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ORIGIN STORIES: CRITICAL RACE THEORY ENCOUNTERS THE WAR ON TERROR

*Natsu Taylor Saito**

In a fractured age, when cynicism is god, here is a possible heresy: we live by stories, we also live in them. One way or another we are living the stories planted in us early or along the way, or we are also living the stories we planted—knowingly or unknowingly—in ourselves.

—Ben Okri, 1997¹

The goal is to have the public read something crazy in the newspaper and immediately think “critical race theory.” We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.

—Christopher Rufo, 2021²

I. INTRODUCTION

Stories matter. They matter to those intent on maintaining structures of power and privilege, and to those being crushed by those structures. In the United States, the space to tell, and to hear, our stories has been expanding. This means that the histories and lived realities of those who have been excluded, particularly people of color, are seeping into mainstream

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1. BEN OKRI, *A WAY OF BEING FREE* 37 (1997).

2. Laura Meckler & Josh Dawsey, *Republicans, Spurred by an Unlikely Figure, See Political Promise in Critical Race Theory*, *WASH. POST*, June 19, 2021, at 2, PROQUEST 2542952481 (quoting Christopher Rufo).

discourse, into the books our children read, the movies and television shows they watch, and the many websites comprising social media. Critical race theory has played a role in this expansion. It insists that we recognize the legitimacy of the stories of those deemed “Other” because they have been erased or distorted beyond recognition in the dominant narrative.³ Critical race theory has helped ensure that the legacies of genocide and broken treaties, of the cruelties imposed upon enslaved persons, of the forced inclusion and exclusion of those regarded simply as disposable labor, have worked their way into the realm of what can be talked about. Critical race scholars have exposed immigration injustices and called out xenophobia and Islamophobia. All this discomfits those who benefit, or believe they benefit, from the status quo.

These stories have always been there, of course—an organic aspect of life and identity for many and generally accessible to others willing to put in a bit of effort. But the increasingly widespread acceptance of the notion that racialized privilege and subordination permeate American society⁴ has created numerous cultural shifts, shifts that emerged quite dramatically in 2020 with the mass social justice mobilizations triggered by the death of George Floyd at the hands (or, more accurately, under the knees) of the Minneapolis police.⁵ Sweeping across this country and around the globe, the uprisings generally associated with the “Black Lives Matter” movement could not be ignored.⁶ These widespread protests reminded us of the uprisings of the mid-to-late 1960s, when hundreds of urban neighborhoods burned and the National Guard rolled in to “restore order,” encased in tanks and suited up for war.⁷ At that time, the powers-that-be were concerned enough that President Johnson convened the Kerner Commission, whose surprisingly accurate assessment of cause and consequence prompted a raft of anti-poverty programs.⁸ Programs that

3. See *infra* notes 52-54, 74-76 and accompanying text.

4. While “American” more properly applies to the entirety of the North and South American continents, for lack of a better alternative it is used here to refer to entities, actions, or policies associated with the United States.

5. See Jared Hamernick, *Toward a Nonviolent State*, 2021 U. ILL. L. REV. ONLINE 77, 77-78 (2021).

6. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, July 3, 2020; Jen Kirby, “Black Lives Matter” Has Become a Global Rallying Cry Against Racism and Police Brutality, VOX (June 12, 2020), <https://www.vox.com/2020/6/12/21285244/black-lives-matter-global-protests-george-floyd-uk-belgium>.

7. See Natsu Taylor Saito, *For “Our” Security: Who Is an “American” and What is Protected by Enhanced Law Enforcement and Intelligence Powers?* 2 SEATTLE J. SOC. JUST. 23, 40-41 (2003); see generally REP. OF THE NAT’L ADVISORY COMM’N ON CIV. DISORDERS (1968) [hereinafter KERNER REPORT].

8. Cf. KERNER REPORT, *supra* note 7, at 1. The Commission was established pursuant to Exec. Order 11365, issued July 29, 1967. *Id.* at v.

worked remarkably well until the “war on poverty” was supplanted by the “wars” on crime, drugs, and terror.⁹ This time, however, we did not get a presidentially appointed commission or federal funding for programs to address the underlying causes of discontent. Instead, “diversity, equity, and inclusion” became the mantra of mainstream institutions—governmental, educational, and corporate.¹⁰

In 2020, critical race theory was still a relatively obscure vein of largely academic inquiry, and it certainly cannot be credited with the sudden willingness of major social institutions to openly address racism. That credit arguably goes to those willing to dismantle those institutions in a much more literal manner. Critical race theory, however, had articulated certain key concepts that moved the conversations within these institutions, and in American society more generally, beyond assimilationist aspirations focusing on acceptance and inclusivity to some foundational questions.¹¹ Is “race” really an objective reality? What purposes are served by the ways racial identities are constructed? Can we account for the persistence of racial disparities in every aspect of life—employment, education, housing, healthcare, incarceration—without looking at structural factors? How does discrimination based on national origin or immigration status differ from racial discrimination? What about all the histories being omitted from the master(’s) narrative? And whose land are we actually on, anyway?

Cultural shifts create rifts. Or bring them to the surface, at any rate. With the social upheavals of 2020, the discussions about race and its role in American history were starting to cut through the many layers of denial that protect the United States’ origin story and, ultimately, the legitimacy of the state.¹² This threatened to open the door to the existential angst that has always lurked in the shadows of American exceptionalism; angst apparently intensified by census data indicating that the number of people

9. Saito, *For “Our” Security*, *supra* note 7 at 41 n.38, 42 n.145, 47 n.182.

10. See generally Zachary McCoy, *Workplace Diversity, Equity, and Inclusion Programs: Inclusive Environments and Diversity Promotion Programs*, 55 U.S.F. L. Rev. 153 (2021).

11. See *infra* notes 59-74 and accompanying text.

12. See John F. Harris, *2020 Shatters the Myth of American Exceptionalism*, POLITICO, Dec. 31, 2020 (addressing the “collision” between reality and the myth of America as “an exceptional leader among nations”), <https://www.politico.com/news/magazine/2020/12/31/2020-american-exceptionalism-452947>; John E. Taylor, *Reflecting on the Death of George Floyd*, 2020-Autumn W. VA. LAW. 8, 9 (2020) (West Virginia Law School dean emphasizing that “[w]e face systemic problems of racism in our society, and the death of George Floyd has concentrated our collective attention on these problems”); Tyrone Beason, “*Something Is Not Right.*” *George Floyd Protests Push White Americans to Think About Their Privilege*, L.A. TIMES (June 28, 2020, 6:00 AM), <https://www.latimes.com/politics/story/2020-06-28/white-voters-racism-reckoning-george-floyd-killing> (describing one person’s realization that he could be “a good man . . . yet still benefit from a racist system”).

identifying as White is shrinking in both absolute and relative terms.¹³ It is against this background that critical race theory—or what is said to be critical race theory—has come under attack in executive orders issued by Donald Trump and legislation proposed or passed in over 20 states, as well as heated local school board meetings and impassioned debates across the media spectrum.¹⁴

While “critical race theory” provides a convenient label, the real targets are the burgeoning efforts to come to terms with historical and contemporary manifestations of racism and xenophobia within the United States and in its foreign policy. Those launching the attacks intend to restore the narrative of righteousness that weaves its way through U.S. history, from its foundational violence through its assertions of global hegemony and its current “war on terror.”¹⁵ Launched with great fanfare following the attacks of September 11, 2001, this war on terror has become a permanent fixture.¹⁶ Settler colonial regimes, including the United States, envision their endpoints not as decolonization but the permanent normalization of settler hegemony.¹⁷ To ensure that hegemony, the war on terror is not meant to end but—like ongoing colonization—is intended to be taken for granted as a constant of contemporary life in the United States and around the world.

This essay addresses the attacks on critical race theory as a logical extension of the ideological foundations of the war on terror. After briefly summarizing some of the presumptions that undergird justifications for the war on terror and the means it employs, it turns to the attacks on critical race theory, and provides a short analysis of why critical race theory is seen as a threat to those intent on defending the status quo. The final section juxtaposes the narrative lenses of the war on terror and critical race theory.

13. Charles M. Blow, *It Was a Terrifying Census for White Nationalists*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/2021/08/15/opinion/united-states-census-white.html>.

14. See Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Aug. 15, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

15. See ERIC R. WOLF, EUROPE AND THE PEOPLE WITHOUT HISTORY 5 (1982) (on the United States as the culmination of Western civilization); NATSU TAYLOR SAITO, SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS 26–34 (2020) (summarizing the American master narrative); see generally NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW (2010).

16. See Glenn Greenwald, *Washington Gets Explicit: Its “War on Terror” Is Permanent*, GUARDIAN (May 17, 2013, 7:54 AM), <https://www.theguardian.com/commentisfree/2013/may/17/endless-war-on-terror-obama>; Chris Megerian, *The US War in Afghanistan Is Over-but the War on Terror Continues*, L.A. TIMES (Sept. 3, 2021, 5:00 AM), <https://www.latimes.com/politics/story/2021-09-03/afghanistan-counterterrorism-challenges>.

17. LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW, 22 (2010). On the United States as a settler colonial regime, see generally SAITO, SETTLER COLONIALISM, *supra* note 15.

Throughout, I rely on insights into storytelling found in Nigerian poet and novelist Ben Okri's *A Way of Being Free*.

II. CERTAINTIES IN THE WAR ON TERROR

"In the name of certainties," Okri observes, "people have had an almost medieval belief in the rightness of the violence they have wreaked on others, in the destruction of other people's ways and lives. In the name of certainties, nations and individuals ha[ve] come to regard themselves as gods."¹⁸ This is an apt description of the rhetoric as well as the underlying precepts of the global war formally launched by the United States when, just a few days after the September 11 attacks on the Pentagon and the World Trade Center, Bush declared from the National Cathedral that "our responsibility to history is . . . to answer these attacks and rid the world of evil."¹⁹ This presaged a shape-shifting military and ideological engagement with neither geographic boundaries nor a clear definition of what would constitute victory.

Named enemies have included Osama bin Laden and the evolving al Qaeda network; the Taliban in Afghanistan; Iraq and its then-president Saddam Hussein; variations of the so-called Islamic State (ISIS); "radical Islam"; the hundreds of men and boys of many nationalities detained at the U.S. Naval Base at Guantánamo Bay, Cuba; and select U.S. citizens declared to be "enemy combatants."²⁰ Within the United States, Muslims, Arab Americans, and South Asians have been profiled as terrorists and subjected to governmental surveillance as well as personal attacks.²¹ Globally, over 900,000 deaths have been attributed to armed conflict in Afghanistan, Pakistan, Iraq, Syria, and Yemen between October 2001 and September

18. OKRI, *supra* note 1, at 25.

19. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002) (quoting statement of George W. Bush at the National Cathedral, Washington D.C., Sept. 14, 2001) [hereinafter NATIONAL SECURITY STRATEGY 2002].

20. See generally David Cole, *The End of the War on Terror?* N.Y. REV. (Nov. 7, 2013), <https://www.nybooks.com/articles/2013/11/07/end-war-terror/>; Hendrick Hertzberg, *War and Words*, NEW YORKER (Feb. 13, 2006), <https://www.newyorker.com/magazine/2006/02/13/war-and-words>; Anthony H. Cordesman, *The Real World Capabilities of ISIS: The Threat Continues*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 9, 2020), <https://www.csis.org/analysis/real-world-capabilities-isis-threat-continues>; Paul Rogers, *Rising ISIS Attacks in Africa Mean the "War on Terror" Is Far from Over*, OPEN DEMOCRACY (Mar. 27, 2021), <https://www.opendemocracy.net/en/rising-isis-attacks-in-africa-mean-the-war-on-terror-is-far-from-over/>.

21. See generally Khaled A. Beydoun, *Between Indigence, Islamophobia, and Erasure: Poor and Muslim in "War on Terror" America*, 104 CAL. L. REV. 1463 (2016); Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in Post-9/11 America*, 47 GONZ. L. REV. 429 (2011); Ming H. Chen, *Alienated: A Reworking of the Racialization Thesis After September 11*, 18 AM. U. J. GENDER, SOC. POL'Y & LAW 411 (2010).

2021, to which we must add deaths attributable to lack of access to food, water, medical care, infrastructure collapse, or other trauma associated with warfare.²² As the United States withdraws from Afghanistan in 2021, there is no end to the violence in sight.²³

Nonetheless, those who speak for the United States continue to project, with certainty, the righteousness of their quest for global hegemony. They are able to do so because the war on terror evokes precepts of American exceptionalism so deeply rooted that they “fade[] almost immediately from [] consciousness into transparency.”²⁴ There are many ways to untangle the ideological presumptions undergirding the military, political, social, cultural, and economic initiatives that claim to be combatting terrorism. Here, I focus on some foundational precepts that illustrate the genealogical links between the attacks on critical race theory—or, more accurately, racialized critiques of U.S. history and institutions—and the ideology of the war on terror.²⁵

First, a Manichean world is posited.²⁶ Because this is a war, there is an enemy, and that enemy is evil, “evil” used as both a noun and an adjective.²⁷ In 2000, George W. Bush had been unable to identify an enemy, noting that, when he was growing up, “It was us versus them, and it was clear who they were. Today we are not so sure who they are, but we know they’re there.”²⁸ Following the attacks of September 11, 2001, he

22. NETA C. CRAWFORD & CATHERINE LUTZ, WATSON INSTITUTE FOR INTERNATIONAL & PUBLIC AFFAIRS, BROWN UNIVERSITY, HUMAN COST OF POST-9/11 WARS: DIRECT WAR DEATHS IN MAJOR WAR ZONES (Nov. 13, 2019), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_Direct%20War%20Deaths_9.1.21.pdf.

23. Missy Ryan & Souad Mekhennet, *After Taliban Triumph, Biden Faces Even Greater Test in Preventing Extremist Resurgence in Afghanistan*, WASH. POST (Aug. 16, 2021, 8:06 PM), https://www.washingtonpost.com/national-security/us-counterterrorism-surveillance-afghanistan/2021/08/16/d27433ee-feaa-11eb-825d-01701f9ded64_story.html; Michael Levenson, *Frenzied Exit from Kabul Nears End as the President Cites a New Terror Threat*, N.Y. TIMES, Aug. 29, 2021, at A1.

24. Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 971 (1993) (on the transparency of whiteness); see generally SAITO, MEETING THE ENEMY, *supra* note 16 (on exceptionalism).

25. These precepts are discussed in more detail in SAITO, MEETING THE ENEMY, *supra* note 15, at 11-19.

26. “Manicheanism connotes a dualistic approach, ‘with a basic doctrine of a conflict between light and dark, matter being regarded as dark and evil.’” Ibrahim J. Gassama, *Africa and the Politics of Destruction: A Critical Re-Examination of Neocolonialism and Its Consequences*, 10 OR. REV. INT’L L. 327, 333 n.27 (2008) (quoting Manichean, Dictionary.com, <http://dictionary.reference.com/browse/manichean> (last visited May 5, 2008)).

27. SAITO, MEETING THE ENEMY, *supra* note 15, at 11.

28. Paul A. Chilton, *Deixis and Distance, President Clinton’s Justification of Intervention in Kosovo*, in AT WAR WITH WORDS 95, 95-126 (Mirjana N. Dedaic & Daniel N. Nelson, eds., 2003) (quoting George W. Bush’s speech at Iowa Western Community College, Jan. 21, 2000).

could tell West Point graduates that “[w]e are in a conflict between good and evil,” and name “terrorists” as the enemy.²⁹ Terrorists, however, were not identified solely by their actions. By September 11, 2001, Arab Americans and Muslims in the United States had already been “‘raced’ as ‘terrorists’: foreign, disloyal, and imminently threatening.”³⁰ As a result, they—and anyone who might look similarly “foreign”—also became “the enemy,” perpetuating a process in which the “other” is “constructed, excluded from the realm of law, attacked, liberated, defeated, and transformed.”³¹

The 2002 *National Security Strategy* also proclaimed that “we make no distinction between terrorists and those who knowingly harbor or provide aid to them.”³² This opened the door to military attacks on “rogue” states, defined as those that not only sponsor terrorism but “[r]eject basic human values and hate the United States and everything for which it stands.”³³ As the United States embarked on its war on terror, many scholars argued that terrorism was most effectively countered by addressing its root causes.³⁴ Moreover, terrorist acts could have been addressed within extant systems of law. This happened when, for example, those who bombed the World Trade Center in 1993 were convicted in a jury trial “replete with due process, an excellent defense team, and protection of the government’s security needs.”³⁵ Terrorism is prohibited under international treaties, customary law, and the laws of war, and an extensive body of international humanitarian law, binding on the United States, applies to international

29. Press Release, White House, President Bush Delivers Graduation Speech at West Point (June 1, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html>.

30. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 *ASIAN L.J.* 1,12 (2001); see also *id.* at 11–15. This article, published in May 2001, was written well before the September 11 attacks.

31. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 278 (2005).

32. See NATIONAL SECURITY STRATEGY 2002, *supra* note 19, at 5.

33. *Id.* at 14–15.

34. See, e.g., CHALMERS JOHNSON, *BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE* 216–229 (2004); NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA’S QUEST FOR GLOBAL DOMINANCE* 187–216 (2004); WARD CHURCHILL, *ON THE JUSTICE OF ROOSTING CHICKENS: REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY*, 5–37 (2003).

35. Eric M. Freedman, *Who’s Afraid of the Criminal Law Paradigm in the “War on Terror”?* 10 *N.Y. CITY L. REV.* 323, 325 (2007) (also noting that the defendants served long sentences and now “are forgotten”); see also Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 *GEO. IMMIGR. L.J.* 1, 14–20 (2002); see generally Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 *GEO. WASH. L. REV.* 1421 (2007).

armed conflict, whether or not war has been declared, and to conflicts between states and nonstate entities.³⁶

Thus, the United States had many options. Nonetheless, the choice was made by American leaders to resort, immediately, to armed conflict. Bush later recalled, upon learning of the September 11 attacks, “I didn’t need any legal briefs, I didn’t need any consultations, I knew we were at war.”³⁷ At his 2009 inauguration, Barack Obama noted that “[o]ur nation is at war, against a far-reaching network of violence and hatred”³⁸ and it remains at war well over a decade later. In this apparently perpetual war, U.S. officials claim that the usual rules of engagement do not apply because the enemy is uncivilized and irrational, motivated by “evil” rather than political or economic interests.³⁹ This facilitates framing otherwise unlawful policies and practices as preemptive self-defense.⁴⁰

A key development in the ideology of the war on terror was that those who “hate us” became legitimate targets of attack, literally as well as figuratively.⁴¹ The war on terror is being fought, its proponents argue, not just to enhance American security or global influence, but “because the allies of terror are the enemies of civilization.”⁴² “Civilization,” in this context, is not used “interchangeably with *culture*, so that other peoples might have other ‘civilizations’” but rather “to distinguish Western super-culture, or the one true ‘civilization,’ from so-called primitive cultures.”⁴³

36. See Saito, *Will Force Trump Legality After September 11?*, *supra* note 35, at 20–24; Chairman of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 159, U.N. Doc. A/59/565 (Dec. 2, 2004), https://www.un.org/en/events/pastevents/a_more_secure_world.shtml (noting applicable international law).

37. Freedman, *supra* note 35, at 323 n.2 (citing *60 Minutes: The President’s Story: The President Talks in Detail About his Sept. 11 Experience* (CBS television broadcast Sept. 11, 2002)).

38. Barack Obama, U.S. President, Inaugural Address (Jan. 20, 2009), <https://obamawhitehouse.archives.gov/blog/2009/01/21/president-Barack-obamas-inaugural-address>.

39. Jeanne M. Woods & James M. Donovan, “*Anticipatory Self-Defense*” and Other Stories, *KAN. J. L. & PUB. POL’Y* 487, 494–95 (2005); see also Press Release, White House, President Bush Delivers Graduation Speech at West Point (June 1, 2002).

40. WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 18 (2006).

41. See NATIONAL SECURITY STRATEGY 2002, *supra* note 19, at 14. Similarly, those opposed to teaching critical race theory claim that it teaches children to hate on the basis of race. See Lawrence Richard, *Mother Lambastes Critical Race Theory, Says It Teaches “Hate” and Will Result in the “Dismantling” of US*, *WASH. EXAMINER* (June 11, 2021), <https://www.washingtonexaminer.com/news/black-mother-critical-race-theory-teaches-hate-dismantling-america>.

42. NATIONAL SECURITY STRATEGY 2002, *supra* note 19, at ii.

43. RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING*, xxviii (1997) (discussing earlier phases of American territorial expansion).

As Bush declared to the German Bundestag, the “values” shared by the United States and its European allies are “universally true and right”; they “bind our civilizations together and set our enemies against us.”⁴⁴

The notion that the war on terror is being fought to “save civilization” undergirds a final precept: that there is but one path of human progress and the United States represents its highest stage.⁴⁵ The philosopher Ludwig Wittgenstein observed that Western civilization is not only “characterized by the word ‘progress’” but “[p]rogress is its form rather than . . . one of its features.”⁴⁶ Progress, in turn, is understood in a linear and intensely Eurocentric manner. We are taught that there is “an entity called the West,” Eric Wolf notes, and that it has a genealogy that leads us from ancient Greece to Rome to Christian Europe.⁴⁷ Christian Europe gave us the Renaissance and the Enlightenment, political democracy and the industrial revolution. “Industry, crossed with democracy, in turn yielded the United States, embodying the rights to life, liberty, and the pursuit of happiness.”⁴⁸

Introducing the *National Security Strategy*, Bush noted that the Cold War had “ended with a decisive victory for the forces of freedom—and a single sustainable model for national success: freedom, democracy, and free enterprise,” values that “are right and true for every person, in every society.”⁴⁹ Thus framed, the United States has not simply a right but a responsibility to remake the rest of the world in its image.⁵⁰ These certainties rationalize the wielding of American military, economic, and political might across the globe as well as the expanding surveillance state and the militarized maintenance of “order” at home. They are invoked to justify, or legitimate, the occupation of this land and the construction of the world’s richest and most powerful state. As Obama proclaimed in 2009, the United States is the world’s most prosperous and most powerful state, and “[w]e will not apologize for our way of life, nor will we waver in its defense.”⁵¹

44. *President Bush’s Speech to the German Parliament*, N.Y. Times (May 23, 2002), <https://www.nytimes.com/2002/05/23/international/europe/president-bushs-speech-to-the-german-parliament.html>.

45. See SAITO, MEETING THE ENEMY, *supra* note 15, at 25–32.

46. LUDWIG WITTGENSTEIN, CULTURE AND VALUE, 7e (Peter Winch trans., amend. 2d ed. 1980).

47. WOLF, *supra* note 15, at 5.

48. *Id.*

49. NATIONAL SECURITY STRATEGY 2002, *supra* note 19, at Introduction Letter.

50. *Cf.* President George W. Bush, Graduation Speech at West Point, *supra* note 29 (“America cannot impose this vision, yet we can support and reward governments that make the right choice for their own people.”).

51. Obama, Inaugural Address, *supra* note 38.

The American master narrative, with its stories of righteousness “planted in us early,”⁵² strives to nullify the diverse range of experiences that comprise our realities. But the stories of those who have been subordinated are not that easily disappeared and, as Okri notes, “[i]f we change the stories we live by, quite possibly we change our lives.”⁵³ Critical race theory challenges the stories that undergird the war on terror and that is, at least in part, why it has come under attack.

III. CRITICAL RACE THEORY: ATTACKING THE MESSENGER

On September 4, 2020, President Trump directed all executive departments and federal agencies to identify “divisive, un-American propaganda training sessions,” specifically those referencing “critical race theory,” “white privilege,” or suggesting “either (1) that the United States is an inherently racist or evil country or (2) that any race or ethnicity is inherently racist or evil.”⁵⁴ It was the opening volley in a concerted effort to “portray[] anti-racist ideas as extremist and politically radioactive, so that they should be denounced by ‘reasonable people on both sides.’”⁵⁵

This directive, which seemed to come out of the blue, can be traced to documentary filmmaker and journalist Christopher Rufo who, in the course of compiling information on anti-racism trainings, had decided that critical race theory was “the perfect villain” for the conservatives’ culture war.⁵⁶ On September 2, on Fox News, he pronounced critical race theory “an existential threat to the United States” and called on the president “to immediately issue an executive order to abolish critical-race-training from the federal government” and “stamp out this destructive, divisive, pseudo-scientific ideology.”⁵⁷ Within forty-eight hours Trump had done so and, by June 2021, Rufo was reporting that “lawmakers in 24 states [had] introduced, and six [had] enacted, legislation banning public schools from

52. OKRI, *supra* note 1, at 37.

53. *Id.*

54. Russell Vought, Memorandum for the Heads of Executive Departments and Agencies (Sept. 4, 2020), <https://context-cdn.washingtonpost.com/notes/prod/default/documents/84f300c2-533a-46b3-bf40-4c913593347a/note/4fe8fea2-9986-4264-ae4c-ec4b9054f715.#page=1>; see also Josh Dawsey and Jeff Stein, *White House Directs Federal Agencies to Cancel Race-Related Training Sessions it Calls ‘un-American Propaganda,’* WASH. POST (Sept. 5, 2020), <https://www.washingtonpost.com/politics/2020/09/04/white-house-racial-sensitivity-training/>.

55. Cheryl Harris, *What Is Critical Race Theory and Why Is Trump Afraid of It?*, NATION (Sept. 17, 2020), <https://www.thenation.com/article/politics/trump-critical-race-theory/>.

56. Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

57. *Id.*

promoting critical race theory's core concepts, including race essentialism, collective guilt and racial superiority."⁵⁸

The depictions of critical race theory as anti-American propaganda intended to denigrate White people are wildly inaccurate. But critical race theory does ask, "What does race have to do with it?"⁵⁹—a question many Americans would prefer not to confront. It considers how and why race plays a role in any given issue and formulates strategies for contesting racial subordination.⁶⁰ This approach, long utilized by individual scholars of color, was introduced as a conscious framework in the late 1980s by professors committed to incorporating the struggle against racism into their analysis of U.S. law and legal institutions.⁶¹ Many of these scholars had been involved in the civil rights movement and brought with them a "redemptive" vision, a conviction that "[j]ustice remains possible, and it is the property of whites and nonwhites alike."⁶² The genealogy of critical race theory in the legal academy can also be traced to the movements that brought African American studies and ethnic studies more generally into colleges and universities.⁶³ In turn, conceptual frameworks inspired by critical race theory are now utilized across a range of other disciplines, including education, psychology, cultural studies, political science, and philosophy.⁶⁴

Recognizing that all analyses arise from particular perspectives, critical race scholars have made "a deliberate choice to see the world from the

58. Christopher F. Rufo, *Opinion: Battle Over Critical Race Theory*, WALL ST. J. (June 27, 2021), <https://www.wsj.com/articles/battle-over-critical-race-theory-11624810791>.

59. Dorothy A. Brown, *Introduction to Critical Race Theory* in CRITICAL RACE THEORY: CASES, MATERIALS, AND PROBLEMS 1, 1 (3d ed. 2014).

60. See Natsu Taylor Saito and Akilah J. Kinnison, *Perspectives and Methods: Critical Race Theory* in OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 139-157 (Jonathan Todres & Shani M. King, eds., 2020); see generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic, eds., 3rd ed. 2013); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et. al, eds., 1995).

61. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, U. ILL. L. REV. 893, 898 (1995); see also Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "a Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1361 (2002); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DEN. U. L. REV. 329 (2006).

62. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994).

63. Devon W. Carbado, *Critical What What?* 43 CONN. L. REV. 1593, 1600-01 (2011) (noting with respect to the establishment of ethnic studies that critical race theory can be thought of "as both an extension of this history and a replication of it in legal education").

64. See Kimberlé Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1256 (2011); Carbado, *supra* note 63, at 1620-23.

standpoint of the oppressed.”⁶⁵ From this methodological foundation a consensus has coalesced around some substantive principles. Most fundamental, perhaps, is that “race” is a powerful social construct, not a biological reality.⁶⁶ Building on the insight that “race” is best understood as a verb rather than a noun, critical race theory recognizes racial identity as both imposed and “performative”⁶⁷ and views identities as complex, dynamic, and intersectional.⁶⁸ Particularly disturbing to those who want to see racism as a thing of the past is work demonstrating that unconscious racism is not only pervasive but often more destructive than intentional bias.⁶⁹ Empirical research supporting this premise is often used in training programs designed to help employees and administrators within corporations, government agencies, and nonprofits recognize implicit bias.⁷⁰ Decoupling racial disparities from animus or discriminatory intent has made it easier to see racism as structural and to understand how biases or historical inequities in one sector of society can spill over to create interconnected and often inescapable networks of inequality.

Critical race theory has exposed racialized privilege as neither exceptional nor simply a vestige of past inequities, but an ordinary and integral aspect of American life.⁷¹ In doing so, it undermines the dominant narrative’s reliance on colorblind assimilationism to rectify racial wrongs. Where racism has been normalized, it cannot be effectively remediated by

65. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN’S RTS. L. REP. 297, 299 (1992).

66. See generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3rd ed. 2015) (discussing the social construction of race); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (rev. ed. 2006) (tracing shifts in the interpretation of the racial prerequisite requirement in naturalization cases).

67. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (1990) (quoting Professor Kendall Thomas’ 1990 Comments at Frontiers of Legal Thought Conference, Duke Law School); Carbado, *supra* note 63 at 1609.

68. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296-99 (1991).

69. Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. HAW. L. REV. 457, 458 (2015); see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

70. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (summarizing empirical studies); Benjamin E. Stockman, Ayalén R. Rodriguez and Sandy Schlesinger, *Trends in Employment Anti-Discrimination Training: Why Employers Are Addressing Unconscious Bias in the Workplace*, June 23, 2021 (noting the widespread use of implicit bias trainings), <https://www.venable.com/insights/publications/2021/06/trends-in-employment-anti-discrimination-train>.

71. See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); see also ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 39 (2005).

colorblindness; indeed, colorblindness may perpetuate structural disparities.⁷² Assimilationism, too, is discredited because it not only erases the histories, cultures, and identities of those deemed “other,” it also requires those in power to be willing to incorporate subordinated peoples.⁷³ More fundamentally, critical race theory “rejects the standard racial progress narrative . . . that characterizes the history of race relations in the United States [as] a history of linear uplift and improvement.”⁷⁴

Critical race theory insists on including the voices of all peoples and complicates the American master narrative—the origin story that provides a highly sanitized version of the violence employed against, and the exploitation of, Indigenous peoples, persons of African descent, and many immigrant groups, and relegates these actions to a past for which no one is today responsible.⁷⁵ This is why the current attacks on critical race theory are closely aligned with efforts to prevent teaching of the 1619 Project, which focuses on the enslavement of people of African descent in the United States, or to dismantle ethnic studies programs in public schools, as Arizona attempted in 2010.⁷⁶ By rejecting a triumphalist American narrative, critical race theory challenges many of the presumptions underlying the war on terror, beginning with the division of the world into “good” and “evil” and the association of Islam, or people from North Africa, the Middle East, or South Asia, with terrorism.⁷⁷ It insists on looking at context and causation, rejecting assertions of exceptionalism that preclude equal application of the law to all.⁷⁸ The stories it introduces complicate the

72. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 44 (5th ed. 2018); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 *STAN. L. REV.* 1, 55 (1991).

73. Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *CALIF. L. REV.* 1401, 1414 (1993); see George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 *CHICANO-LATINO L. REV.* 1, 32-33 (1999); Gary Peller, *Race Consciousness*, 39 *DUKE L.J.* 758 (1990).

74. Carbado, *supra* note 63, at 1607; see also Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 373 (1992); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518, 523 (1980).

75. See Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 *FL. A&M U. L. REV.* 1, 31-32 (2014); SAITO, *SETTLER COLONIALISM*, *supra* note 15, at 26-34.

76. See Sarah Schwartz, *Lawmakers Push to Ban ‘1619 Project’ From Schools*, *EDUC. WK.* (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02>; Valerie Strauss, *Arizona’s Ban on Mexican American Studies Was Racist, U.S. Court Rules*, *WASH. POST.* (Aug. 23, 2017), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/08/23/arizonas-ban-on-mexican-american-studies-was-racist-u-s-court-rules/>.

77. See generally Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 *FORDHAM L. REV.* 455 (2017).

78. See generally Crenshaw, *Twenty Years of Critical Race Theory*, *supra* note 64; Mutua, *The Rise, Development and Future Directions of Critical Race Theory*, *supra* note 61.

premise that Western civilization—and the United States, in particular—is the culmination of human history.⁷⁹

Those who employ a critical race perspective are often accused of being storytellers rather than serious scholars because they use narrative to illustrate that law, history, and even the sciences are never simply objective and empirical, and to emphasize the importance of truth as perceived by those “at the bottom.”⁸⁰ “In storytelling there is always transgression,” Okri observes.⁸¹

There is nothing more shocking or more dangerous or more upsetting to individuals and nations than truth. Giving truth direct narrative expression is to give it a public explosion. . . . [I]t wakes up all the hidden bullies, the hidden policemen, and the incipient dictators and tyrants of the land.⁸²

Those bullies have emerged as politicians and media personalities take up the attacks on critical race theory, loudly condemning it as intent on humiliating White children, racist rather than anti-racist, unpatriotic, and possibly a communist plot.⁸³ In Rufo’s words, “We have successfully frozen their brand—‘critical race theory’—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all the various cultural insanities under that brand category.”⁸⁴

79. See WOLF, *supra* note 15, at 5; SAITO, MEETING THE ENEMY, *supra* note 15, at 18–34.

80. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 323, 324 (1987); see generally DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). On storytelling, see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 1989, 2320, 2323–24 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 37–46 (2001).

81. OKRI, *supra* note 1, at 52.

82. *Id.* at 52–53.

83. See, e.g., Liz Wheeler, *Opinion: Critical Race Theory Is Repackaged Marxism*, NEWSWEEK (June 14, 2021, 6:00 AM), <https://www.newsweek.com/critical-race-theory-repackaged-marxism-opinion-1599557>; Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, PEW: STATELINE (June 14, 2021) (noting that in a March 2021 poll conducted by Leger in collaboration with the Atlantic 71% of respondents had never heard of critical race theory, but 48% thought it should not be taught in schools), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools>.

84. Meckler & Dawsey, *supra* note 2 (quoting Rufo).

IV. DANGEROUS NARRATIVES

The attempt to “rebrand” critical race theory as a toxic source of cultural insanities is part of a larger process in which we see the emergence not only of the bullies but of the hidden policemen and incipient tyrants as well. In this sense, the current “culture wars” are a natural extension of the war on terror. After September 11, 2001, no time was lost in expanding long-standing efforts to suppress those who challenge the political, economic, social, or racial status quo.⁸⁵ Initially, we saw this in the rapid passage of the so-called USA PATRIOT Act⁸⁶ and the implementation of the National Security Entry-Exit Registration System (NSEERS).⁸⁷ Foreshadowing the “Muslim bans” later implemented by the Trump administration, NSEERS required men from twenty-four Muslim-majority countries to provide detailed registration information to the government, making it much easier to track and, potentially, intern or deport them.⁸⁸

The USA PATRIOT Act opened the door to repressive governmental tactics previously condemned as illegal and unconstitutional in the mid-1970s, most notably in Senate investigations of the FBI’s COINTELPRO operations and similar programs used by other national security agencies to quash internal “enemies”—most of whom were people of color.⁸⁹ It significantly expanded the surveillance authority of federal agencies, limited the rights of immigrants, blurred the line between criminal and intelligence investigations, and created a new crime of “domestic terrorism.”⁹⁰ Domestic terrorism was broadly defined to encompass a range of activities intended to “influence the policy of a government by intimidation or coercion.”⁹¹ Quite predictably, it has since been used to threaten those engaged in social or political protest (and those who provide them with “material support”) with felony charges and long prison terms.⁹² The construct has

85. See generally Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051 (2002).

86. *Id.* at 1059–1060; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272.

87. See generally Kareem Shora, *National Security Entry Exit Registration System (NSEERS)*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 73 (2003).

88. See Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J. L. & MOD. CRIT. RACE PERSPECTIVES 1, 24 (2019); on the “Muslim bans,” see *id.* at 25–26.

89. See Saito, *Whose Liberty?*, *supra* note 85, at 1078–1098; see generally WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* (2d ed. 2002).

90. Saito, *Whose Liberty?*, *supra* note 85, at 1115–1123.

91. *Id.* at 1120 (citing USA PATRIOT Act, Sec. 802(a)).

92. *Id.* (citing USA PATRIOT Act, Sec. 805).

also opened the door to increasingly militarized responses to situations that are presumptively matters of ordinary law enforcement.

Thus, for example, in 2016, Indigenous-led opposition to pipeline construction at Standing Rock, North Dakota, was met by “heavily militarized police . . . who arrived in armored vehicles and assaulted them with purportedly less-than-lethal weapons, LRAD sound devices, and water cannons,”⁹³ and similar attacks on water protectors around the country have continued well into the summer of 2021.⁹⁴ At Standing Rock, local and federal officials implemented “military-style counterterrorism measures” with the help of TigerSwan, a defense contractor active in the global war on terror.⁹⁵ TigerSwan, in turn, described the water protectors camped on unceded Indigenous lands as “an ideologically driven insurgency with a strong religious component,” explicitly likening them to jihadist fighters.⁹⁶ In subsequent prosecutions of water protectors around the country, numerous states have enhanced penalties for protests aimed at “critical infrastructure” such as pipelines, and individuals continue to face terrorism charges.⁹⁷

Similarly, those participating in anti-racist protests stemming from police killings, or other actions associated with the Black Lives Matter movement, often face serious felony charges, including terrorism.⁹⁸ In other instances, the FBI has attempted to create a false equivalence between the deadly violence inflicted by White supremacists and what they term “Black identity extremists.”⁹⁹ Illustrating the contestation over narrative that often frames these cases, in the summer of 2020 felony charges were

93. Alleen Brown, Will Parrish & Alice Speri, *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to “Defeat Pipeline Insurgencies,”* INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies>; see also Will Parrish & Sam Levin, *Treating Protest as Terrorism: US Plans Crackdown on Keystone XL Activists,* GUARDIAN (Sept. 20, 2018), <https://www.theguardian.com/environment/2018/sep/20/keystone-pipeline-protest-activism-crackdown-standing-rock>.

94. GINIW Collective, *Brutal Arrests, Tear Gas, Rubber Bullets Used on Water Protectors at Stop Line 3,* CENSORED NEWS: INDIGENOUS PEOPLES AND HUM. RTS. (Aug. 1, 2021), <https://bsnorrell.blogspot.com/2021/08/brutal-arrests-pepper-spray-rubber.html>.

95. Brown, Parrish, & Speri, *supra* note 93.

96. *Id.*

97. Alleen Brown, *Ohio and Iowa Are the Latest of Eight States to Consider Anti-Protest Bills Aimed at Pipeline Opponents,* INTERCEPT (Feb. 2, 2018), <https://theintercept.com/2018/02/02/ohio-iowa-pipeline-protest-critical-infrastructure-bills/>.

98. Akela Lacy, *Protesters in Multiple States are Facing Felony Charges, Including Terrorism,* INTERCEPT (Aug. 27, 2020), <https://theintercept.com/2020/08/27/black-lives-matter-protesters-terrorism-felony-charges/>; Masood Farivar, *Hundreds of Domestic Terrorism Investigations Opened Since Start of George Floyd Protests, Official Says,* VOA NEWS (Aug. 4, 2020), <https://www.voanews.com/usa/race-america/hundreds-domestic-terrorism-investigations-opened-start-george-floyd-protests>.

99. See generally Natsu Taylor Saito, *Identity Extremism,* 76 NAT. L. GUILD REV. 32 (2019).

brought “against the Virginia State Senate pro tempore, a local school board member, local NAACP leaders, and public defenders for injury to a monument and conspiracy, in relation to the destruction of confederate statues.”¹⁰⁰

The stories we choose to live by have consequences; that’s why they’re so intensely contested. The war on terror builds on a deeply rooted and triumphalist narrative of American exceptionalism. Its foundation is being challenged by grassroots as well as theoretical efforts insisting that accurate histories of people of color be included in the stories we tell. The virulent reactions to critical race theory—or just to acknowledging slavery, for that matter—illustrate that we cannot let just a little bit of honesty in the door. Those who are reacting recognize that this is a dangerous path, dangerous because so much has been built on a foundation of denial and half-truths. Unraveling contemporary manifestations of racism will, in fact, take us back to the genocidal policies of the earliest European settlers and the reality that we live, still, on Indigenous lands subjected to colonial occupation.¹⁰¹ Nonetheless, returning again to Okri, “if we refuse to face any of our awkward and deepest truths, then sooner or later, we are going to have to become deaf and blind. And then, eventually, we are going to have to silence our dreams, and the dreams of others.”¹⁰²

100. Lacy, *supra* note 98.

101. See generally DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (Oxford Univ. Press rev. ed. 1993); Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663 (2002).

102. OKRI, *supra* note 2, at 42.

