, JUSTICE AS INTEGRITY: TOLERANCE AND THE MORAL MOMENTUM OF LAW 52 (2006); Owen Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1, 9-10 (1986) ("Critical legal studies scholars are distinguished (if at all) from feminists and from the legal realists of an earlier generation by the purity of their negativism. When critical legal studies scholars insist that 'law is politics,' they mean something quite different and more nihilistic than either realists or feminists.").

464. KING, JR., *The Current Crisis in Race Relations*, *supra* note 457, 87-88.

465. KING, JR., *Nonviolence and Racial Justice*, *supra* note 3, at 9. King also noted "aware[ness] of the fact that there are devout believers in nonviolence who find it difficult to believe in a personal God. But even these persons believe in the existence of some creative force that works for togetherness, a creative force in this universe that works to bring the disconnected aspects of reality into a harmonious whole." KING, JR., *The Current Crisis in Race Relations*, *supra* note 457, at 88.

466. KING, JR., *Nonviolence and Racial Justice*, *supra* note 3, at 9.



will defeat our purpose.”<sup>467</sup> Thus, like many African Americans across generations stretching back into the deepest and darkest period of slavery, King understood the cause of Black freedom as fundamentally rooted in a spiritual, teleological reality in which justice will ultimately prevail.<sup>468</sup>

Because Cook’s effort to read King in parallel with CLS and CRT does not address the obvious incompatibility between, on the one hand, King’s approach to racial oppression and the struggle to achieve the Beloved Community and, on the other hand, the naturalistic, constructionist antisubordination agenda to which CLR and CRT are committed, the argument in Cook’s seminal piece<sup>469</sup> does not present a counterexample to my claim that CRT’s constructionist conception of subordination is a plausible explanation of the marginalization of the African American Christian tradition in CRT. Indeed, as I have argued, Cook’s effort to interpret King in parallel with CLS and CRT itself neglects King’s deeply Christian spiritual vision of the Beloved Community and the importance he attaches to the possibility of spiritual growth.<sup>470</sup> Thus, in a very real sense, Cook himself marginalizes those aspects of King’s thought that are most deeply rooted in the Christian tradition.

### 3. Cook’s Subsequent Work Emphasizes Spiritual Transformation But Fails to Examine Its Implications for a Constructionist Antisubordination Agenda

While Cook’s 1990 article reading King in parallel with CLS marginalizes the importance King attaches to spiritual formation, in subsequent work, Cook eventually emphasizes that spiritual formation is essential to King’s vision of the Beloved Community.<sup>471</sup> However, he never addresses the ramifications of King’s emphasis on spiritual formation for his earlier argument paralleling King and CLS.

In a 1992 article, *Reflections on Postmodernism*, Cook emphasizes that nonviolence is a means as well as an end, and he comes very close to stating that spiritual transformation is essential to realizing the Beloved Community:

To King, nonviolence was an end in itself and not merely a means to an end. He understood moral ends could not be supported by immoral means because we are shaped as much by

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467. MARTIN LUTHER KING, JR., *Walk for Freedom*, in A TESTAMENT OF HOME: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 83 (James W. Washington ed., 1991).

468. KING, JR., *Nonviolence and Racial Justice*, *supra* note 3465, at 9; *see also* RABOTEAU, *supra* note 61, at 310-12 (noting that slaves identified with the Exodus story of ancient Israel and anticipated God’s deliverance).

469. Cook, *Beyond Critical Legal Studies*, *supra* note 15, at 1011.

470. *See* discussion, *supra* pp. 193-204.

471. COOK, THE LEAST OF THESE, *supra* note 21, at 113.

our means as we are by our ends. Caught between existentialism's universal of the Beloved Community and its particularity of human frailty and limits, King realized that social struggle was a process of self-construction, humans caught in the process of Becoming, and that our choice of violence or nonviolence reflected not only who we are but shapes who we shall become as well.<sup>472</sup>

Accordingly, here Cook clearly emphasizes nonviolence's role in self-construction and self-formation.<sup>473</sup> Moreover, although postmodern notions of self-construction and Christian spiritual transformation are distinct and even at odds, they are mutually concerned with how our choices shape who we are and who we become.<sup>474</sup> This overlap perhaps explains Cook's seemingly natural transition from a discussion emphasizing the connection between self-construction and nonviolence to his claim that nonviolent action is "a call for greater spirituality in our struggles, a new orientation in our approach to others, their traditions and their histories."<sup>475</sup>

Nevertheless, Cook's 1992 article does not indicate how King's view of human nature relates to his view of the connection between nonvi-

472. Cook, *Reflections on Postmodernism*, *supra* note 21, at 770.

473. *Id.*

474. It bears noting that, although spiritual formation involves self-construction, spiritual formation (in a Christian sense) focuses on formation of a person in the image and likeness of God. Compare Dallas Willard, *Spiritual Formation: What it is, and How it is Done*, available at <http://www.dwillard.org/articles/artview.asp?artID=58> (last visited Dec. 2, 2015) ("Christian spiritual formation is the process through which the embodied/reflective will takes on the character of Christ's will."), with KING, JR., *The Strength to Love*, *supra* note 462, at 508 (noting that the "inner peace" and "inner stability of the man of faith is Christ's chief legacy to his disciples"), and MARTIN LUTHER KING, JR., *A Gift of Love*, in *A TESTAMENT OF HOME: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 62 (James W. Washington ed., 1991) (noting that those who give the gift of love "follow[] in the example and Spirit of Christ himself"). For this reason, Christian spiritual formation is teleological. In contrast, postmodern self-construction, particularly as it is understood in atheistic, postmodern existential philosophers, such as Jean-Paul Sartre, is not committed to the transcendental sources of meaning and teleology that characterize Christian spiritual formation. Compare Thomas C. Anderson, *Atheistic and Christian Existentialism: A Comparison of Sartre and Marcel*, in *NEW PERSPECTIVES ON SARTRÉ* 48 (Adrian Mirvish & Adrian van den Hoven eds., 2010) ("The [atheistic] existentialist. . . thinks it very distressing that God does not exist, because all possibility of finding values in a heaven of ideas disappears along with Him . . . . Nowhere is it written that the good exists, that we must be honest, that we must not lie, because the fact is we are now on a plane where there are only men." And [Sartre] goes on to point out the consequences: "Dostoevsky said, 'If God did not exist, everything would be permitted.' That is the very starting point for existentialism." Indeed, everything is permissible if God does not exist.") (footnotes omitted), with *id.* at 51 ("[I]n the 1960s Sartre grants an objectivity to values that his earlier work did not. That objectivity does not come from some transcendent being or realm, it issues from our actual human needs. That objectivity gives values/norms an independence from human freedom since our choices can neither create nor remove the value of certain objects . . . . In the final analysis human beings remain the source of all values, including their own, for Sartre.").

475. Cook, *Reflections on Postmodernism*, *supra* note 21, at 770.

olence and self-transformation.<sup>476</sup> Similarly, it does not examine the implications of King's emphasis on the relationship between nonviolence and self-transformation for the argument in his 1990 article that King employs arguments analogous to CLS in respect to method and emphasis on structural transformation.<sup>477</sup> As a result, while his 1992 article emphasizes the importance King attaches to self-transformation, it does not overcome (or address) the differences between King's and CLS/CRT's approach to antistubordination.<sup>478</sup> Thus, like his 1990 article, Cook's 1992 article, *Reflections on Postmodernism*, does not undermine my claim that CLS's and

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476. See generally *id.*

477. See generally *id.*

478. Postmodernism's skepticism of master narratives, and by implication antistubordination projects, is the problem at the center of Cook's 1992 article. Cook, *Reflections on Postmodernism*, *supra* note 21, at 752-53. Arguing that King's Christian existentialism positions him as a thinker who combines postmodern sensibilities with a modernist commitment to human liberation, Cook urges progressive scholars to adopt, like King, a position between modernism and postmodernism. *Id.* at 752-54. According to Cook, by occupying the space between modernism and postmodernism, progressive scholars will thereby be able to harness post-modern critiques of socially constructed differences while preserving a commitment to "teleological projects of emancipation." *Id.* at 752-54. As a result, Cook's 1992 article is not (unlike his 1990 article) concerned with arguing on behalf of an analogy between King and CLS's model of antistubordination but with understanding King's Christian existentialism as an example of occupying the space between modernism and postmodernism and arguing that progressive scholars can harness post-modernism without sacrificing a commitment to a project of human liberation. Moreover, while his 1992 article does not focus on drawing an analogy between King and CLS's methods and model of antistubordination, it can be understood as continuing his 1990 article's focus on showing how King provides a helpful example of going beyond deconstruction and to reconstruction. Finally, while Cook argues for the practical desirability of balancing postmodern criticism with emancipatory projects, his suggestion that King's existentialism constitutes a "postmodern humility" (that is, skepticism of master narratives) capable of bridging or occupying the space between modernist emancipatory projects and post-modern skepticism of master narratives is odd. *Id.* at 754, 768-71. Cook never explains why King's Christian existentialism is best understood as an example of postmodern humility. See *id.* at 766-82. However, Christian existentialism, while insisting on epistemological humility, unlike postmodernism, is committed to the view that human beings and meaning are dependent upon God. Compare Richard Colledge, *Between Ultra-Essentialism and Post-Essentialism: Kierkegaard as Transitional and Contemporary*, *CON-TRETEMPS* (July 3, 2002) at 54, 59, available at <http://sydney.edu.au/contretemps/3July2002/colledge.pdf> ("Kierkegaard rejected western metaphysics not because he was *a priori* disposed towards an anti-supernaturalist or humanist agenda in which human free becoming is affirmed as the ground of all being, in which the human becomes god to itself. Nothing could be further from the case."), with *id.* at 60 ("[F]or all the revolutionary aspects of Kierkegaard's assault on rationalist metaphysics, at no point does he propose to do away with the established 'two-worlds' outlook of classical metaphysics and traditional theism. In purely, though radically, pushing Hegel's immanent-eternal realm back into a transcendence beyond the grasp of human finite reason, Kierkegaard presupposes the same bi-polarity that is foundational for Christian Platonism and which was scorned by Nietzsche."). In addition, while there are certain resonances between King's Christian existentialism and postmodernism, Christian existentialism, unlike postmodernism, does not deny truth exists but insists that we experience it subjectively. Thus, whereas a post-modernist who supports an emancipatory effort arguably lacks a basis for doing so (after all, following Habermas's performative contradiction critique of postmodern analysis, the postmodernist should deconstruct her emancipatory project), a Christian existentialist faces no

CRT's conception of antisubordination operates so as to marginalize arguments grounded in the normative resources of the African American Christian tradition.<sup>479</sup>

Unlike his 1992 article on post-modernism, in subsequent work on related themes Cook does not focus on arguing for the relevance of the Social Gospel, Martin Luther King, Jr., and the Black prophetic tradition for critical scholarship, but instead focuses on showing how the Christian value of love can enrich liberal normative discourse.<sup>480</sup> Moreover, in later work, Cook goes beyond postmodern notions of self-construction—a notion that overlaps with but which is distinguished in important respects from King's Christian existentialism—and clearly emphasizes the importance Dr. King gives to spiritual transformation.<sup>481</sup> However, perhaps because in his later work Cook is writing as a critical scholar critiquing

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such problem. JURGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* (1985).

479. In a speech delivered in 1992 focused on exploring and synthesizing the tensions between universalism and particularism, Cook articulates a view of spirituality that, due to its lack of specificity, appears to be congenial to both CRT's conception of antisubordination and its antiessentialist commitment. Cook, *Spiritual Movement Towards Justice*, *supra* note 21, at 1008, 1015. In particular, Cook states that, “[s]pirituality is the sincere striving for unalienated and unfractured human connection. Spirituality is understanding the limits of our knowledge and allowing the humility fostered by such understanding to open us to the possibilities of knowledge once impeded by the arrogance of our self-contained worlds.” *Id.* at 1018. While Cook suggests that this view of spirituality is analogous to slave conversion experiences, he makes no effort to illustrate how the view of spirituality as “unalienated and unfractured human connection” is rooted in either Christian tradition or Christian theology. *See id.* at 1016–18. Indeed, Cook expressly states that he is speaking “not of religion in its institutional sense—not of liturgy, denomination, or creed—but of something more transcendent—the spiritual dimension of self-affirmation, purposefulness, and an empowered connection to the lives and problems of others.” *Id.* at 1016. As a result, while Cook describes the slave conversion experience as analogous to “unalienated and unfractured human connection,” he advances a view of spirituality sheared of the belief structure in which the slave conversion experience took place. *Id.* at 1016–18. Put bluntly, shorn of liturgical, denominational or creedal commitments, Cook's conception of spirituality is only superficially rooted in the Christian tradition.

480. In both a 1994 article and a 1997 monograph, Cook argues (1) that American pragmatism and legal realism have led to an impoverished conception of the common good and (2) that the “unabashed[ ] normativ[ity]” of religious discourse can provide the basis for a revitalized conception of community. Compare Cook, *The Death of God*, *supra* note 21, at 1432 (arguing that legal realism inherits its impoverished normative discourse from John Dewey's pragmatism's rejection of religious discourse but lacks a normative vision of its own), *with id.* at 1432–34 (arguing that religious discourse can revitalize our conception of the common good), and COOK, *THE LEAST OF THESE*, *supra* note 21, at 1–2 (arguing that religious discourse can revitalize our conception of the common good). In addition, in a 2000 article Cook argues that Black reparations require society to move beyond the limits of liberalism to the Beloved Community, which can be accomplished through a “socio-spiritual process” that Cook calls social atonement. Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, *supra* note 21, at 959, 980.

481. COOK, *THE LEAST OF THESE*, *supra* note 21, at 113; Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, *supra* note 21, at 975.

liberalism from a religiously grounded normative perspective, he never critically reexamines his earlier arguments on King and CLS.<sup>482</sup> More specifically, he does not examine the ramifications of King's understanding of the inseparability of structural and spiritual transformation for achieving the Beloved Community for his earlier effort to parallel King and CLS. He likewise does not revisit his earlier, erroneous chronology of King's views of human nature. Thus, even in later writings, Cook seems to be unaware of the fact that the interrelationship between both King's views of human nature and his emphasis on both structural and spiritual transformation undermines critical portions of his earlier argument paralleling King and CLS.<sup>483</sup> For the foregoing reasons, Cook's later work does not constitute a counterexample to my claim that the tension between the constructionist view of antisubordination and the African American Christian tradition plausibly contributes to the marginalization of the latter in CRT scholarship.

### III. SUMMARY AND CONCLUSION

While I have closely engaged Cook's work to illustrate why it does not constitute a counterexample to my claim that CRT's exclusively constructionist conception of subordination stands in tension with scholarship grounded in the African American Christian tradition, Cook's corpus stands as an all-too-rare example of a substantial body of work that attempts to ground race and law scholarship in the normative resources of the tradition that carried and sustained Black folks through slavery and Jim and Jane Crow, and which ultimately powered the Black freedom movement.<sup>484</sup> Unfortunately, however, Cook's efforts have not spawned a more wide-ranging body of race and law scholarship drawing on the Christian tradition.

Although I have framed the question in broader terms, in a sense, the task of this Article has been to understand why—despite the undeniable importance of Christianity among African Americans and CRT's commitment to drawing on the normative resources of Black communities—Cook's corpus has not led to a more substantial body of scholarship exploring the relationship between race, law, and the African American Christian tradition. I have addressed this question along two basic lines of

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482. See generally Cook, *The Death of God*, *supra* note 21; Cook, *THE LEAST OF THESE*, *supra* note 21.

483. See discussion, *supra* pp. 178-80 (describing the claim that in his article *Beyond Critical Legal Studies*, *supra* note 15, Cook parallels King and CLS).

484. See sources cited, *supra* note 21 (collecting Cook's scholarly contributions treating race and law from the normative resources of the Christian tradition); see also *supra* note 3 and accompanying text (noting the role of the African-American Christian tradition in the civil rights movement); RABOTEAU, *supra* note 60, at 310-12 (noting that slaves identified with the Exodus story of ancient Israel and anticipated God's deliverance).

inquiry: endogenous and exogenous explanations of Christianity's marginal role in CRT scholarship.

First, as we have seen, there are powerful endogenous explanations of CRT's failure to develop a substantial body of literature drawing on the normative resources of the African American Christian tradition.<sup>485</sup> More specifically, given CRT's deep debt to Black nationalist and Black power thought and its anchoring commitment to a principle of subordination whose internal logic entails treating religion as any other social factor, CRT's genetic structure and intellectual frame renders it at best indifferent to scholarship grounded in the African American Christian tradition.<sup>486</sup>

Second, the exogenous factors of race and law scholars' religious identifications, disincentives against producing Christian informed scholarship, and Establishment Clause concerns may help to explain the absence of a substantial body of CRT literature that engages the intersection of race and law from the perspective of religiously grounded normative arguments.<sup>487</sup> However, as we have discussed, these exogenous explanations are either inconsistent with CRT's commitment to drawing on the values and perspectives of communities of color or with CRT's character as a form of outsider scholarship that is willing to cut against the grain of established academic expectations.<sup>488</sup> Notwithstanding these observations, it is impossible to rule out the possibility that some or all of these explanations have and continue to contribute to CRT's failure to more widely engage the African American community's single most significant source of values and normative meaning.<sup>489</sup> Yet, whether or not exogenous factors contribute to CRT's neglect of the African American Christian tradition, as we have seen, CRT's formation and commitments are at any rate consistent with and help to explain the limited attention CRT has given to the African American Christian tradition.

In light of this diagnosis and the important role that race and law scholarship engaged with the African American Christian tradition can play in developing self-knowledge among African American Christians, I would be remiss if I did not explicitly inquire whether CRT is likely to develop a literature that responds to this need. On this question, it is possible to draw the following strong but reasonable conclusion. In light of the fact that CRT's intellectual frame and exclusively constructionist view of subordination are in tension with scholarship grounded in the Christian tradition, we should not expect CRT to generate a substantial body of

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485. See discussion, *supra* pp. 142-77.

486. *Id.*

487. See discussion, *supra* pp. 134-42.

488. See discussion, *supra* p. 142.

489. Compare discussion, *supra* p. 142 (acknowledging that the exogenous factors may help to explain the marginal role of the African-American Christian tradition in CRT), with *supra* note 8 and accompanying text (citing data indicating that the Christianity is a central source of normative meaning for a significant percentage of Black Americans).

legal scholarship examining how African American Christians' ultimate commitments relate to the intersection of race and law and antistatutory projects in general. As a result, the important project of developing a legal literature that fosters self-knowledge among African American Christians' vis-à-vis their relationship to American law is unlikely to evolve out of CRT (at least as it has been historically constituted).

Accordingly, if a body of legal scholarship grounded in the African American Christian tradition is to develop, it will be necessary to construct a form of scholarship that is capable of accommodating the African American Christian tradition's prophetic, critical perspective on American law and society but also its anthropological and broader metaphysical commitments to a universe defined by an underlying spiritual reality. The complexity of such a project is difficult to overestimate but will undoubtedly entail the following two essential components. First, such a project would have to carefully delineate the Christian tradition's influence on the development of Western law as well as an assessment (which will undoubtedly be controversial) of ways in which the African American Christian tradition compares with those Christian traditions that have had the most impact on the development of American law. The results of such a comparison would form the beginnings of an approach to American law that is distinctively rooted in the African American Christian tradition. Second, such a project will entail determining which (or which combination of) major philosophical and normative theories of law (natural law, legal positivism, critical, etc.) are best suited to how the African American Christian tradition would approach American law. From the foregoing two essential components, it would be possible to lay the groundwork for a form of scholarship that is able to accommodate both the metaphysical and the prophetic commitments of the African American Christian tradition.

Although here I cannot say more about this larger, future project, after 250 years of slavery,<sup>490</sup> nearly 100 years of de jure second-class citizenship,<sup>491</sup> and approximately sixty years after *Brown v. Board of Education*,<sup>492</sup> it is time to develop an approach to law that reflects the values and normative commitments of the African American Christian tradition. However, in addition to the difficulties arising from the scope of knowledge necessary to develop the project, there is a practical question of whether, given the current sociology of the legal academy, such a project can flourish. More specifically, if, on the one hand, accusations of anti-Christian bias among left-leaning academics are to some extent accurate, and if, on the other hand, we make the plausible assumption that scholars sympathetic to Christian-informed scholarship tend to be politically con-

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490. FRANKLIN, *supra* note 108, at 244.

491. Erwin Chemerinsky, *What Would Be the Impact of Eliminating Affirmative Action?*, 27 GOLDEN GATE U. L. REV. 313, 313 (1997) ("For almost 100 years after the Civil War, Jim Crow laws segregated every aspect of Southern life.").

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

servative, including on matters of race, then it is possible that an effort to develop a distinctively African American Christian approach to law will find itself alienated from (although for different reasons) the two groups of scholars who are most able to contribute to the project's success.

Because of the possibility that developing an approach to law that reflects the African American Christian tradition will receive little support in the legal academy, scholars engaged in the project will have to be pioneering, prophetic voices who are willing to cut against the grain of the secular left as well as the predominantly colorblind, religious right. However, not all is grim. While the project may suffer marginalization within the halls of the legal academy, the Black community's substantial identification with Christianity means that the effort to develop an African American Christian approach to law has a natural and substantial constituency outside of the ivory tower. Moreover, because such a project would in part seek to develop self-knowledge among African Americans Christians vis-à-vis American law, and because one of the primary goals of critical scholarship should be to reach beyond the academy, the project's potential importance is undeniable. For these reasons, even if it faces headwinds and crosscurrents, we would do well to remember civil rights activist Fannie Lou Hamer's words to a group of religiously skeptical, northern student activists: "Our religion is very important to us [her fellow poor black Mississippians]—you'll have to understand that."<sup>493</sup> In the same spirit, I conclude this Article: Christianity remains deeply important to a significant majority of the African American community; it is time for legal scholarship to reflect this fact.

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493. DAVID L. CHAPPELL, *A STONE OF HOPE: PROPHETIC RELIGION AND THE DEATH OF JIM CROW* 71-72 (2004).



