
Derrick Bell's
Enduring
Education
Legacy
"Covenant Keeper"
GLORIA LADSON-BILLINGS & WILLIAM F. TATE
Editors

Although he spent his career as a lawyer and law school professor, Derrick Bell had a profound impact on the field of education in the area of educational equity. Among many accomplishments, Bell was the first African American to earn tenure at Harvard Law School; he also established a new course in civil rights law and produced what has become a famous casebook: *Race, Racism, and American Law*. A man who could rightly be called "The Father of Critical Race Theory," Bell was an innovator who did things with the law that others had not thought possible. This book highlights Bell's influence on a number of prominent education and legal scholars, first identifying some of Bell's work and then illustrating how these scholars have used it to inform their own thinking and practice. What is contained here is an assemblage of contributors with deep commitments to the path-breaking work of Derrick Bell—a scholar, a teacher, an activist, a mentor, and a covenant keeper.

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“Covenant Keeper”

sj Miller & Leslie David Burns
GENERAL EDITORS

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Edited by Gloria Ladson-Billings
and William F. Tate

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Foreword

Critical What What?

DEVON W. CARBADO*

On November 3, 2010, I had the pleasure and honor of delivering the fifteenth annual Derrick Bell Lecture on Race in American Society at New York University School of Law. The event was all the more special to me because it coincided with Professor Bell's eightieth birthday. Little did I know that this would be the last birthday he would celebrate. In 2011, Derrick Bell died. Less than a year after delivering a lecture in his name and presence I was in New York attending a memorial service that beautifully captured and honored the multiple dimensions of his life.

Like all memorial services, Bell's was a difficult one to attend. For no matter how much I told myself that this was a moment in which to commemorate Bell's life, it was also, quite clearly, a moment to mark his departure. This endemic feature of memorial services—that they call upon us to both celebrate life and come to terms with death—is precisely why these services inevitably engender sadness and joy, solemnity and humor, prayer and music.

And, yet, I knew I had to go. My commitment in this regard was not first and foremost about paying my respects to the exemplary and courageous life Professor Bell had lived. There were other ways I could do that. My decision to attend derived from my sense that the memorial service would be a window on facets of Professor Bell's life about which I knew very little. Death is paradoxical in that

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way. The rituals through which we process death are, quite typically, revelatory biographies of our life.

And so it was with Bell's memorial service. It composed a wonderful picture of his life—the multiple ways in which he performed civil rights, the multiple people with whom he had forged bonds, and the multiple contexts in which his presence—his life—had been felt.

The service also revealed that, even in death, Professor Bell could build a community that transcended and opened up boundaries. Which is to say, the community of people Bell brought together on that day did not otherwise exist as a formation. Bell's death brought that community of people to life.

Eleven months earlier, none of the foregoing was on my mind. Derrick Bell was very much alive. And, his email invitation to me to deliver the Bell Lecture was awaiting my response.

Of course, I could not say no. Nor did I want to. I was deeply honored that he had asked.

But, I was also in a state of worry. More precisely, I felt at least a little bit over my head. To say that Professor Bell helped to found Critical Race Theory (CRT) understates the case. For quite some time his work defined the movement. Moreover, as the CRT literature grew inside and outside of legal discourse, Professor Bell's scholarship helped to chart the multiple trajectories along which the theory would travel. What, then, could *I* possibly say to shape the thinking of a man whose thinking formed and shaped the development of CRT?

Professor Bell wanted to know that as well, though in an altogether different sense. In a series of email exchanges we discussed the areas I might cover in my talk. His engagements with me were not about policing the boundaries of the lecture; there was no litmus test that I had to pass. Nor were those exchanges a kind of interview in which I had to prove to Professor Bell that he had not made a mistake in inviting me to give the lecture. Instead, our discussion reflected a genuine interest on Professor Bell's part in ascertaining the subject matter on which my lecture would be based.

I did not know before writing this Foreword that I kept my email exchanges with Professor Bell. With the permission of Janet Dewart Bell, Professor Bell's widow, I reproduce portions of those emails below. Before doing so, a little context is in order.

When I received the invitation to deliver the lecture I had been working on a book with Mitu Gulati that attempted to pull together some of our work on race as a performative identity. The basic idea is that people experience discrimination based not only on phenotypic markers of race (such as facial features and skin tone) but on performative dimensions of race (such as accent and demeanor). We called our approach a "working identity" theory of race and, in the introduction of our book, we articulated ten implications of our general thesis.

1. Discrimination is not only an inter-group phenomenon, it is also an intra-group phenomenon. We should care both about employers preferring whites over blacks (an inter-group discrimination problem) and about employers preferring racially palatable blacks over racially salient ones (an intra-group discrimination problem).
2. The existence of intra-group discrimination creates an incentive for African Americans to work their identities to signal to employers that they are racially palatable. They will want to cover up their racial salience to avoid being screened out of the application pool.
3. Signaling continues well after the employee is hired. The employee understands that she is still black on stage; that her employer is watching her racial performance with respect to promotion and pay increases. Accordingly, she becomes attuned to the roles her Working Identity performs. She will want the employer to experience her Working Identity as a diversity profit, not a racial deficit.
4. Working Identity requires time, effort, and energy—it is work, "shadow work." The phenomenon is part of an underground racial economy in which everyone participates and to which almost everyone simultaneously turns a blind eye.
5. Working Identity is not limited to the workplace. Admissions officers can screen applicants based on their Working Identity. Police officers can stop, search, and arrest people based on their Working Identity. The American public can vote for politicians based on their Working Identity. Here, too, there are incentives for the actor—to work her identity to gain admissions to universities, to avoid unfriendly interactions with the police, and to gain political office.
6. Working Identity is costly. It can cause people to compromise their sense of self; to lose themselves in their racial performance; to deny who they are; and to distance themselves from other members of their racial group. Plus, the strategy is risky. Staying at work late to negate the stereotype that one is lazy, for example, can confirm the stereotype that one is incompetent, unable to get work done within normal work hours.
7. Working Identity raises difficult questions for law. One can argue that discrimination based on Working Identity is not racial discrimination at all. Arguably, it is discrimination based on behavior or culture rather than race. Therefore, perhaps the law should not intervene. And even assuming that this form of discrimination is racial discrimination, it still might be a bad idea for the law to get involved. Do we really want judges deciding whether a person is or isn't "acting white" or "acting black"—and the degree to which they might be doing so? It is difficult to figure out what role, if any, law should play.

8. Working Identity transcends the African American experience. Everyone works their identity. Everyone feels the pressure to fit in, including white heterosexual men. But the existence of negative racial stereotypes increases those pressures and makes the work of fitting in harder and more time consuming. African Americans are not the only racial minority that experiences this difficulty, though our focus in the book is primarily on this group.
9. Nor is race the only social category with a Working Identity dimension. Women work their identities as feminine or not. Men are expected to act like men. Gays and lesbians are viewed along a continuum of acting straight or not. Racial performance is but part of a broader Working Identity phenomenon.
10. We all have a Working Identity whether we want to or not. Working Identity does not turn on the intentional, strategic behavior of the actor. An employer might perceive an African American as racially palatable even if that person does not intend for the employer to racially interpret her in that way. Irrespective of strategic behavior on the part of the employee, the employer will racially judge her based not only on how she racially looks but also on how the employer perceives her to racially act.[1]

I told Professor Bell that I was going to employ Barack Obama's experiences as president of the United States to explore some of the foregoing issues. Our email correspondence then included, among other exchanges, these:

Professor Bell: *It is so easy to be disappointed that Obama is not speaking out more strongly against his enemies and ours, but then most of us don't do that in our far less important interactions and confrontations with our white faculty colleagues.*

Me: *I think you are right that, in some sense, it's easy to critique Obama. At the same time, it's actually quite hard. There is a kind of closing of ranks in which I confess I sometimes participate. At any rate, my talk will not be a critique of him. It is more about some of the challenges the current moment presents.*

Professor Bell: *Trying to place Obama in his role as president is somewhat like trying to place Jackie Robinson in his first few years in the majors when he took all manner of abuse and kept focusing on the game he played so well. Jackie knew he could play the game. I sometimes fear that Barack is not always sure what game he is playing and were I in his place, I would not know either.*

There is so much humility in Professor Bell's words. As some of you might know, Professor Bell was not always pleased with the way in which President Obama manifested his racial commitments. At the same time, Bell wanted to make clear that, in some ways, President Obama was too easy a target. His point was not that we should eschew criticizing the president. Remember: Professor Bell led a life in

which he insisted on confronting authority.[2] Bell's point was that we should hold ourselves, and not just President Obama, accountable. He was urging us to bring our politics home—to "our white faculty and colleagues." Bell understood that politics was not simply "out there" (in, for example, the domain of presidential governance); politics was also "right here" (in, for example, the domains of personal, social, and workplace life).

There is another sense in which Bell's words reflected humility: the due regard he gave to the existential weight of being the first black president. Recall that Professor Bell "would not know" "what game" to play were he president of the United States. His view in this respect was neither apologia for President Obama nor a claim that being the first black president necessarily entails an abdication of one's racial justice responsibilities and commitments. Instead, Professor Bell meant to highlight the enormous constraints—the racial "push" and "pull" factors—under which President Obama undoubtedly operates and raise a question mark about how he (Bell) would negotiate those constraints.

As emails often do, ours eventually trailed off. We moved from the thorny issue of race and Obama to small talk about mutual friends and colleagues. We agreed to stay in touch.

As the date for the lecture neared, we began corresponding again. I do not recall how we got to the title of my presentation. (Regrettably, those emails I do not have.) I do recall telling Professor Bell what I had in mind for the title: *After Obama: Three Post-Racial Challenges.* Bell's response was succinct and pointed: "Do you intend to put post-racial in scare quotes? America is not post-racial."[3]

The truth of the matter is: I had not intended to put post-racial in scare quotes. From where I sat, it went without saying that the United States was *not* post-racial. Surely, Professor Bell knew that I knew that.

However, Bell's intervention was not about what I knew. It was about whether the title of my lecture (at least implicitly) legitimized the ideas around which post-racialism was being organized—including the twin claims that racism was largely a thing of the past and that Obama's presidency proved—once and for all—that the nation had racially overcome. Presumably, Professor Bell was thinking that, against the backdrop of the near normalization of post-racialism as the discourse through which people were beginning to describe and think about American racial politics, it was ideologically dangerous to employ the term without simultaneously interrogating it. Scare quotes were a way of performing that interrogation.

As you might have surmised, I changed the title along the lines Professor Bell suggested. (If only all the feedback I got on my work was that easy to incorporate.) I also changed the title of the book on which the lecture was based. There, too, I interrogated post-racial with scare quotes. Now, every time I see the title—*Acting White?Re-thinking Race in "Post-Racial America"*—I think about Professor Bell. It

is a subtle reminder of the vigilance with which he pursued racial justice—down to the very last scare quote.

***

Covenant Keeper: Derrick Bell's Enduring Education Legacy is a more robust and capacious reminder of Professor Bell and his commitment to racial justice. The terrain this book covers is truly remarkable. This should not surprise us. After all, its editors, Gloria Ladson-Billings and William F. Tate, are leading figures in the field on CRT and education, and each of the contributors has written terrific articles in the area. Moreover, the call for the symposium that became the basis for *Covenant Keeper* asked the participants "to select a book, article, chronicle, concept, or principle by Professor Bell that has had direct impact on their work." This call was profoundly generative. It produced a set of engagements with Derrick Bell's work that expands the CRT canon.

The chapters in this book include close readings of: Bell's theory of interest convergence, his structural approach to education, his profound understanding of race as a social construction, his deployment of double jeopardy and intersectionality, his perceptive analysis of legal doctrine, his utilization of narratives and chronicles, and his deep investment in pedagogy and activism.

There is much that I could say about each of the chapters. But this is not a moment for me to be prolix. Besides, Professors Ladson-Billing's and Tate's introduction summarizes and contextualizes each essay. What I will say is that reading the chapters will give you a sense not only of the breadth and depth of CRT in the field of education but also of the breadth and depth of Bell's scholarly agenda, including the interdisciplinary nature and impact of his work.

Given the scope of Bell's work, and the reach of CRT across the disciplines, one might think that that the theory is uncontroversial and well understood. One would be wrong to so conclude. More than 38 years after the publication of Bell's now classic and foundational text, *Race Racism, and American Law*, and more than two decades after the establishment of Critical Race Theory (CRT) as a clearly defined intellectual movement, defining oneself as a Critical Race Theorist can still engender the question: critical what what? When asked, the inquiry is not just about the appellation, though this is certainly part of what engenders the question. For example, when my colleagues and I proposed the establishment of a Critical Race Studies specialization at UCLA School of Law more than a decade ago and mobilized the work of Derrick Bell, among others, to do so, the only push back we got was over the name.

Why Critical Race Studies? Why not Civil Rights? Race and the Law? Anti-Discrimination Studies? Ultimately, we succeeded in persuading our faculty that it made sense for us to trade on and signal a connection to an intellectual movement of which several of us considered ourselves a part and that Derrick Bell helped

to found. But the episode suggested that there was something in and about the name. By any other name, our faculty meeting on the matter would have been considerably shorter. To borrow from George Lipsitz, our engagement with our colleagues about this particular institutional naming was a moment of "organization learning."[4]

This should not lead one to conclude that the "Critical what what?" question is only about the name. The query is about the whatness (or, less charitably, the "there there") of CRT as well. What is the genesis of CRT? What are the core ideas? What are its goals and aspirations? What intellectual work does the theory perform outside of legal discourse? What are the limitations of the theory? What is its future trajectory?

This foreword takes up the foregoing questions. I do so because it is critically important that a book that honors Derrick Bell situate his work with respect to the body of literature it helped to produce. As will become clear, my analysis will be decidedly incomplete. Accordingly, you should read this foreword more as a gesture towards answering the questions I raised about CRT than as a definitive answer to them.

One might start by saying that CRT rejects the standard racial progress narrative that characterizes mainstream civil rights discourse—namely, that the history of race relations in the United States is a history of linear uplift and improvement. Of course, America's racial landscape has improved over time, and CRT scholars should be ready to point this out. The problem with the racial progress narrative, however, is that it elides what one might call the reform/retrenchment dialectic that has constituted America's legal and political history.[5]

Consider the following three examples: (1) the end of legalized slavery and the promulgation of the Reconstruction Amendments (the reform) inaugurated legalized Jim Crow and the promulgation of Black Codes (the retrenchment); (2) *Brown v. Board of Education*'s dismantling of separate but equal in the context of K–12 education (the reform) was followed by *Brown II's* weak "with all deliberate speed" mandate (the retrenchment); (3) Martin Luther King, Jr.'s vision of racial cooperation and responsibility, which helped to secure the passage of the Civil Rights Act of 1964 (the reform), was re-deployed to produce a political and legal discourse that severely restricts racial remediation efforts: colorblindness (the retrenchment). A linear narrative about American racial progress obscures this reform/retrenchment dynamic.

Nor do racial progress narratives make clear that the episodes we celebrate today as significant moments of racial reform (e.g., *Brown*) were moments of national crisis, moments that contested what Lani Guinier has called the "tyranny of the majority,"[6] counter-majoritarian moments, moments preceded by mass political mobilization. Far from reflecting national harmony in which the country as a whole agreed that racial change was in order, racial reform typically has occurred when the equality interest of people of color converges with the interest

of powerful elites; and "even when the interest convergence results in an effective racial remedy, that remedy will be abrogated at the point that policy makers fear that the remedial policy is threatening"[7] to the dominant social order. This, of course, is Derrick Bell's theory of interest convergence, which he offers as an explanation for the reform/retrenchment dynamic I have described. The broader point is that one of CRT's key claims is that racial reform and racial retrenchment are defining aspects of American law and politics.

In addition to rejecting the civil rights linear racial progress narrative, CRT repudiates the view that status quo arrangements are the natural result of individual agency and merit. We all inherit advantages and disadvantages, including the historically accumulated social effects of race. I call this "racial accumulation." Racial accumulation is the economic (shaping both our income and wealth),[8] cultural (shaping the social capital upon which we can draw),[9] and ideological (shaping our perceived racial worth). In short, racial accumulation structures our life chances. This does not mean that agency is irrelevant. It means that discussions of agency should not obscure racially accumulated burdens and benefits.

CRT puts those burdens and benefits into sharp relief. The theory exposes the inter-generational transfers of what we might think of as racial compensation. Building up over time to create racial shelters (hidden and protected racial privileges) and racial taxes (hidden and unprotected racial costs),[10] racial compensation profoundly shapes and helps to support the contemporary economies of racial hierarchy.[11] CRT intervenes to correct this market failure and the unjust racial allocations it produces.

One way the theory does so is by challenging two dominant principles upon which American anti-discrimination law and politics rest—to wit, that colorblindness necessarily produces race neutrality and that color consciousness necessarily produces racial preferences. By historically contextualizing existing racial inequalities, CRT is able to both contest the [colorblindness/race-neutrality]/[color-conscious/racial preferences] alignments and reverse them. The theory effectuates this reversal by demonstrating how colorblindness can produce racial preferences and how color consciousness can neutralize and disrupt embedded racial advantages.[12]

CRT also weighs in directly on the very idea of race, rejecting the conception of race as a biologically fixed social category. Part of this effort includes describing race as a performative identity, one whose meanings shift not only from social context to social context but from social interaction to social interaction. Under this view of race, people actively work their identities to shape how others experience them.[13] And even when a person does not intend to manage her identity in this way, the racial meanings others ascribe to her (is she racially assimilationist? is she racially counter-cultural?) will turn at least in part on her performative identity.

Imagine, for example, two black women—one of whom has dreaded hair; the other's hair is relaxed. Neither intends to employ her hair to make a racial

statement about herself. Notwithstanding the absence of that intent, both will be racially interpreted (and even interpellated, to draw from Althusser)[14] based at least in part on their hair. As between the two women, people are more likely to "read" the woman with dreads as racially counter-cultural.[15] This is because, as Paulette Caldwell,[16] Angela Onwuachi-Willig,[17] and Margaret Montoya[18] have explained, hair is racially constitutive. Self-presentation or performance more generally is as well. This performative understanding of race suggests that people are not born raced, to re-articulate a point Simone de Beauvoir makes about sex; they become raced, in part through a series of cognizable acts.[19] These acts—which we rehearse, renew, and revise—become consolidated over time, constituting the very thing (race) we imagine to be ontologically prior.[20]

The foregoing were precisely some of the ideas I rehearsed with Derrick Bell as I explored with him the topics I might pursue in the context of delivering the Derrick Bell Lecture. As I indicated earlier, Professor Bell seemed to approve of the analysis, though he wanted to ensure that I interrogated the "post-racial" title under which the work was situated.

CRT rejects the view that race precedes law, ideology, and social relations. Instead, Critical Race Theorists conceptualize race as a product of law, ideology, and social relations. According to CRT, the law does not simply reflect ideas about race. The law constructs race: Law has historically employed race as a basis for group differentiation, entrenching the idea that there are "in fact" different races; law has helped to determine the racial categories (e.g., Black, White, Yellow) into which institutions and individuals place people; law sets forth criteria or rules (e.g., phenotype and ancestry) by which we map people into those racial categories; law has assigned social meaning to the categories (e.g., Whites are superior; Blacks are inferior; Japanese Americans are disloyal); law has employed those meanings to structure hierarchical arrangements (e.g., legalized slavery for inferior people (Blacks) and legalized internment for people who are disloyal (people of Japanese descent)); and those legal arrangements, in turn, have functioned to confirm the social meanings that law helped to create (e.g., the people who are enslaved must be inferior; that is why they are enslaved; the people who are interned must be disloyal; that is why they are interned).[21]

CRT has also focused more specifically on how the law constructs whiteness, thus, for example, Cheryl Harris's arguments about "whiteness as property"[22] and Ian Haney López's white-by-law analysis of the naturalization cases.[23] These efforts are part of a broader body of work demonstrating that, historically, whiteness has functioned as a normative baseline.[24] We are all defined with whiteness in mind. We are the same as or different from whites. Think, for example, about some of our contemporary debates about racial equality. Essentially, two competing paths exist to pursue racial equality in the United States: demonstrate either that people of color are the same as, or different from, whites. To draw from an observation that Catharine MacKinnon makes about sex: "The main theme in the fugue

is 'we're the same, we're the same, we're the same.' The counterpoint theme … is 'but we're different, but we're different, but we're different.'"[25] Both of these conceptions of equality implicitly have whiteness as their reference. Under the sameness framework, people of color are measured in terms of their correspondence with whiteness; under the difference framework, we are assessed according to our non-correspondence.[26]

This sameness/difference dynamic helps to explain how race figures in equal protection analysis. Critical Race Theorists have long criticized what I call the *race per se* approach to equal protection—the presumption that any use of race is constitutionally suspect.[27] As a result of this presumption, the government needs to articulate a compelling justification for incorporating race into its decision-making.[28] To put the point more doctrinally, race-based governmental decision-making must survive strict scrutiny. The baseline effects of whiteness, and the sameness/difference dynamic it produces, provides a *partial* explanation for why this is so. Because we are all (supposed to be) the same as whites—because race is ostensibly nothing but skin color[29]—judges should "strictly scrutinize" instances in which the government treats us differently by relying on race.[30] At the same time, because we (people of color) are said to have different racial experiences than whites and this difference is perceived to facilitate the "robust exchange of ideas," the government may, at least in the context of higher education, invoke diversity to justify relying on race.[31]

At the front end of equal protection analysis, then, the notion is that people of color are *formally* the same as whites (taking race into account treats them differently and thus should be strictly scrutinized)[32]; at the back end of the analysis, the racial experiences of people of color are perceived to be *substantively* different (thus, the government can employ diversity as a compelling justification for affirmative action). Under the strained logic of this sameness/difference approach, people of color are the same as, but have different racial experiences than, whites. One way to make sense of this would be to say that equal protection doctrine reflects a strong imperative that people of color *should be* the same as whites; but, understanding that they are not, the doctrine reflects a weak and instrumental tolerance of their difference.

Neil Gotanda has engaged this problem of sameness and difference by critiquing what he refers to as the Supreme Court's formal approach to equal protection.[33] Under this approach, evidence of formal sameness in treatment precludes the finding of discrimination. Other CRT scholars, such as Charles Lawrence, have linked this problem of racial formalism to intent-centered models of discrimination, models that require evidence of discriminatory intent to sustain an anti-discrimination cause of action.[34] Still other CRT scholars, such as Darren Hutchinson, have demonstrated how the Supreme Court's commitment to treating people formally the same "has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need

of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude."[35] Each of these efforts is part of a broader CRT project to articulate racism as a structural phenomenon, rather than as a problem that derives from the failure on the part of individuals and institutions to treat people formally the same.

Informing CRT's structural account of racism is the notion that racism is endemic in society. It is, to put it the way Daria Roithmayr might, "locked-in."[36] This locked-in feature of racism is linked to our very system of democracy. Which is to say, historically, racism has been constitutive of, rather than oppositional to, American democracy. This does not mean that racism is an expression of American democracy. That would be putting the point too strongly. It is more accurate to say that racism was built into the constitutional architecture of American democracy. As Rachel Moran and I explain elsewhere, "[t]he drafters of the Constitution took a sober second look at the rhetoric of radical egalitarianism in the Declaration of Independence, and they blinked. The adoption of the Constitution in 1787 and its ratification one year later depended on a compromise, one that integrated slavery into the very fabric of American democracy."[37] The lingering effects of this foundational moment—or the ongoing relationship between racial inequality and American democracy—are precisely what Gunnar Myrdal referred to racism as an "American dilemma."[38]

In describing racism as an endemic social force, CRT scholars argue that it interacts with other social forces, such as patriarchy,[39] homophobia,[40] and classism.[41] The theory is thus committed to what Kim Crenshaw has called "intersectionality"—and, more specifically, to an intersectional engagement of structural hierarchies.[42] This engagement endeavors not only to "look to the bottom," to borrow from Mari Matsuda[43]; it also seeks to "look to the top."[44] In other words, the theory seeks to make clear that there is a "top" and a "bottom" to discrimination[45] and that, historically, racism has been bi-directional: It gives to whites (e.g., citizenship) what it takes away from or denies to people of color. Framing discrimination in this way helps to reveal an uncomfortable truth about race and power: The disempowerment of people of color is achieved through the empowerment—material or psychological—of whites.[46] There is no disadvantage without a corresponding advantage, no marginalized group without the powerful elite, no subordinate identity without a dominant counterpart. As Guy-Uriel Charles argues, "[l]ooking at the gaping racial disparities [in America] on most socio-economic indicators, there are clearly two classes of citizens: Whites and coloreds."[47] Racism has historically drawn this line, effectuating and maintaining a relational difference that is based on power. CRT attempts to describe the role law plays in producing and naturalizing this racial arrangement.

Critical Race Theorists pursue this project across racial groups,[48] and in the context of doing so try to avoid what Angela Harris might refer to as the pitfalls of

essentialism.[49] While some would say CRT scholars *are* anti-essentialist, it would be more accurate to say that we *aspire to be* anti-essentialist. The distinction is important. Because to invoke any social category is already to essentialize, the question is not whether we engage in essentialism but rather the normative work we deploy our essentialism to perform.

Part of that work entails highlighting the discursive frames legal and political actors have employed to disadvantage people of color. These frames include, but are not limited to: "colorblindness,"[50] "illegal alien,"[51] "terrorist,"[52] "reverse discrimination,"[53] "foreigner,"[54] "merit,"[55] "the border,"[56] "citizenship,"[57] "the war on drugs,"[58] and "the war on terror."[59] Even our most celebrated constitutional frameworks, such as "equal protection"[60] and "due process,"[61] can function as repositories of racial power. CRT reflects "a desire not merely to understand … [these and other] vexed bond[s] between law and racial power but to *change* … [them]."[62] Committed to grappling with the immediacies of now and the transformative possibilities of tomorrow, CRT reflects both pragmatism and idealism.[63]

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Clearly, the foregoing ideas do not fully capture CRT. Think of them as a starting point. As you will undoubtedly appreciate upon reading *Covenant Keeper,* scholars of education have pushed the theory beyond its articulations in law—and certainly beyond the redacted account I present in this foreword. *Covenant Keeper* is useful, then, not only for people whose primary field is education. It is useful for scholars in other disciplines as well, including law. To put this point another way, *Covenant Keeper* provides a perfect opportunity for legal scholars to see not only how CRT is travelling in the field of education but also how the theory is being re-articulated and reconstituted in the process.

NOTES

1. Devon W. Carbado & Mitu Gulati, Acting White? Rethinking Race in "Post-Racial" America" (2013).
2. Derrick Bell, Confronting Authority: Reflections of an Ardent Protester (1994).
3. I do not have the email to reproduce the precise quote.
4. George Lipsitz, *"Constituted by a Series of Contestations": Critical Race Theory as a Social Movement*, 43 Conn. L. Rev. xxx (2011).
5. *See generally* Kimberlé Crenshaw, *Race, Reform and Retrenchment*, 101 Harv. L. Rev. 1331 (1998).
6. Lani Guinier, The Tyranny of the Majority (1994).
7. Derrick Bell, Silent Covenants: Brown v. *Board of Education* and the Unfulfilled Hopes for Racial Reform 69 (2004).

8. *See, e.g.*, Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality (1997).
9. *Cf.* Pierre Bourdieu, Outline of a Theory of Practice, Distinction: A Social Critique of the Judgement of Taste, and Homo-Academicus (1962).
10. *Cf.* Jody David Armour, Negrophobia and Reasonable Racism: The Hidden Costs of Being Black In America (1999).
11. One might also think about this in terms of the racial deficits and racial surpluses we inherit.
12. *See generally* Devon W. Carbado & Cheryl I. Harris, *New Racial Preferences*, 96 Calif. L. Rev. 1139 (2008).
13. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259 (2000); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. Contemp. L. Issues 701 (2001); *see also* Mario L. Barnes & Angela Onwuachi-Willig, *By Any Other Name?: On Being "Regarded As" Black and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 Wis. L. Rev. 1283; Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. Rev. L. & Soc. Change 517 (2008); Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 Harv. Women's L.J. 185 (1994). Scholars outside of the field of CRT have also drawn on this insight. *See*, *e.g.*, Kenji Yoshino, Covering: The Hidden Assault on Our Civil Rights (2007).
14. According to Althusser:
    There are individuals walking along. Somewhere (usually behind them) the hail rings out: "Hey you there!" One individual (nine times out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e., recognizing that "it really is he" who is meant by the hailing. But in reality things happen without succession. The existence of ideology and the hailing or interpellation of individual as subject are one and thus the same thing.
    Louis Althusser, *Ideology and Ideological State Apparatuses*, *in* Lenin and Philosophy and Other Essays 174–75 (Ben Brewster trans., 1971).
15. *See generally* Carbado & Gulati, *The Fifth Black Woman*, *supra* note 13 (discussing these dynamics).
16. *See* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender* 1991 Duke L.J. 365 (1991).
17. *See* Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 Geo. L. Rev. 1079 (2010).
18. Margaret Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, *supra* note 13.
19. Simone de Beauvoir, The Second Sex 12–13 (Constance Borde & Sheila Malovany-Chevalier trans., Knopf 2009) (1949).
20. *Cf.* Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 Theatre J. 519, 523 (1988) ("[T]he body becomes its gender through a series of acts which are renewed, revised and consolidated through time."). *But see* Bruce Wilshire, Role Playing and Identity: The Limits of Theatre as Metaphor (1982) (arguing that gender is not a performance)
21. Devon W. Carbado, *Discrimination on the Basis of Racial Orientation* (draft on file with author).
22. *See* Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1713 (describing "whiteness" as a "valuable asset" that whites seek to protect).
23. Ian Haney López, White By Law: The Legal Construction of Race (2006).

24. *See, e.g.*, Critical White Studies: Looking Behind the Mirror (Richard Delgado & Jean Stefancic eds., 1997); Stephanie Wildman et al., Privilege Revealed: How Invisible Preference Undermines America (1996). Feminists have made similar points about gender. *See* Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. Legal Educ. 47, 48 (1988) ("The norms and the dynamics of the natural world—the way its biological, evolutionary, and even chemical and physical properties are explained—embody unstated male reference points."); *see also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259, 316–17 (1993) (noting that "the law's incorporation of a male normative standard may be invisible but it is not inconsequential"). One can, of course, advance similar claims about heterosexuality. *See* Devon W. Carbado, *Straight Out of the Closet*, 15 Berkeley Women's L.J. 76 (2000).
25. CathArine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 34 (1987); *see also* Carbado, *Straight*, *supra* note 24 (drawing on MacKinnon's sameness/difference analysis).
26. Here, too, I am merely re-articulating a point MacKinnon makes about sex. *See* Carbado, *Straight*, *supra* note 24.
27. Devon W. Carbado, *A Strict Scrutiny of Strict Scrutiny* (draft on file with author).
28. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Race-based classifications must also be narrowly tailored, which, roughly, means that even when the government has a compelling reason for incorporating race into its decision-making, the means by which it does so should be carefully thought out and narrowly circumscribed.
29. *Shaw v. Reno*, 509 U.S. 630 (1993). According to the Court:

    > A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.
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    > *Id.* at 647–48.
30. *Adarand*, 515 U.S. 200.
31. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
32. *Adarand*, 515 U.S. at 239 (Scalia, J., dissenting) ("[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. … In the eyes of government, we are just one race here. It is American."); *see also Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 987 (9th Cir. 2004) (quoting *Adarand* for the same proposition); *Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., Fla.*, 256 F.3d 1095, 1103 (11th Cir. 2001) (same); *Equal Open Enrollment Ass'n v. Bd. of Educ. of Akron City Sch. Dist.*, 937 F.Supp. 700, 710 (N.D. Ohio 1996) (same); *U.S. v. Adair*, 913 F. Supp. 1503, 1513 (E.D. Okla. 1995) (same); *Clarke v. City of Cincinnati*, 1993 WL 761489, *27 (S.D. Ohio, 1993) ("[W]e are all members of one and only one race, the human race.").
33. Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 Stan. L. Rev. 1 (1991).
34. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

35. Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. Ill. L. Rev. 615 (2003) [hereinafter Hutchinson, *Unexplainable*].
36. *See generally* Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 Va. L. Rev. 727 (2000).
37. Devon W. Carbado & Rachel F. Moran, *Introduction* to Race Law Stories 8 (Rachel F. Moran & Devon W. Carbado eds., 2008).
38. Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944).
39. *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 582 (1990).
40. *See generally* Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. Rev. 1467 (2000); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 Conn. L. Rev. 561 (1997); Russell K. Robinson, *Racing the Closet*, 61 Stan. L. Rev. 1463 (2009).
41. *See generally* Trina Jones, *Race, Economic Class, and Employment Opportunities*, 72 Law & Contemp. Probs. 57 (2009).
42. *See generally* Kimberlé Crenshaw, *Mapping the Margins*, 43 Stan. L. Rev. 1241 (1991).
43. Mari J. Matsuda, *Looking to the Bottom*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).
44. *See generally* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. Rev. 1283 (2002).
45. *See id.*
46. Of course, whiteness is not a monolithic identity category. Class, sexual orientation, among other aspects of person, shape how whites experience their whiteness. Understood in this way, whites have differential access to the privileges of whiteness. *See id.* at 1297; *see also* Camille Gear Rich, *Marginal Whiteness*, 98 Calif. L. Rev. 1497 (2010). At the same time, whites across differences can nevertheless trade—if only psychologically—on their whiteness. Du Bois's notion of the wages of whiteness speaks precisely to this idea. Du Bois argued that "the white group of laborers, while they receive a low wage, were compensated in part by a sort of public and psychological wage." W. E. B. Du Bois, Black Reconstruction in America: An Essay Towards a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America 1860–1880, at 700 (1965). Du Bois's point was that, notwithstanding the material deprivations that working class whites historically have experienced, they were able to draw on the psychological wages of whiteness, which they treated as a material resource over and against the instantiation of black inferiority. *See* David Roediger, The Wages of Whiteness: Race and the Making of the American Working Class (1991).
47. Guy-Uriel Charles, *Towards a New Civil Rights Framework*, 30 Harv. J. L. & Gender 353 (2007).
48. *See, e.g.*, Robert Chang, Disoriented: Asian Americans, Law, and the Nation-State (1999); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Justice 177 (1997); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Calif. L. Rev. 1 (1995).
49. On the problem of essentialism in feminist legal theory, see generally Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990).
50. *See, e.g.*, Gotanda, *supra* note 33.

51. *See, e.g.*, Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 Law & Contemp. Probs. 1 (2009) (discussing racialization of illegal aliens).
52. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002).
53. Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 Harv. Blackletter L.J. 1 (1994); *see also* Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 Mich. L. Rev. First Impressions 123 (2007), http://www.michiganlawreview.org/assets/fi/105/crenshaw.pdf.
54. Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1 (1996); Robert S. Chang, *Dreaming in Black and White: Racial-Sexual Policing in the Birth of a Nation, the Cheat, and Who Killed Vincent Chin?*, 5 Asian L.J. 41 (1998).
55. *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113 (2003); Harris & Narayan, *supra* note 53.
56. *See* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 Ind. L.J. 1111 (1998); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. Ill. L. Rev. 525; George A. Martínez, *Race and Immigration Law: A Paradigm Shift?* 2000 U. Ill. L. Rev. 517.
57. *See* Hiroshi Motumura, Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States (2006); Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 Ohio St. L.J. 1285 (2002); Linda Bosniak, *Citizenship Denationalized*, 7 Ind. J. Global Legal Stud. 447 (2000).
58. *See* Paul Butler, Let's Get Free: A Hip-Hop Theory of Justice 43–36 (2009); Paul Butler, *Retribution, for Liberals*, 46 UCLA L. Rev. 1873 (1999).
59. *See* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 Calif. L. Rev. 1259 (2004).
60. *See* Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 Fordham L. Rev. 1753 (2001).
61. *See* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. Rev. 1 (1992).
62. *See* Critical Race Theory: The Key Writings xiii (Kimberlé Crenshaw et al. eds. 1995).
63. *See* Mari J. Matuda et al., Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment 3 (1993) (describing CRT as "both pragmatic and utopian").