

# Michigan Law Review

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Volume 95 | Issue 4

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1997

## Foreword: "Racialism" and Reason

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### Recommended Citation

Frank I. Michelman, *Foreword: "Racialism" and Reason*, 95 MICH. L. REV. 723 (1997).  
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# FOREWORD: “RACIALISM” AND REASON

Frank I. Michelman\*

Clueless, I am not; but still I can wonder why I, of all people, was recruited to write a foreword for this symposium — sight unseen, before its component papers had even been submitted. Neither legal representation nor the teaching of it has ever been for me a main activity or focus of scholarly reflection. Although I have written occasionally about race — in defense of busing,<sup>1</sup> on the side of affirmative action<sup>2</sup> — no one could mistake me for a critical race theorist. I am the original-model imperial scholar,<sup>3</sup> as of last report only partially redeemed.<sup>4</sup> “Liberal” is the usual name for the brand of legal theorist I think I am and certainly intend to be. But isn’t “liberal” an opposite to “critical?” So what am I doing here?

Okay, I’m publicly certifiable as a liberal who’s been soft on critical race theory (CRT) — a liberal who for whatever reasons has been expressly receptive to some of the characteristic contentions of CRT<sup>5</sup> and strongly supportive of its place at the legal academic spread.<sup>6</sup> Still, why would anyone want to solicit for this space the kind of diplomatic hedging with CRT (or, worse, the sort of *no-lesse oblige* patronization of it) that you’d have to expect from such a compromised character? Ulterior motives are not beyond imagining: someone could be thinking to jack up the symposium’s cachet or circulation by getting my name on its cover. If so, lotsa luck.

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1. See Frank I. Michelman, *Boston, Busing and “Quality Education,”* NEW REPUBLIC, Oct. 26, 1974, at 8.

2. See Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.’s Constitutional Thought*, 77 VA. L. REV. 1261, 1290-306 (1991) [hereinafter Michelman, *Super Liberal*].

3. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 564-65 (1984).

4. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1360 n.38 (1992).

5. See Michelman, *Super Liberal*, *supra* note 2, at 1297-303; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 343-52 (1992).

6. See Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1023-24, 1051-52 (1991). I wrote a commendatory “blurb” for the back cover of *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

I lean to a different explanation for my invitation to be here: someone, I like to think, is pulling my chain. Someone got the idea that it would be interesting and fun to see what would happen if you took a bent-over-backwards liberal like me and locked him up (by a commitment to write a foreword) with a bunch of unvarnished calls to race-conscious social action that (someone thought) his liberal principles can't accept and his bleeding heart or PC reflex can't reject. Seems like a neat idea, too, although perhaps I'm not the one to say. Anyway, to find out how the guy's wheels come off — or maybe don't — read on.

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To my (I'm afraid, incorrigibly modernist) cast of mind,<sup>7</sup> what the essays in this symposium most significantly have in common is not any commitment of manner, method, or metatheory, manifest and important as such commitments are in them and in the larger CRT corpus. The central concern here, as I see it, is not narrativity or irony or deconstruction; not the social metaphysics of position, perspective, and the constructedness of consciousness (with related explanations of the persistent systemic effects of race in American life); not the nemesis of essentialism; and not even the issue of law's possible transcendence of politics or morality's of experience. These essays' most telling shared commitment, I find, is to a highly contentious proposition of moral substance, one that I shall call "the race proposition."

To my understanding, the contentious CRT race proposition comes down roughly to the following. (1) Race in America is both real and socially (including legally) constructed; it is a real social phenomenon of groups constituted by projected and correlatively experienced relations among their memberships of superiority and inferiority, patronage and clientage, privilege and disprivilege. (2)

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7. Eric Yamamoto locates critical race theory in "the tension between postmodernism, with its despairing unpacking of liberal legalism, and modernism, with its concepts of truth and justice that for people of color 'have always been both indispensable and inadequate.'" Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 829 (1997) (quoting Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 744 (1994)). Robert A. Williams, Jr., somewhat similarly juxtaposes "endorsement of the discourse of rights" with "exposure" of law's "legacy of . . . colonialism and racism," as pedagogical aims for a Critical Race Practice Clinic, although a question remains of the relation between the liberal-individualist "concepts of truth and justice" to which Yamamoto and Harris probably refer and the group rights of cultural preservation that are of especial concern to Williams. Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 762-65 (1997).

Those projections and relations and their material correlates are a grave affront to justice, against which legal actors — lawmakers, judges and jurors, legal advocates and counselors, teachers and scholars of law — morally ought to direct their practices, pragmatically (to that end) sometimes differentiating by race their responses to the situations and claims of the various groups and their members. (3) In the conduct of their (broadly speaking) public transactions, therefore, it is sometimes morally right (although it is also sometimes morally wrong, possibly depending on racial variables) for legal actors to advert consciously, in thought or in utterance, to the matter of race and to the racial identities of the population groups, parties, clients, students, and readers with whom they deal, not to mention of the self. “‘Race cognizance’ . . . becomes . . . an anti-racist strategy.”<sup>8</sup> (4) It is therefore morally wrong to demand that legal norms be tightly bound to an aim or ideal of colorblindness in the (broadly speaking) public or “civil” transactions of economy, society, and politics.

If you wanted an unendearing term for the CRT race proposition, would “racialist” do? Some leading race crits use this term specifically — and pejoratively, to name something to which they stand opposed — to mean us-against-them race-favoritism or race-loyalty.<sup>9</sup> In *The Bloods and the Crits*, a recent eye-opening caustic and, as the title conveys, supremely antagonistic review of CRT,<sup>10</sup> Jeffrey Rosen applies “racialism” less strictly, sometimes to CRT compendiously and directly<sup>11</sup> and sometimes to the alleged tendency of its teachings.<sup>12</sup> In Rosen’s usage, the term extends to advocacy of sometimes taking race expressly into account in determinations of how someone is to be treated or judged.<sup>13</sup> It also covers the urging of certain sociological claims from which that ad-

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8. Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 989 (1997). Cahn continues:

Through race cognizance, whites self-consciously recognize [that race makes a difference in people’s lives] . . . but do not believe that racial difference leads to inferiority. . . . [T]hinking carefully about the relevance of race need not lead to racism or essentialism.

*Id.*

9. See, e.g., Kimberlé Crenshaw et al., *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* at xxxi-xxxii (Kimberlé Crenshaw et al. eds., 1995) (opposing “racialism” among blacks while generally advocating anti-racist race-consciousness).

10. See Jeffrey Rosen, *The Blood and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27.

11. See *id.* at 28 (speaking of “the critical race scholars’ racialism”).

12. See *id.* at 31 (“Attacking racism, these scholars promote racialism.”).

13. See *id.* at 42 (contrasting the bad “racialism” of “[a]scribing the sympathetic attributes of victimhood to a defendant [in a criminal trial] because of his race” and the good “colorblindness” that justice commands).

vocacy proceeds: of persistent systemic racism in America<sup>14</sup> and of a gap between the perceptions of whites in general and blacks in general about many matters of race.<sup>15</sup> Now, “racialist” may *sound* like “racist,” but Rosen is scrupulous about the difference: although, in his view, “racialist” social analysis and advocacy are morally suspect because they tend to invite or accommodate injustice,<sup>16</sup> he is clear that not all racist talk is racist, apparently because not all such talk proceeds from conscious racial prejudice, hostility, or hatred. “Racialism” thus employed is nevertheless a danger to reasoned debate, always willy-nilly tending to insinuate what it denies. As Peggy Russell says of “playing the race card,” its use irresistibly tends to impugn the morality and good faith of “the ‘race-talking’ advocate.”<sup>17</sup>

Why do I call the race proposition the “most telling” commitment that the articles here, and by extension the works of the CRT corpus at large, have in common? Because I believe the deflation of colorblindness in which the race proposition issues is the factor fueling the fieriest opposition to CRT that I find in the liberal quarters I frequent. I take as exemplary Rosen’s *Bloods and Critics*.<sup>18</sup> Consider that essay’s stage-setting and tone-setting characterization of the CRT corpus: “Rejecting the achievements of the civil rights movement of the 1960s as epiphenomenal,” Rosen begins, “critical race scholars argue that the dismantling of the apparatus of formal segregation failed to purge American society of its endemic racism, or to improve the social status of African Americans in discernible or lasting ways.”<sup>19</sup>

“Reject?” “Epiphenomenal?” “Discernible?” I am sure that Rosen, who was not writing a scholarly tome, could and did find fairly citeable support in the CRT corpus before publishing that sentence. Yet I do not find the account very “nuanced” — to apply here the standard to which Rosen rightly holds his scholarly

14. See *id.* at 28 (apparently applying “racialism” to Judge Leon Higginbotham’s “analysis” of persistent systemic racism in the American legal system).

15. See *id.* at 30-31, 34 (applying “racialist” to the “descriptive claims of critical race theory . . . [of] a jarring gap in perceptions between whites and blacks”).

16. See *id.* at 30-34.

17. See Margaret M. Russell, *Beyond “Sellouts” and “Race-Cards”: Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 792 (1997) (discussing “playing the race card” and observing that “the not-so-subtle implication is that talking about race has turned into a matter of sophistry, gamesmanship, and hyperbole”).

18. See Rosen, *supra* note 10.

19. *Id.* at 27.

reviewees.<sup>20</sup> To my reading, race crits — who to be sure are no monolith — by no means prevailingly reject or belittle either the historical aims or the historic accomplishments of “formal” desegregation and the Movement. Rather they prevailingly honor them, embrace them, find to their anger and dismay that the country has failed to stay the course on which they launched us, and seek explanations for that fact that might eventually point a way to overcome it.<sup>21</sup> If so, then the real fighting issue between Rosen and CRT isn’t the apparent borderline lunacy of disparaging civil rights but rather the gross repugnancy to liberal ideals, as Rosen takes them to be, of CRT’s complexification of the relations among colorblindness, civil rights, and justice.<sup>22</sup> The liberal family quarrel (which you will repeatedly see surfacing in what follows) between Rosen’s reactions and mine, his readings and mine, might then be in some measure explainable by the fact that I, as I shall explain below, think he is in this instance mistaken about liberal ideals.

I don’t say that the colorblindness issue exhausts liberal objections to the scholarly methods and professions of CRT. With reason, in my view, many liberals plead for caution in the uses of “stories” (as opposed to just the facts, ma’am) in moral, political, and legal argument — or, worse, in place of it. Few, however, would deny either the power of frankly fictional stories to test and

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20. See *id.* at 28 (criticizing an author for “neglect [of] a great deal of countervailing evidence and . . . slight[ing] important nuances that might complicate his argument about the centrality of racism in American law”).

21. See Crenshaw et al., *supra* note 9, at xiii, xiv-xv (a volume listed among those under review in Rosen’s essay); Crenshaw and her co-authors observe:

Our opposition to traditional civil rights discourse is neither a criticism of the civil rights movement nor an attempt to diminish its significance. On the contrary, . . . we draw much of our inspiration and sense of direction from that courageous, brilliantly conceived, spiritually inspired, and ultimately transformative mass action.

Of course, colored people made important social gains through civil rights reform, as did American society generally . . . . The law’s incorporation of what several authors here call “formal equality” . . . marks a decidedly progressive moment in U.S. political and social history. However, the fact that civil rights advocates met with some success in the nation’s courts and legislatures ought not obscure the central role the American legal order played in the deradicalization of racial liberation movements. Along with the suppression of explicit white racism (the widely celebrated aim of civil rights reform), the dominant legal conception of racism as a discrete and identifiable act of “prejudice based on skin color” placed virtually the entire range of everyday social practices in America — social practices developed and maintained throughout the period of formal American apartheid — beyond the scope of critical examination or legal remediation.

*Id.*

22. “The prestige of color-blindness is diminishing in America, and not only among people of color. This is a disaster. For we will be blind to color or we will be blind to justice.” Rosen, *supra* note 10, at 42.

clarify moral and legal beliefs,<sup>23</sup> or, in a litigation setting, our utter dependence on narrative for the precipitation of normatively significant “facts” out of welters of sense-impressions and empirical reports. As for nonfictional stories in place of argument, what about *res ipsa loquitur* and the Brandeis brief?

Many liberals have their doubts, too, about the weight and effects in the United States now of “past” or “societal” discrimination, of “structural” or “institutional” racial hierarchy, and of “unconscious” racial prejudice or hatred. These may be fairly debatable questions, but if so they are debatable as matters of concept and fact that cannot in themselves be furious fighting issues for us denizens of the empire of reason. “Societal” and “structural” and “unconscious” racism are perfectly intelligible notions, and claims of their applicability to the United States now are not, I daresay, honestly dismissible out of hand as unreasonable or disingenuous: If you were to hear today at the water cooler about some ambiguously pigmented fellow, not of your acquaintance, who has been “passing” at your firm or faculty or company, would it occur to you to ask “as which race?” or to say that you simply couldn’t fathom his motives? For all his disparagement, as trans-factual, of CRT’s “central premise” that nonwhite lives suffer widespread harm from a denigratory race-consciousness that is “institutional and endemic,”<sup>24</sup> Jeffrey Rosen offers not the slightest rebuttal to the premise that I can see, beyond a ringing and risible declaration that the life of Judge Leon Higginbotham “refutes” it.<sup>25</sup> He offers instead the form of response that lawyers know as demur-and-avoid and others

23. A classic example for lawyers would be *Billy Budd*. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 2-6 (1975). This point is obscured by Rosen’s one-sided dispatch of storytelling:

Stories do not appeal to reason; they usurp it. Reasoned arguments depend on things such as truth, evidence, logic, objectivity and the rest of the anachronistic apparatus of the critical mind. Stories, by contrast, appeal to the heart. They are designed to edify, and to confirm the prejudices of a community of listeners. For this reason, stories are a primary instrument of identity.

Rosen, *supra* note 10, at 40.

24. See *id.* at 39.

25. See *id.* at 28. Compare *id.* at 39 (describing as from “a world that [has] transcended facts” the views that “racism is institutional and endemic” and that “there is no need to prove individual acts of intentional discrimination to establish that an African American . . . has been victimized by racism”) with Richard Delgado, *Rodrigo’s Thirteenth Chronicle: Legal Formalism and Law’s Discontents*, 95 MICH. L. REV. 1105, 1144 (1997) (“Formalism . . . makes you . . . recite things you know are not true — that racism exists only when it is intended . . .”). Rosen points to the willingness of American appellate courts to intervene against overtly racist acts. See Rosen, *supra* note 10, at 30. That is no answer to the CRT premise, which is, of course, precisely that of an institutional racism whose extent and effects far exceed the kinds of expression of it that colorblind law can remedy.

know as changing the subject: The premise of institutional racism carries normative and prescriptive implications at odds with liberal ideals of colorblindness and individual responsibility, and *for that reason* cannot be entertained in legal argument. And there, after all, is the point: I am myself right here and now entertaining the premise as a sociological theory. Whether my doing so draws liberal polemical fire down around my head will depend completely on whether I do or do not go on stoutly to add “but our Constitution, notwithstanding, is and ought to be colorblind.”

Denials of cogency to reasoned arguments in morals and law are something else. They would indeed pose direct threats to political and legal liberalism. They do not, however, explain the energy of a polemic like Rosen’s. Liberal thought truly cannot accommodate the view that questions of political and legal justice have no answers of reason and principle but only of desire and power. As a reader can doubtless tell, I (liberally) want to resist attribution of that view to CRT.<sup>26</sup> But my point for the moment is different: this “indeterminacy” issue is an old one. Liberal jurists have long contested it with nonrace critics and other adversaries. These days they tend to do so coolly, in elaborately philosophical ways.<sup>27</sup> It is hard to think that, decoupled from the race proposition, the late appearance of one more branch of academic legal indeterminism (assuming that is what CRT is) would have opened a hot new front in the culture wars.

We return, then, to the race proposition,<sup>28</sup> and now we should take the trouble to notice precisely the respects in which its claims are contentious. Advocacy of (some) race-consciousness in legal norms themselves — as opposed to in the civil transactions that legal norms aim to standardize — would not as such be contentious in American legal culture. Laws prohibiting express or intentional discrimination and segregation by race — by the government ever, and by anyone in various civil transactions — are race-conscious by any definition. Such laws make an issue of race. They cannot be

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26. Compare Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Criminal Defenses*, 95 MICH. L. REV. 1063, 1090 (1997) (“[T]he postmodern politics of normativity problematizes . . . moral aspiration. . . [Moral aspiration] must ‘presuppose that objectively correct answers exist and that there is an impartial position from which to distinguish legitimate from illegitimate uses of power.’”) (quoting Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEXAS L. REV. 523, 529 (1996)) with Delgado, *supra* note 25, at 1144 (“Formalism . . . makes you lie — profess beliefs, for example, in . . . [the law’s] internal consistency, and in the underlying coherence of contradictory platitudes.”).

27. See, e.g., Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996).

28. See *supra* text accompanying note 8.



applied without ascertainment of someone's race — or at least someone's belief about someone's race. They grant "special rights" against *race-based* gradings and sortings of individuals — as compared, say, with gradings and sortings based on law school attended, which also may be very arbitrary.<sup>29</sup> They are historically rooted in perceptions of injustice suffered especially by nonwhites and everywhere understood as interventions on the especial behalf of nonwhites although not their behalf exclusively.<sup>30</sup> Premised as they are on flat rejection of the possibility that separated could ever in the foreseeable future be equal in American civil society, responding as they thus do to entrenched social awareness of hierarchized racial differentiation, antidiscrimination laws may quite plausibly be held to contribute toward — even if they also in other respects work against — the normalization of race hierarchy in American life.<sup>31</sup>

Antidiscrimination laws are thus neatly "racialist," and they grant "special rights" to boot, and indeed these facts about them prompt objection to both their moral permissibility and their practical utility by critics whose sincerity and rationality in general I see

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29. Antidiscrimination laws depart from a default position of (1) a supposed normal freedom of people who are not public officials to select, judge, and grade those with whom they deal in civil and economic affairs on whatever grounds they find relevant to their desires and purposes, and (2) a supposed normal responsibility of public officials to judge and grade those with whom they officially interact on whatever grounds they rationally find relevant to the public's purposes. Consider a prosecutor who, knowing that black jurors are less likely than white ones to send a black man to jail, seeks to keep blacks off the jury that will try a black defendant whose guilt of criminal violence is definitely known to the prosecutor by a mountain of inadmissible but quite credible confessions and corroborating evidence. See *Batson v. Kentucky*, 106 U.S. 1712 (1986) (holding race-conscious juror challenges unconstitutional); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677, 689 (1995) (affirming the fact that black jurors are more likely than white ones to acquit black defendants).

30. This understanding applies to the equal protection clause itself, of course, as manifested by the Supreme Court's adoption of a "suspect classification" doctrine and its impulse, when deciding the "suspectness" of a legal classification such as sex, alienage, or "illegitimacy" to compare that classification with color. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) ("[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. . . . [I]t can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and . . . in the political arena."); cf. *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) ("[D]iscrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes."). But cf. Yamamoto, *supra* note 7, at 861 (writing of Justices who have "used America's multiracial demographics and the existence of interminority competition and conflict to transform whites . . . into 'just another group competing with many others'" (quoting Alexandra Natapoff, Note, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 *STAN. L. REV.* 1059, 1062 (1995))).

31. Cf. Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 *MICH. L. REV.* 901, 932 (1997) ("To be colorblind assumes that one notices race, but then 'chooses' not to notice it and can do so without the first noticing influencing the interaction.").

no reason to question.<sup>32</sup> Laws exceptionally excluding race<sup>33</sup> from the grounds on which we are free to select and grade and sort our civil-transactional partners are nevertheless overwhelmingly and unhesitatingly approved as right by American lawyers and the population at large. Evidently, most Americans believe that this much race-consciousness in the laws is required for the pursuit of justice in the public social, economic, and political transactions for which law sets the standard. Perhaps there is a touch of CRT in us all.

What is contentious is not acceptance by race critics of (some) race-consciousness within the law. What is contentious is their rejection of the pursuit by law of colorblindness in society outside the law — not as such but as a sovereign test for the rightness of all laws. Not rejection of the pursuit as such, because race critics stand unitedly and righteously opposed to allowing social and civic transactions *ever* to be guided by a presumption of someone's worth because white or defect because nonwhite, and many if not all of them rightly do so with absolute zero tolerance for ostensibly rational, experience-based, instrumental reasons for such conduct.<sup>34</sup> Their protest, then, must be against the overriding immorality of the conduct, no doubt in view of the human devastation that it wreaks. These theorists, in other words, while rejecting constancy in the pursuit of social-transactional colorblindness as an overriding requirement for legal norms, do not sweepingly reject a place for colorblindness in social transactions. Apparently it is not colorblindness *per se* that CRT rejects as a standard for social transactions — colorblindness in its place, as we might say — but rather refusals to consider race when to do so would serve justice.<sup>35</sup> As I say, the race proposition is one of moral substance.

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32. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 7-12 (1992).

33. It is no answer that they also dictate exceptions for nationality, ethnicity, sex, religion, and disability.

34. See Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 MIAMI L. REV. 127, 127-30 (1987); *supra* note 29. Would any race critic approve a prosecutor's use of peremptories against blacks as such? One might also consider the case of the affirmative-action appointee denied the presumption of ability that normally attends the fact of appointment to the post, see Williams, *supra* note 7, at 744, although the rationality of such denials is contestable, see Margaret Jane Radin, *Affirmative Action Rhetoric*, in *REASSESSING CIVIL RIGHTS* (Jeffrey Paul, Fred D. Miller, Jr. & Ellen Frankel Paul eds., 1991); Johnson, *supra*, at 1014-16.

35. See, e.g., Johnson, *supra* note 34, at 1052 (distinguishing justifiable affirmative action from "first order discrimination" against "people of color on the basis that they are biologically or culturally inferior to whites"); Russell, *supra* note 18, at 785 (questioning "an overly rigid adherence to notions of 'colorblindness' in lawyering strategy").

What is the logical status of the race proposition in CRT? Loose talk of “racialism” and “essentialism” could suggest to the unwary that race critics prevailingly see race loyalty or race favoritism as an unconditioned moral *a priori*.<sup>36</sup> They could seem to portray CRT as arbitrarily, and very peculiarly, starting with a platonic conception of a Good that requires a world replete with occasion for the exercise of racial attachments and loyalties — so that if the social phenomenon of race itself were to perish from the earth that would in the view of CRT be a moral catastrophe. But of course the CRT race proposition is not *a priori* or foundational but rather is an outcome of argument proceeding, as far as I can see, from an utterly banal precept of justice, to wit: neither social suffering nor indignity nor disadvantage nor their opposites ought in any measure to be dealt on the basis, or be predictable from the knowledge, of a person’s inferior or superior location in any hierarchy of whatever society constructs as race.

Now, if race-linked privilege is any essential part of your complaint, then inducement of the perishing or deflation or “destabilization” or “deconstruction” of race itself must logically qualify as a remedy.<sup>37</sup> Within the corpus of CRT, I see neither prevailing hostility to such a remedy nor, *pace* Rosen, prevailing rejection of it as impossible.<sup>38</sup> I see what appear to be representative instances of receptivity to the remedy in principle<sup>39</sup> and the positive pursuit of it in scholarship.<sup>40</sup> I do, of course, also see insistence that it’s not that easy; that it won’t soon be wrought in any case, and never under ideologized prohibition of conscious and deliberate reference to race from the legal and civil transactions of judges and

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36. See Rosen, *supra* note 10, at 30 (“The view that blacks experience racism as normal rather than exceptional leads some critical race scholars to a vulgar racial essentialism. The daily experience of racism, they hold, leads blacks to perceive particular events in American law and culture differently than whites, and so those who dissent from the black perspective are not really black. Attacking racism, these scholars promote racialism. Perhaps the thrall of essentialism helps to explain the vehemence of Higginbotham’s obsessive attacks on Justice Clarence Thomas . . .”).

37. See Johnson, *supra* note 34, at 1048, 1042 (speaking of “the destabilization of racial identity” that, “if achieved, can eliminate existing racial identities and any impermissible benefits that flow from existing patterns of racial domination”).

38. Cf. Rosen, *supra* note 10, at 27 (“The claim that these scholars make is not only political; it is also epistemological. Our perception of facts, they maintain, is contingent on our racially defined experiences; and, since the white majority can never transcend its racist perspectives, formally neutral laws will continue to fuel white domination. The prevailing mood is fatalism.”).

39. See, e.g., Butler, *supra* note 29, at 725; Crenshaw et al., *supra* note 9, at xxxi-xxxii (opposing expressly both “racialism” and “essentialism”).

40. See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 30-31, 33, 176, 187-88, 194-95 (1996); Johnson, *supra* note 34, *passim*.

juries, advocates and counselors, and teachers and scholars of law; and — the crucial bone of contention — that in the American present such a prohibition, a pretense to the dissolution of race without the reality of it, is itself on balance a net contributing cause to daily injustice and its reproduction.

Some CRT sources contain calls to the defense and preservation of Black or African-American culture.<sup>41</sup> These seem no more fairly attackable as “racialist” than the Saint Patrick’s Day parade. Shall we invoke “the wages of racialism”<sup>42</sup> as a reason to deny to American Africanists what is cheerfully permitted to American cultural nationalists of every other description? Would that be the implication of judicial holdings that race in particular (but compare party, machine politics, incumbent-protection, cultural likeness) can never be a noticeably influential factor in legislative districting?<sup>43</sup> The sources also contain grapplings with wrenching questions: of the choice by criminal defense counsel to use or not use “racialized” defenses that may procure an acquittal at the cost of conspiring in justice-disserving social constructions of race;<sup>44</sup> and of the special obligations of blacks in the legal system to consider race in the pursuit of justice.<sup>45</sup> Here we find Paul Butler’s much-publicized proposal that black jurors in particular ought in certain circumstances to acquit black accuseds who appear to them to be guilty as charged beyond a reasonable doubt.<sup>46</sup>

Like Jeffrey Rosen, I react negatively to Butler’s proposal. Not, however, because it dares to conceive of justice and of America in ways that could possibly warrant race-conscious jury nullification in some cases. My problem is that Butler’s call for such action is addressed specifically and apparently only to blacks. By contrast, both Anthony Alfieri and Naomi Cahn, in their essays below, support an “ethic” or “responsibility” of race-consciousness in legal advocacy without reference to the advocate’s race. If there are considerations of justice in support of race-conscious jury nullification, why would they not be valid for jurors of all races? Butler does not say. The omission is important, because it invites —

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41. See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* in CRENSHAW ET AL., *supra* note 9, at 257, 271-72; Johnson, *supra* note 34, at 1044-50.

42. Rosen, *supra* note 10, at 34.

43. Cf. *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

44. See Alfieri, *supra* note 26; Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1307-08 (1995); Cahn, *supra* note 8, at 995-98.

45. See, e.g., Cahn, *supra* note 8, at 993-95; Russell, *supra* note 17, at 785-88.

46. See Butler, *supra* note 29.

although it certainly does not necessitate<sup>47</sup> — a reading of his article as a call to race loyalty, which is not the same thing as a call to justice.

On what possible grounds might one take issue with the CRT race proposition, understood as a call to justice? I am supposing that one accepts the banal precept of the absolute moral intolerability of race-linked social privilege and disprivilege. In order, then, to reject the CRT race proposition you might: (1) deny that in our country now there is any such thing to speak of, or (2) maintain that a combination of laws and social pressures against express or intentional race-based discrimination can adequately control the cyclical reproduction of materially consequential, racially constructed privilege and disprivilege. I do not myself see how anyone's unshaken confidence in either of those contentions can withstand honest engagement with the corpus of CRT.<sup>48</sup> Informed, impassioned, liberal opposition to CRT must draw from a further apprehension of something positively abhorrent in CRT's partial rejection of colorblindness in legal and civil transactions. Something, I mean, on the order of an intolerable clash between such a rejection and liberally uncompromisable principles of political justice and right.

What principles? Jeffrey Rosen cites the naked principle of civil-transactional colorblindness itself, apparently regarded as an unconditioned liberal *a priori*.<sup>49</sup> He also cites the principle of the rule of law.<sup>50</sup> Invocations of the rule of law against CRT can have multiple meanings. They may refer to the nonneutrality — the outright partialism — of CRT's stance toward colorblindness: being nonwhite is not allowed to count against you ever, but sometimes it can count in your favor, even in competition with whites. To invoke against that stance the need for ruleness and "principle" in the law is obviously to beg the question of the moral apriorization of colorblindness itself. Racially partialist deviation from colorblindness is *lawless* only because and insofar as the law prohibits it, which is just what CRT is contesting; but a law permitting such deviation would not on that account alone be *unprincipled*, except in the possible sense in which "unprincipled" means unjust — to assert which

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47. See *id.* at 725.

48. In the following collection, see especially Dorothy Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

49. "The prestige of color-blindness is diminishing in America, and not only among people of color. This is a disaster. For we will be blind to color or we will be blind to justice." Rosen, *supra* note 10, at 42.

50. See *id.* at 27.

would be tantamount to equating justice *a priori* with colorblindness in the law.

What logic could possibly warrant such an equation? Legal colorblindness has, to be sure, the perfect form of a practical principle (that is, a principle respecting what is to be done). Obviously, however, not all formally perfect practical principles are consonant with justice. That could not be, because there are limitless numbers of formally conceivable practical principles, that can conflict in their applications to a context or state of affairs. A principle that would, in some proposed application to a given context, defeat a conceded principle of justice for that context cannot itself be a principle of justice as thus applied in that context.<sup>51</sup>

Now, CRT has an *argument* that such is indeed the case with the principle of colorblindness as relentlessly applied to the American social context. Its application in that way, the argument runs, defeats the precept of justice — to repeat it — that neither social suffering nor indignity nor disadvantage nor their opposites ought in any measure to be dealt on the basis, or be predictable from the knowledge, of a person's inferior or superior location in any hierarchy of whatever society constructs as race. That right there is a *principle*, folks, in case you hadn't noticed. It is also the moral major premise of an argument *contra* colorblindness. Reject the premise if you will. Or show the falsity of some other premise in the argument, such as the sociological premise of systemic racism — the *falsity*, not the inferential obnoxiousness to some conclusion you favor. Or find some fault in CRT's chains of inference from the premises to the anti-colorblindness conclusion.<sup>52</sup> Those are the only ways in all liberal reason to defeat an argument you do not like; it's just not done by nakedly reviling the conclusion.<sup>53</sup>

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51. In other words: Stanley Fish was right when he said toward the end of his recent Op-Ed that the choice posed by affirmative action "is not between the principled and the non-principled. It is between [so-called] neutral principles, which refuse to acknowledge the dilemmas we face as a society, and moral principles, which begin with an awareness of those dilemmas and demand that we address them." Stanley Fish, *When Principles Get In The Way*, N.Y. TIMES, Dec. 26, 1996, at A15. Fish began that same Op-Ed by making "principle" unmodified the culprit because, he said, "a principle scorns actual historical circumstances and moves quickly to a level of generalization and abstraction so high that the facts of history can no longer be seen." *Id.* Wrong. Only bad or inept principles do. Good "moral" ones do not. Fish knows this, and said so before he was done.

52. Cf. Shelby Steele, *Indoctrination Isn't Teaching*, N.Y. TIMES, Jan. 10, 1997, at A33 (accepting premise of systemic racism but rejecting inference that teaching Ebonics is a good idea).

53. You can use the repugnancy of the conclusion to force reconsideration of the premises — see, for example, JOHN RAWLS, *A THEORY OF JUSTICE* 46-53 (1971) (explaining "reflective equilibrium") — but in the end the conclusion sticks if the premises do and you find no fault with the logic.

There is, however, another less formal and more formidable way to understand liberal invocations of “the rule of law” against CRT. The more formidable charge is that CRT or some of its adherents, specifically through dalliance with the indeterminist school of legal criticism, attacks and corrodes the rule of *democratic* law — or, in other words, the general willingness of aggrieved fractions of the American population to seek relief within and not outside the channels of peaceful democratic politics and honest judicial enforcement of whatever legislation results. At stake in this charge are values of the utmost concern to liberalism: a nonoppressive civil peace, the maintenance or restoration of minimally acceptable levels of civil respect and other goods of political community and harmony, general confidence that basically fair terms of social cooperation among conflicting interests and visions are pursued and upheld in good faith, and, ultimately, the stability of a political regime that in its fundamentals is deemed to be morally worth saving.

Jeffrey Rosen understandably believes that these values are placed under strain not only by calls to black jurors, as black, to take the law into their own hands but also — although perhaps not in every instance nearly so severely — by calls to us all for any sort of ostensibly “reverse-discriminatory” practice in the law. That belief is no more reasonably dismissible out of hand than the claim of systemic racism. Systemic racism is not, after all, the only sociological fact that there is. The sincere, convinced embrace by many of the commanding morality of colorblindness is another.

Lacking both wisdom and space to deal adequately with this issue, I confine myself to one aspect of it. Rosen traces to a specific cause what he sees as the willingness of some theorists to risk with “racialist” advocacy the future of democracy’s rule in America. The cause, in his view, lies in the kind of antiliberalism that consists in repudiation of the possibility of there being any sort of political and legal rule that is not just a disguised play of arbitrary power. I believe, to the contrary, that the problem has its roots not outside liberal thought but within it.

A political regime, liberals say, is constituted by the fundamental laws that fix its “constitutional essentials” — charter its popular-governmental and representative-governmental institutions and offices and define and limit their respective powers and jurisdictions.<sup>54</sup> Among the contents of the fundamental laws that constitute a political regime may be an entrenchment of certain

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54. See JOHN RAWLS, *POLITICAL LIBERALISM* 227-28 (1993).

rights of persons against ordinary lawmaking. Any such enumeration of entrenched human rights — and by “enumeration” I of course mean to include major interpretations such as that of “the equal protection of the laws” to mean colorblind law — is likely at any time to be deeply and reasonably controversial within the population. You can find examples all over contemporary constitutional law.

The endemic controversy of basic-rights entrenchments and interpretations points to a more general truth: Any established political order, constituted by a set of fundamental laws, contains an irreducible element of coerciveness vis-à-vis what liberalism holds to be the ideally and primordially free, autonomous, and equal individuals within range of its authority. Liberals accordingly say that in order for this coercion to comport with justice, it must at least be the case that everyone concerned has true reasons of his or her own, whether or not consciously held, for agreeing to its terms — reasons that everyone *would* discover themselves to have in a wide and general reflective equilibrium,<sup>55</sup> reasons that are *objectively* consonant with everyone’s system of interests (including interests they presumptively have in fair and peaceful social co-existence or cooperation with others), or that are in accord with what everyone *would* agree to, according to their understandings of their interests, in the light of a truly democratic debate.<sup>56</sup>

Now suppose we shift slightly the question under consideration. From the question — call it the question of justice — of a given regime’s actual consonance with justice in the liberally defined sense of everyone’s having reason of their own to agree whether they know it or not, we move to the question — call it the question of legitimacy — of the moral justifiability of supporting the regime, including its coercive apparatus, in the face of actual unliquidated disagreement among individuals and population groups about whether the regime really does satisfy justice. These two questions are obviously related in some way, but they are not identical, or at any rate liberals had better hope that they are not.

That is because of what I shall call (in the manner of John Rawls) the fact of reasonable interpretative pluralism — the fact, that is, of inevitable irresolvable uncertainty and irreparable reasonable disagreement among inhabitants of a modern country about the entrenchments and interpretations of human rights that

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55. See *id.* at 8, 28, 95-97.

56. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 107, 447-48, 459, 566 n.15 (1996).



justice truly requires in the country's historical circumstances.<sup>57</sup> If we strictly followed Rawls, we would take reasonable interpretative pluralism to be one of those social facts — Rawls calls them “circumstances of justice” — that bear crucially upon people's reasons for agreeing or not to one or another set of public practical norms and thereby affect the very content of justice.<sup>58</sup> But, I want to suggest, the fact of reasonable interpretative pluralism cuts deeper. This fact makes nondemonstrable by public reasoning any authoritative truth about what it is that everyone has reason to agree to in the matter of legal human-rights entrenchments and interpretations. It doesn't make truth in this matter *philosophically* unavailable, or beyond reasoned argument, or just a matter of opinion or desire or power; it makes it *politically* unavailable among people who, aware of human frailty and “the burdens of judgment,” all sharing belief that there is a truth of the matter, can neither all agree on what that is nor dismiss as unreasonable their opponents' positions.<sup>59</sup> The fact of reasonable interpretative pluralism thus opens a gap between the question of justice and the question of legitimacy, of what it would be morally right or justifiable for anyone to be doing about this matter of political coercion. What is more and what is worse, liberals by affirming reasonable pluralism present themselves with the possibility that there is no answer at all to the question of what it would be right for anyone or any society to be doing about this matter — or, in other words, that nothing that is done about it can be right or morally justifiable, that all there can be is facts of power. This is precisely what John Rawls calls “the problem of political liberalism.”<sup>60</sup>

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57. On “the fact of reasonable pluralism,” see RAWLS, *supra* note 54, at 36-37.

58. See *id.* at 66. The fact of reasonable pluralism, for example, gives people reasons for accepting entrenched norms of toleration that they might not otherwise have.

59. John Rawls calls “burdens of judgment” the causes of unliquidatable disagreement about justice among persons who, as reasonable, all observe and report honestly, argue cogently, and share a “desire to honor fair terms of cooperation.” RAWLS, *supra* note 54, at 55. Among the causes he posits is the following:

To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total [life] experience, . . . and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.

*Id.* at 56-57. Compare Jeffrey Rosen's rejection, as fantasy-world and as “vulgar essentialism,” of claims that “the daily experience of racism . . . leads blacks to perceive particular events in American law and culture differently than whites” and that “our perceptions of facts is racially contingent.” See Rosen, *supra* note 10, at 30-31.

60. See RAWLS, *supra* note 54, at xviii.

For liberals, this grim conclusion must be avoidable. But how do we escape it? If we can, it can only be by our being able to identify some possible attribute in a currently prevailing set of human-rights entrenchments and interpretations, *other than the reasonably contested attribute of actual congruence with justice*, that could underwrite the moral justifiability of acts in support of a coercive political regime that contains this set of entrenchments and interpretations. But then what could this other attribute be?

One might liberally think that acts in support of a prevailing set of human-rights prescriptions are morally justified as long as there is something about the set in virtue of which everyone is able to observe and abide by what it contains, not just out of desire to avoid legally administered punishment or loss but also out of consciously held "respect for" the interpretations.<sup>61</sup> There would, then, have to be at least one possible fact about a set of human-rights prescriptions that would make it possible for everyone to observe the interpretations out of respect for them, without regard to any adverse institutional consequences of nonobservance. Public and certain knowledge that the set of interpretations accords with justice is not a possible such fact if reasonable interpretative pluralism is true. I am aware of only one other possibility. A possible characteristic of the regime, in virtue of which everyone subject to it could abide by it out of respect for it, is that the regime's human-rights prescriptions are in some way made continuously accountable to truly democratic critical re-examination that is fully receptive to everyone's perceptions of situation and interest and, relatedly, everyone's opinion about justice.<sup>62</sup>

Notice, though, that a response in this form to someone demanding justification for your support of a given constitutional regime, including a contested set of human-rights prescriptions, can never be complete. A "truly democratic" process is itself inescapably a legally conditioned and constituted process. It is constituted, for example, by laws regarding political representation and elections, civil associations, freedom of speech, property, access to media, and so on. Thus, in order to confer legitimacy on a set of laws issuing from an actual set of discursive institutions and practices in a country, those institutions and practices would themselves have to

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61. See HABERMAS, *supra* note 56, at 447-48.

62. For extended discussions of various possible grounds for attributing such a legitimating virtue to democracy, see Frank Michelman, *Democracy and Positive Liberty*, BOSTON REV., Oct.-Nov. 1996, at 3; Frank I. Michelman, *Must Constitutional Democracy be "Responsive?"* 107 ETHICS (forthcoming July 1997).

be legally constituted in the right way. The laws regarding elections, representation, associations, speech, property, etc., would have to be such as to constitute a process of more-or-less "fair" or "undistorted" democratic political communication, not only in the formal arenas of legislation and adjudication but in civil society at large.

The problem is that whether they do or not may itself at any time become a matter of contentious but reasonable disagreement, according to the liberal premise of reasonable pluralism. Such disagreement, if not honestly and effectively addressed, could lead pretty directly to just the sort of ominous decay of legitimacy that Jeffrey Rosen observes. The deepest premises of liberalism predict that possibility, with no help needed from any barbarians at the gate. Liberalism, in other words, can be a coherent political philosophy — if you take it as a challenge and not a catechism.