

Crossroads, Directions, and a New Critical Race Theory

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TEMPLE UNIVERSITY PRESS
PHILADELPHIA

Foreword

Who Are We? And Why Are We Here? Doing Critical Race Theory in Hard Times

Charles R. Lawrence III

Editors' note: This Foreword is a slightly edited transcript of a speech given by Charles Lawrence at the opening session of the November 1997 Critical Race Theory Conference at Yale University, where many chapters of this book were first presented as panel presentations and working papers. We have published Professor Lawrence's speech as he spoke it to preserve its intimacy and energy, as well as its historical context.

WHEN HARLON DAITON asked me to give the opening remarks at this conference, and I asked him what I should talk about, he said something like, "Just be your warm, wise self." My first reaction to Harlon's typically playful and generous response was ambivalence. It was the same feeling I had experienced when I first received the announcement of the conference in the mail. The flyer described the meeting as a tenth birthday celebration for Critical Race Theory and named my Stanford article on unconscious racism among the genre's foundational canon. I felt honored by this generous acknowledgment of my work. I knew it was a gesture of love and respect by the conference organizers. But I wasn't at all sure I liked Harlon's undisguised pleasure in calling me an "old man" and getting away with it. He even suggested that when I gave this talk I might wear an old brown leather jacket—a favorite of mine that was fashionable, even hip, in the early days of Critical Race Theory but would now look quaint. Harlon swears that he was but a child when he first saw me wear it.

But as the day drew closer, my primary emotion was anxiety. What I was experiencing was something more than the ordinary jitters that always accompany public presentations of self. This was not a lecture to students or colleagues who would judge me on terms I had learned to mediate and master, even as I held the judges at arms length. This would be a conversation with friends and comrades. I do not know you all, but there are many of you who know me well—who have shared my joys and sorrows, stood with me against my ene-

mies, and covered my back. And I know that many of you whom I do not know well have been with me, too, because I have seen your work and it is work that teaches, nourishes, and shelters me and reminds me that I am not crazy—or maybe it is that I am not the only crazy one. So fast and facile footwork with theory and text will not do. I must speak the truth, as best I can, about things that matter to me. Now what I feel is not primarily anxiety but exhilaration and pride at the sight of you and in the beauty of my chosen family.

I remember feeling the same way ten years ago. There were only forty, maybe fifty, of us then. We were gathered in a large upstairs room that looked like a combination auditorium/gymnasium. Folding chairs were arranged in a large circle around the room's perimeter. It was the first session of the tenth National Critical Legal Studies Conference. A small group of us had been attending CLS meetings for several years, seeking intellectual community in what was then the dominant progressive movement in the legal academy. There were more of us at this CLS conference than ever before. Our numbers were larger because the conference, entitled "Sounds of Silence: Racism and the Law," had placed us momentarily at the center of the CLS agenda. Although in its initial incarnation it was a conference planned by and for white folks, we had, in the end, played a significant role in its creation. Ultimately, it was a genuine response by our friends and collaborators in CLS to our personal experiences of alienation and marginalization in their community and to our challenge that their work contained insufficient attention to and understanding of the issues we considered central to the work of combating racism.² We were also asking them to examine their own racism (never an easy request to make or respond to) and trying to figure out for ourselves where we fit in—how to situate ourselves as progressive people of color in law teaching.³

The organizers of the conference had decided that the colored people and white folks should meet in separate "minority" and "non-minority" caucuses for the opening evening session. We hoped that this would allow the white folks to take responsibility for dealing with their own racism (the help said we wouldn't do windows that evening), and we wanted an opportunity to speak to one another with candor, and without posturing, about our own condition as people of color on the left. This was a chance to sit down with family and really talk.

Kimberlé Crenshaw had asked me to chair the colored caucus. Kimberlé was only in her first year of law teaching, but she had been a moving force in putting the conference on the right track, and would soon become one of Critical Race Theory's founding sisters. I had been in the teaching business longer than Kimberlé and thought of myself as a big brother, but even then, when Professor Crenshaw said "We need you to do this," there was no saying no.

Because we were a much smaller group then, I could do what I wish were possible here—that is, listen instead of talk. I suggested that we proceed by going around our large circle, with each of us speaking briefly, so that we could hear from everyone in the room. I asked each person two questions: "Who are you?" and "Why are you here?" I wanted to know where we were from, who our people were, and by what route we had come to this place. What had attracted us to critical legal studies, and what made us feel alienated? What were our frustrations, and what were our hopes.

The stories we told one another that night were wonderful and richly complex. We had lots to say, and suddenly it could all be said: our anger, pain, and even joy; our strength and vulnerability; the ambivalence of our roles as outsiders on the inside; the schizophrenia that comes with mastering the master's language while struggling to maintain flu-

ency in languages that are expressive of liberating themes. We were lonely souls seeking community and refuge from the white worlds where we worked. We looked less diverse than we do now. Most of us were African Americans, but the clear and vibrant voices of Native, Latino, and Asian American brothers and sisters presaged the considerable gifts and important work that they represent among us today.

What we had most in common was a genealogy. On the second day of the conference, Harlon Dalton described our shared biography in an eloquent and irreverent speech. Contrasting us with the "typical crit" who "lived in his head disconnected from much of the richness of the surrounding world," he said this of us,

No matter how smart or bookish we were, we could not retreat from the sights, sounds, and smells of the communities from which we came. We learned from life as well as from books. We learned about injustice, social cruelty, political hypocrisy and sanctioned terrorism from the mouths of our mothers and fathers and from our very own experiences. . . . And from the beginning we learned, not as an article of political faith but rather as a simple fact of life, that our fate and that of all persons of similar hue were inseparably intertwined. That fundamental connectedness, together with our distinctive subcultures, nourished and sustained us, created in us an unshakable sense of community. The lucky ones among us reveled in that community, fed on it. Others of us resented it or tried to hide from it. But escape was not possible, for the community was within us, and we were branded forever.⁴

Those of us who were most senior, and even *we* were young people then, had come of age in the midst of the rushing river of the Civil Rights Movement.⁵ In 1966, the summer of my first year in law school, I traveled to southwest Georgia to work with C. B. King.⁶ When we drove to court in Baker County or Americus, the brothers in the movement would meet us at the county line and escort us to the courthouse, with the barrels of their shotguns sticking out the window. The following summer, I dropped out of law school for a year to teach and organize in North Philadelphia. High-school kids were reading Malcolm and Fanon and Harold Cruz—or, at least, they were carrying the books around and quoting from them. In 1970, I dropped out again, leaving a legal-services job to become the principal of a parent-run community school in Roxbury, a poor Black neighborhood in Boston. Mary Helen Washington, in her presidential address to the American Studies Association, describes this period in her own professional history, when she was a young assistant professor in the English Department at the University of Detroit,

Besides teaching a full load, fighting to increase the pitifully small number of black students on campus, negotiating with the traditional departments for their reluctant acceptance, we were under a great deal of pressure, in the Black Power climate of Detroit, to be politically involved; you had to read Mao and Marx and Malcolm; you had to be "in struggle." I remember one meeting at Wayne State, where I went to hear the fiery Ron Dellums speak, that featured the entire spectrum of black political thought in Detroit: There were Black Muslims, Black Panthers, Pan-Africanists, black cultural nationalists, black Christian nationalists, Marxist-Leninists, and communists; I was there as a closeted integrationist. In my journals I reported coming home that night and becoming deeply involved in cleaning my house so I could restore my sense of order.⁷

Like the young Professor Washington, I do not remember so much choosing to be an activist as being pulled along by the current of the times: trying to understand and keep up with an onrushing river of liberation, trying to do the practical work of representing jailed freedom fighters and drafting resolutions at neighborhood meetings and Black

political conventions. I embarked on my professional career at the high point of the long, forward-moving doctrinal march from *Sweatt* to *Griggs*.⁸

Many of the folks in that room ten years ago were a decade younger than I, and it was this generation of law teachers who first called themselves critical race theorists. Kimberlé Crenshaw locates Critical Race Theory's conception in the late 1980s when she began law school.⁹ It was a period of retrenchment, an initial assault against the gains made during the Civil Rights Movement. This somewhat younger group of progressive colored law teachers were part of the militant resistance to that retrenchment. Their political consciousness and intellectual agenda were forged in the activism that opposed visions of race, racism, and law that were dominant in this post-civil-rights period. The *Bakke* case is the doctrinal marker of the times that shaped this generation of critical race theorists. They were part of an organized grassroots movement that waged an effective fight against the backlash embodied in *Bakke*. The result of this struggle was an uneasy compromise: watered-down affirmative-action programs remained in place alongside a new rhetoric of "reverse discrimination."¹⁰

If the youthful biographies of early critical race theorists were shaped by the movements that culminated in *Griggs* and *Bakke*, the biographies of our younger brothers and sisters, and the middle passage of my contemporaries, are marked by *Croson*, *Adarand*, *Hopwood*, Propositions 187 and 209,¹¹ the confirmation of Justice Clarence Thomas, and the Million Man March. How do we do Critical Race Theory in these perilous times? How do we define ourselves when there is no ideologically grounded mass movement to define us? How do we resist an organized and well-funded ideological assault from the right that has been vicious and successful beyond anything we anticipated?¹² How do we talk to one another about the hard stuff—sexism, heterosexism, nationalism, class privilege, internalized racism—moving beyond the Black-white paradigm and still understanding its special place in the construction of American racism?¹³ "Who are we? And why are we here?"

In the remainder of this talk I want to say some things about how we might begin to talk with one another about the answers to these questions. I start with a list of things that keep coming up in the conversations I have been having with myself as I struggle to find, or define, a place and way to work, and a community to work with, in this season of my life. I offer this short and tentative list not as answers to my questions but as places to begin our conversations:

1. Speaking simple truths to power.
2. Making our own communities our first audience.
3. Creating a homeplace for refuge and hard conversations.
4. Defining boundaries (knowing who is us and who is them).
5. Starting small (knowing that small is important and good).
6. Remembering that we are beautiful and that we are bad (or "the bomb").

Speaking Simple Truths

Mari Matsuda and I recently spoke on a panel at the American Studies Association annual conference. The conference organizers had asked us to speak about our book *We Won't Go Back: Making the Case for Affirmative Action*.¹⁴ Roger Wilkins, the historian, journalist, and long-time civil-rights activist, was the respondent to our papers. He gave a wonderful talk

that was at once penetrating, thoughtful, and inspiring. Two things that he said stand out for me. First, he reminded us that Proposition 209, the anti-affirmative-action initiative in California, and *Hopwood*, the Fifth Circuit Court decision holding a race-based affirmative-action program at the University of Texas unconstitutional, are reenactments of those provisions of the slave codes that made it a crime to teach a slave to read or cipher; and second, both the eighteenth- and late-twentieth-century versions are products of the slave masters' fear of revolt. "It doesn't surprise me," said Roger, "that when white folks read Matsuda and Lawrence's work, they say, 'We better stop teaching these folks to read and write.'"

When a member of the audience asked Wilkins why the children of middle-class Black folk like him should benefit from affirmative action, he answered, "Because fighting racism in white institutions is hand-to-hand combat. And if my daughter is among the best-trained and most committed freedom fighters, we must have her here with us. We need every warrior we can muster."

These are simple truths, simply said. The dismantling of affirmative action is segregation. Its purpose and meaning are the same as the Jim Crow laws. We need to call Pete Wilson and Orrin Hatch what they are—old-fashioned segregationists. When our liberal colleagues stand by and wring their hands, saying, "Now that these measures are law, nothing can be done," we need to ask, "Which side are you on?" and tell them that we will judge them by the results of their actions. Law faculties determine the standards by which we judge who is qualified to attend our schools, and if we are unwilling to reexamine measures of merit that replicate white privilege, we must explain our collaboration with segregationists.¹⁵ Just as respectable white folks in Birmingham, Alabama, and Jackson, Mississippi, were responsible for the bombings and lynchings by the Klan, because they had the power to put a stop to them, we and our colleagues are responsible for the crime that is done by the resegregation of our law schools, and that simple truth must be told.¹⁶

These are truths that have been lost and forgotten amid the revisionist rhetoric of "color blindness" and "racial preferences." When our colleagues accuse us of "being polemical and lacking balance" or engaging in "identity politics" and "vulgar racial essentialism" or being "radical nihilists" when today's political climate calls for pragmatism and compromise, or when they attack our scholarship as "unanalytic," "unsophisticated," "untruthful," "Beyond All Reason," and even "anti-Semitic,"¹⁷ we must know that these are words designed not just to discredit and defame but to intimidate and pressure us to self-censor. I am worried that our enemies have achieved some success in this project, that too often we seek the safety of abstract theory and avoid the narratives that implicate our colleagues. I do not mean in saying this that we should not be doing erudite meta-theory and complex deconstruction. Nor is this a call to abandon the openness, empathy, and reconciliation that have been such an important part of our work. But we must also speak the simple and radical truths of white supremacy and patriarchy and class oppression and heterosexism, even when we know we will pay a price for speaking them.

Speaking to Our Own

Critical Race Theory was born as part of the resistance to retrenchment, and it is not surprising that we and our work have been subject to relentless attack throughout the past ten years. We know the colleagues who have established careers and gained name

recognition by critical-race-bashing. More important, impugning our ideas and silencing our message is central to the ideological war that is being waged by the right. Most of us live and work in a largely white world, and our work is paid for and judged by a white audience. Powerful white folks and their non-white allies, such as Ward Connolly and Justice Clarence Thomas, have the power to make and enforce law, and it is natural that, as lawyers and law professors, we so often find ourselves speaking to them first and foremost: responding to attacks, seeking to influence legislation, writing articles for white tenure committees, lecturing and writing in venues where few in our audience are colored or poor. This is often important work. Much of it is the hand-to-hand combat that Roger Wilkins spoke of. But I want to suggest that in these times of backlash and retrenchment, it is especially important that we find ways to speak to and with the folks from our own communities.

There are several reasons for this. I want to mention four and save for another time a discussion of each. The first is that our lack of control of or access to mainstream media has forced us into a reactive posture. In a recent column in *The Nation*, Patricia Williams described the frustration and futility of defending against the stream of caricature of Critical Race Theory in such places as the *Wall Street Journal* and the *New Republic*:

They take a fluidly left-leaning group and depict it as an idiotically "separatist" right wing monolith. This "why did you beat your wife" strategy means that real debate of issues posed by a serious, responsible left is eternally circumvented as we sacrifice precious time to the kind of simple-minded but necessary refutation that only sets you up for more: I am not a neo-Nazi! I can so tell the difference between fantasy and fact! And of course, some of my best friends are white. . . .

Critical Race Theory is treated as a conceptual ghetto filled with dangerous low-income scholarship unworthy of reading, never mind careful reading. From there, it is easy to believe whatever misquoted, misconstrued blather is said to stream from the mouths of those . . . anti-intellectual thugs with "blood" on their Singular Mind—theirs being, of course, the True Black Mind that fabricates faster than Madame Defarge could knit.¹⁸

What makes Patricia Williams's piece most poignant is that it is an exercise in the very futility she describes. Moreover, our rejoinder to these libelous falsehoods can never adequately redress the injuries they inflict. Precious souls such as Patricia Williams should not be subjected to the personal assault and abuse that goes with participating in this anything-but-intellectual debate.

The second reason to spend less time talking to white folks and more to our folks is that the latter conversations are important to our own continuing education. We learned the best of our theory in conversations with our own communities and within the context of activism with those communities. The remarkable chapters in this volume are evidence that this continues to be so.

Third, there is much teaching to be done in communities of color, both the teaching of the skills that are denied our children in the public schools (each of us should find a young person to tutor) and the teaching of politics—helping young Black people put the lie of their inferiority outside of them, helping men of color understand how patriarchy harms them as well as their sisters, teaching colored professionals the importance of coming out of the closet as beneficiaries of affirmative action.

And fourth, we would not be here but for the ideologically informed struggles of the communities from which we come, and we will not be here for long if the folks in those communities do not know that they belong here and that they must fight for our inclusion and theirs. George C. Wolfe, who produced *The Colored Museum* and *Bring in 'Da Noise*,

Bring in 'Da Funk sees as one of his central missions building new audiences among young Black people. He is setting aside large groups of tickets for Black schools and marketing deep discounted tickets on cable TV's Black Entertainment Television (BET) and in the hip-hop magazine *Vibe*. Wolfe says: "You are building an audience, because audiences are mostly old and white, and that perception is a fact. And when they die, there is a possibility that audiences could die."¹⁹

Creating Homeplace

bell hooks, a keynote speaker at that Critical Legal Studies Conference ten years ago, has said: "Home, however fragile and tenuous (the slave hut, the wooden shack), had a radical dimension. Despite the brutal reality of racial apartheid, of domination, one's homeplace was the site where one could freely confront the issue of humanization, where one could resist."²⁰

In hard times, it is especially important to create homeplaces: safe places among trusted friends to seek refuge and dress the wounds of battle and places for hard conversations, where differences can be aired and strategy mapped, where we can struggle with and affirm one another. As we have increased our numbers, it has become more difficult for Critical Race Theory meetings to be a homeplace for us all. From the beginning, we have also been about coalition-building. That wondrous musical/political voice Bernice Reagon Johnson has said of coalition: "Coalition work is not done in your home. Coalition work is done in the streets. It is some of the most dangerous work you can do. And you shouldn't look for comfort."²¹

Critical Race Theory has always lived with this tension. Folks have come seeking refuge from hostile workplaces, and often they have encountered the unsafety of coalition-building. We have struggled to teach one another about the intersections that gender and race and heterosexism make and to confront our own internalization and participation in those subordinations. Some of us have said, "I am marginalized or made invisible or even dehumanized by this discussion." And we have not always heard them. Inevitably, I will hear gossip about some falling-out or a faction forming, but I take this news of Critical Race conflict as evidence of growing pains. I am reassured that we are alive and not unlike other families. I also believe it is not necessarily a bad thing that, as we grow in number, we form smaller, more intimate groups of younger and older Lat-Crits and queer-race-Crits and Midatlantic-women-of-color-Crits, homeplaces within a collective too large now to be a homeplace itself. I think this is good because some wonderful work is produced in these smaller groups and because I do not experience them as excluding or divisive. Many of us move freely among them and identify with more than one.²²

Defining Boundaries

There is another tension that has been with us always. This is the tension between our desire to create a community of kinship and safe harbor for all people of color who self-identify as progressive and our need to define our politics with sufficient clarity to make that politics meaningful and functional. In hard times, I think it is more important than ever to define clearly who we are and what we stand for. I am not talking about the silly debate over whether certain individuals have been, or should be, barred from attending

Critical Race Theory workshops. I am not advocating the adoption of a party platform or the recitation of an apostles' creed. I believe that our work suffers when we are not prepared to engage in serious criticism of ourselves and of one another. But in a time in which we are misrepresented and caricatured by our enemies, when there are people of color who are misogynist, homophobic, or anti-other but still call themselves progressive race-men, we must be clear about what we stand for. We must know who is us and who is them. For me, an important starting point in this project of self-definition is our commitment to the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression. The end of racial oppression requires fundamental social transformation, not just adjustments within established hierarchies, and those who would claim Critical Race Theory without a commitment to challenging hierarchy and subordination in all its many intersecting forms should not find community with us.

Starting Small

What do we do when there is no mass movement, when the river of liberation is not pulling us along in a rushing torrent but only moving in its deep streams? I have been thinking about those who went before us, earlier generations of radical teachers who kept the flames of freedom alive in hard times. There is a poster on my office wall at home with a picture of the brothers of the Niagara movement, all in fancy hats. When I look at that picture, I am always struck by what a small group they were. I think of Ida Wells mounting an anti-lynching campaign, at first almost single-handedly. Spike Lee interviews Andrew Young in his movie *Four Little Girls*, a retrospective documentary about the infamous Easter Sunday bombing of the Sixteenth Street Church in Birmingham, Alabama. Young reflects on the massive Civil Rights Movement that rose up in that city, so long known for the brutality of its racism. He says, "Everybody always thinks of the movement as hundreds and thousands of people marching and going to jail, but when we first came to Birmingham, we'd have ten or twelve people show up for a march."²³ In hard times, we must continue to be activists. In hard times, it is important and necessary and good to start small.

We cannot teach about liberation without actively engaging in its politics. As Paulo Freire has said, "There is no true word that is not at the same time praxis."²⁴ Many among us are doing this important work. Julie Su is helping immigrant garment workers in Los Angeles sweatshops to fight the big names of American fashion and learning from them what it means to fight.²⁵ Gerald Torres is quietly working behind the scenes to mount a political fight-back against the Fifth Circuit's *Hopwood* decision. Kendall Thomas is putting together cross-racial coalitions in New York to fight homophobia. Sumi Cho, Margaret Montoya, Margalynn Armstrong, and Angela Harris are meeting with student and community activists at Boalt to organize an action campaign and march against the resegregation of the University of California. I have named just a few of you. Surely there is no need to despair, because there is still a movement as long as we continue to act up.

Remembering That We Are Gorgeous

One morning about a month ago, Mari Matsuda walked into her office. Scrolling across the screen of her computer in three-inch-high letters were the words, "Professor Matsuda

Is the Bomb." Was this a threat or a not-so-funny practical joke? Had some member of a hate group found a way to write this message on her computer? Thinking it was better to be safe than sorry, Mari called the associate dean, and the dean called security. It was the security guard, a young brother, who said, "Professor Matsuda, I think someone is trying to pay you a compliment."

Mari tells this story on herself, laughing in good-humored self-deprecation at how out of touch she is with youth culture. Her very hip Afro-Asian research assistant, Ms. Susan Epps, had put the message on the screen, and she does think her professor is "the bomb." For me this story is not just an artifact of the generation gap. It is a reminder that in hard times it is important to remember that we are "the bomb," or "bad," as we first-generation critical race theorists used to say when we were young. Each of you is "the bomb," and collectively we are a nuclear explosion of beauty.

Why am I here? Mainly because this is the smartest, best-looking, sweetest bunch of people in law teaching. Judge Richard Posner says you are bad role models for minority youth, that you reinforce all the pejorative stereotypes of colored folks.²⁶ But if he's right that white folks will think that all colored folks look and act like you, that's just fine with me. I want Kimi and Pauli to grow up to be just like you.

Derrick Bell says that racism is permanent. One thing is for certain: None of us will live long enough to know whether he is right. So we're in this fight for the long haul, and Derrick is certainly right when he says we struggle because that is what gives life meaning, that is what gives us joy.²⁷ I for one am glad I'm in this struggle with all of you.

Notes

1. Charles R. Lawrence III, "The Id, the Ego, and Equal Protection," *Stanford Law Review* 39 (1987): 317.
2. For a discussion of the history of Critical Race Theory and its relationship to the critical legal studies movement, see Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado, and Kimberlé W. Crenshaw, *Works That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Boulder, Colo.: Westview Press, 1993). Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1995); Jose A. Bracamonte, "Foreword—Minority Critique of the Critical Legal Studies Movement," *Harvard Civil Rights—Civil Liberties Law Review* 22 (1987): 297.
3. Charles R. Lawrence III, "The Word and the River: Pedagogy as Scholarship as Struggle," *Southern California Law Review* 65 (1992): 2231.
4. Harlon Dalton, "The Clouded Prism," *Harvard Civil Rights—Civil Liberties Law Review* 22 (1987): 435.
5. Vincent Harding, *There Is a River: The Black Struggle for Freedom in America* (San Diego: HarBac, 1981), xviii-xix. Harding uses the river as metaphor in writing the history of Black radicalism in America. He says of his chosen metaphor: "I wanted and needed to write . . . a narrative, analytical, and celebrative history of the freedom struggle of black people in this country, beginning before there was a country. I was especially concerned to try to convey its long, continuous movement, flowing like a river, sometimes powerful, tumultuous, and roiling with life; at other times meandering and turgid, covered with the ice and snow of seemingly endless winters . . . the river of black struggle is people, but it is also hope, the movement, the transformative power that humans create and that creates them, us, and makes them, us, new persons."
6. C. B. King was one of the small army of civil-rights attorneys in the deep South. At the height of the Civil Rights Movement, he was the only African American attorney within an eighty-mile radius of Albany, Georgia. A brilliant lawyer and orator, King rode the circuit of back-country courthouses in southwestern Georgia representing the young freedom fighters of the Student Nonviolent Coordinating Committee (SNCC) and the Southern Christian Leadership Conference (SCLC) and the local folk who rose up in a

mass movement around them. An outstanding figure in his own right, he was also a mentor to an impressive corps of young civil-rights attorneys, including Dennis Roberts, Paul Harris, and Robert Cover.

7. Mary Helen Washington, "Disturbing the Peace: What Happens to American Studies If You Put African American Studies at the Center? Presidential Address to the American Studies Association," *American Quarterly*, sec. 50.1 (October 29, 1997), 1-2.

8. *Sweatt v. Painter*, 339 U.S. 629 (1950), holding that a Black law-school candidate had to be admitted to the University of Texas Law School, despite the existence of a local Black law school, because the latter was not equal to the University of Texas in faculty, resources, or reputation, among other criteria. I name *Sweatt* as the beginning of this progressive doctrinal march because it contained the revolutionary seeds of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). In finding that a segregated law school for Negroes could not provide them with equal educational opportunities, the Supreme Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school," thus recognizing the intangible injuries of stigma and racial isolation that became the foundation of *Brown* and the 1964 Civil Rights Act. *Griggs v. Duke Power Company*, 401 U.S. 424 (1970), holding that the Civil Rights Act prohibits an employer from requiring certain tests, such as a high-school diploma, when such tests are not significantly related to job performance, when the tests disqualify Blacks at much higher rates than whites, and when whites previously had received such jobs by preference to the point of excluding Blacks. I name *Griggs v. Duke Power Company* as the high point of this progressive doctrinal movement because it was *Griggs* that required a justification of ostensible neutral practices that produced racially discriminatory results. In *Griggs*, the court momentarily transformed antidiscrimination law by shifting the emphasis on bad intent to one on consequences, thus adopting what Alan Freeman called the "victim perspective"—that there is no equality until the conditions associated with slavery and segregation have changed. Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," *Minnesota Law Review* 62 (1978): 1049.

9. Professor Kimberlé Crenshaw discusses the politics and legal ideology that characterized the retrenchment of the post-Civil Rights era in "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101 (1998): 1331. For a discussion of Critical Race Theory's historical, intellectual, and political origins, see Matsuda et al., *Words That Wound*, 1-15, and Crenshaw et al., *Key Writings*, xiii-xxii.

10. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). For a discussion of the history of the politics of backlash against remedial racial remedies and affirmative action that culminated in the *Bakke* case, and of the politics of resistance to that backlash, see Charles R. Lawrence III and Mari J. Matsuda, *We Won't Go Back: Making the Case for Affirmative Action* (Boston: Houghton Mifflin, 1997). See also Joel Dreyfuss and Charles R. Lawrence III, *The Bakke Case: The Politics of Inequality* (New York: HarBac, 1979).

11. *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989), striking down Richmond's plan requiring prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount to one or more minority enterprises. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), holding that a federal program designed to provide highway contracts to disadvantaged business enterprises must withstand strict scrutiny; *Hopwood v. University of Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581, holding that the goal of achieving a diverse student body is not a compelling interest justifying racially preferential admission policies. California's Proposition 187 prevents illegal aliens from receiving social services, health-care services, and public education. *League of United Latin Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Calif. 1997), held that portions of Proposition 187 were pre-empted by federal laws regulating immigration. Thus, the portions of the proposition that required state officials to verify an immigrant's status, notify authorities that he may be here unlawfully, and publicly report his immigrant-status information were struck down. California's Proposition 209 prohibits the use of affirmative action in public employment, public education, and public contracting. In *Coalition for Economic Equity v. Wilson*, 110 F.2d 1431 (9th Cir. 1998), the court affirmed and upheld Proposition 209, holding that it did not deny citizens equal protection.

12. See, for example, Jeffrey Rosen, "The Bloods and the Critics: O. J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America," *New Republic*, December 9, 1996, 27; Richard A. Posner, "The Skin Trade" (book review), *New Republic*, October 13, 1997, 40; Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (New York: Oxford University Press, 1997).

13. See, for example, the chapters by Sumi Cho and Robert Westley, Catharine A. MacKinnon, Mari Matsuda, Francisco Valdes, and Eric Yamamoto and Julie Su in this volume.

14. Lawrence and Matsuda, *We Won't Go Back*.

15. The LSAT remains the primary determinant of admission at Boalt and UCLA, and the primary cause of the exclusion of African American and Latino students. The failure of these faculties, and almost all others, to abandon this heavy reliance on the LSAT has little to do with their confidence in its infallibility as an accurate predictor of performance in law school, much less the profession. Rather, it is evidence that they are more concerned about preserving their ranking in the *U.S. News and World Report* pecking order and the privilege that hides in the myth of meritocracy than they are with racial justice. For a discussion of how the liberal defense of affirmative action fails to challenge the manner in which traditional standards of merit perpetuate race and class privilege and ignores substantive defenses of affirmative action that articulate the need to remedy past and ongoing discrimination, see Charles R. Lawrence III, "Two Views of the River: A Critique of the Liberal Defense of Affirmative Action," *Columbia Law Review* 101 (2001): 928.

16. Martin Luther King chastised white religious leaders who stood silent while Blacks' homes and churches were bombed and then called his campaign of nonviolent direct action "extreme" and counseled compromise with and acceptance of segregation. Dr. King wrote, "I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens' Councilor or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice." Martin Luther King, Jr., "Letter from Birmingham City Jail," in *Eyes on the Prize: Civil Rights Reader*, ed. Clayborne Carson et al. (New York: Penguin Books, 1991), 153, 156.

17. Posner, "Skin Trade," uses the following words and phrases to describe critical race theorists and their ideas: "identity politics," "paranoid," "rational fringe and lunatic core," "goofy," "irresponsible," "childish," "loony Afrocentrism," "disgrace to legal education," "extremism," and "hysteria." Rosen, "Bloods and the Crips," has employed phrases such as "vulgar racial essentialism" and accused critical race theorists of being polemical and lacking balance. Farber and Sherry, *Beyond All Reason*, 52-71, devote an entire chapter to the alleged "anti-Semitism" of critical race theorists.

18. Patricia J. Williams, "De Jure, De Facto, De Media . . . ; Diary of a Mad Law Professor," *New Republic*, June 2, 1997, 10.

19. Jacqueline Trescott, "'Da Noise' of a Full House: National Tour Strives to Reach Diverse Audience," *Washington Post*, November 9, 1997, G1.

20. bell hooks, *Yearning: Race, Gender, and Cultural Politics* (Boston: South End Press, 1990), 42.

21. Bernice Reagon Johnson, "Coalition Politics: Turning the Century," in *Home Girls: A Black Feminist Anthology*, ed. Barbara Smith, 1st ed. (New York: Kitchen Table-Women of Color Press, 1983), 356, 359.

22. See the chapter by Francisco Valdes in this volume.

23. Spike Lee, *Four Little Girls* (New York: HBO Home Video, 1998), audiovisual (40 Acres and a Mule Fireworks, 1997).

24. Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 1982), 75.

25. See the chapter by Julie A. Su and Eric K. Yamamoto in this volume.

26. Posner, "Skin Trade." "The ironic consequence is that the critical race theorists are poor role models. Instead of exemplifying in their careers the potential of members of their groups for respected achievement in the world outside the ghetto of complaint—the kind of exemplification that we find in the career of Colin Powell—critical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable salary to write childish stories about how awful it is to be a member of such a group."

27. See generally Derrick A. Bell, Jr., *Faces to the Bottom of the Well: The Permanence of Racism* (New York: Basic Books, 1992).

Words That Wound

Critical Race Theory, Assaultive Speech, and the First Amendment

Mari J. Matsuda, Charles R. Lawrence III,
Richard Delgado, and
Kimberlè Williams Crenshaw

Westview Press
BOULDER • SAN FRANCISCO • OXFORD

1

Introduction

*Charles R. Lawrence III, Mari J. Matsuda,
Richard Delgado, and Kimberlè Williams Crenshaw*

This is a book about assaultive speech, about words that are used as weapons to ambush, terrorize, wound, humiliate, and degrade. Of late, there has been an alarming rise in the incidence of assaultive speech. Although this is hardly a new phenomenon—hate speech is arguably as American as apple pie—it is a social practice that has gained a new strength in recent years. Incidents of hate speech and racial harassment are reported with increasing frequency and regularity, particularly on American college campuses, where they have reached near epidemic proportions. The National Institute Against Prejudice and Violence in its 1990 report on campus ethnoviolence found that 65 to 70 percent of the nation's minority students reported some form of ethnoviolent harassment, and the number of college students victimized by ethnoviolence is in the range of 800,000 to 1 million annually.¹

In response to this outbreak of hate speech, many universities and other public institutions have enacted regulations prohibiting speech that victimizes racial minorities and other historically subordinated groups. These regulations have prompted a heated and wide-ranging public debate over the efficacy of such regulations. Many believe that hate speech regulations constitute a grave danger to first amendment liberties, whereas others argue that such regulations are necessary to protect the rights of those who have been and continue to be denied access to the full benefits of citizenship in the United States. This debate has deeply divided the liberal civil rights/civil liberties community and produced strained relations within the membership of organizations like the American Civil Liberties Union (ACLU).

Those civil libertarians who favor restrictions on hate speech find themselves in a distinct minority. They are called "first amendment revisionists" and "thought police." It is not a coincidence that the strongest sentiment for regulating hate speech has come from members of victimized communities. Persons of color, women, gays, and lesbians are disproportionately

represented among those who support the sanctioning of hate speech, and the Jewish community is sharply divided on this issue.

This book is a collection of essays written by four of the leading advocates of public regulation of racially abusive hate speech. We do not attempt to present all sides of this debate. Rather we present a dissenting view grounded in our experiences as people of color and ask how those experiences lead to different understandings of racism and law. Our purpose here is to analyze a pressing public issue from within the emergent intellectual movement called critical race theory. In so doing we hope to provide our readers with insights that will be helpful to them as individuals, policymakers, and students of theory.

How has this book come to pass? What is the common ground that unites the work of the four authors? Are there generic themes, shared stories? Is there an ideology that makes our disparate work a whole? How and why is our work different from that of our white colleagues on the left or of those who describe themselves as liberals? What distinguishes our position from that of politicians and theorists on the right who have called for restrictions on speech?

The answers to these questions begin with our identities. We are two African Americans, a Chicano, and an Asian American. We are two women and two men. We are outsider law teachers who work at the margins of institutions dominated by white men. The identity that defines us, that brings our work together and sets it apart from that of most of our colleagues, is more complex than the categories of race and gender imposed upon us by a world that is racist and patriarchal. It is an identity shaped by life experience: by what parents and neighbors taught us as children; by our early encounters with the more blatant forms of segregation and racial exclusion and the contemporary confrontations with less obvious forms of institutional and culturally ingrained racism and sexism that face us each day; by our participation in the civil rights struggles of the 1960s and 1970s; and by the histories of the communities from which we come.

Our identities are also defined by choice. Each of us has chosen to identify with a tradition of radical teaching among subordinated Americans of color. The historian Vincent Harding describes this tradition as a vocation of struggle against dehumanization, a practice of raising questions about the reasons for oppression, an inheritance of passion and hope.² We inherited this tradition from parents and grandparents and from countless others who have resisted racial oppression, but Harding's description begins with the word "vocation." The inference is that one must *choose* to accept the gift and the burden of this inheritance. One must choose to embrace the values of humanism. One must choose to engage in the practice of liberationist teaching. One must make that choice each day. It is this voluntary

association with the struggle that is the most important part of our common identity.

What Is Critical Race Theory?

Teachers of color in the legal academy who choose to join this tradition of radical teaching have sought, in their teaching and scholarship, to articulate the values and modes of analysis that inform their vocation of struggle. These efforts have produced an emerging genre known as critical race theory. Critical race theory is grounded in the particulars of a social reality that is defined by our experiences and the collective historical experience of our communities of origin. Critical race theorists embrace subjectivity of perspective and are avowedly political. Our work is both pragmatic and utopian, as we seek to respond to the immediate needs of the subordinated and oppressed even as we imagine a different world and offer different values. It is work that involves both action and reflection. It is informed by active struggle and in turn informs that struggle.

Critical race theory cannot be understood as an abstract set of ideas or principles. Among its basic theoretical themes is that of privileging contextual and historical descriptions over transhistorical or purely abstract ones. It is therefore important to understand the origins of this genre in relation to the particulars of history. Critical race theory developed gradually. There is no identifiable date of birth, but its conception can probably be located in the late 1970s. The civil rights movement of the 1960s had stalled, and many of its gains were being rolled back. It became apparent to many who were active in the civil rights movement that dominant conceptions of race, racism, and equality were increasingly incapable of providing any meaningful quantum of racial justice. Individual law teachers and students committed to racial justice began to meet, to talk, to write, and to engage in political action in an effort to confront and oppose dominant societal and institutional forces that maintained the structures of racism while professing the goal of dismantling racial discrimination.

The consciousness of critical race theory as a movement or group and the movement's intellectual agenda were forged in oppositional reaction to visions of race, racism, and law dominant in this post-civil rights period. At the same time, both the movement and the theory reflected assertions of a commonality of values and community that were inherited from generations of radical teachers before us.

Group identity forms in a way similar to individual identity. Its potential exists long before consciousness catches up with it. It is often only upon backward reflection that some kind of beginning is acknowledged. The same holds true of intellectual influences. Some influences are so significant that they

become transparent, they fade into what becomes the dominant picture. Often it is not until one engages in a conscious reconstruction, asking what led to what else, that a history is revealed or, perhaps more accurately, chosen.

Kimberlè Crenshaw places the social origins of what was to become critical race theory at a student boycott and alternative course organized in 1981 at the Harvard Law School. The primary objective of the protest was to persuade the administration to increase the number of tenured professors of color on the faculty. The departure of Derrick Bell, Harvard's first African-American professor, to assume the deanship of the law school at the University of Oregon had left Harvard Law School with only two professors of color. Students demanded that the law school begin the rectification of this situation by hiring a person of color to teach "Race Racism and American Law," a course that had been regularly taught by Bell, who was also the author of a ground-breaking text on the subject. When it became apparent that the administration was not prepared to meet their demand, students organized an alternative course. Leading academics and practitioners of color were invited each week to lecture and lead discussion on a chapter from Bell's book.

This course served as one of several catalysts for the development of critical race theory as a genre and movement. It brought together in a common enterprise many of the legal scholars who were beginning to teach and write about race with activist students who were soon to enter the ranks of teaching. Kimberlè Crenshaw, then a student at Harvard, was one of the primary organizers of the alternative course. Mari Matsuda, a graduate student at the law school, was also a participant in the course. Richard Delgado and Charles Lawrence were among the teachers invited to give guest lectures. The course provided a forum for the beginnings of a collectively built discourse aimed at developing a full account of the legal construction of race and racism in this country.

The Harvard course was not the only place where teachers and students gathered to engage in this new enterprise. There were conferences, seminars, and study groups at law schools across the nation. A small but growing group of scholars committed to finding new ways to think about and act in pursuit of racial justice began exchanging drafts of articles and course materials. We gave each other support and counsel by phone, as each of us struggled in isolation in our own institutions. We met in hotel rooms before, during, and after larger law school conferences and conventions. Slowly a group identity began to take shape.

Some of us sought intellectual community in what was then the dominant progressive movement in the law schools, critical legal studies. Critical legal studies, originating among a predominantly white group of law professors identified with the left, had attracted a small but significant group of scholars of color who were, to varying degrees, alienated from dominant liberal

approaches to the law and legal education and were looking for both progressive allies and a radical critique of the law. Many of these colleagues on the white left had worked with us during the civil rights and antiwar movements of the 1960s and some of them continued to be important sources of support to our efforts to integrate law school student bodies and faculties and make law school curricula and legal scholarship more responsive to the needs of subordinated communities of color.

Even within this enclave on the left we sometimes experienced alienation, marginalization, and inattention to the agendas and a misunderstanding of the issues we considered central to the work of combating racism. Scholars of color within the left began to ask their white colleagues to examine their own racism and to develop oppositional critiques not just to dominant conceptions of race and racism but to the treatment of race within the left as well.

By the mid-1980s this motley band of progressive legal scholars of color had produced a small but significant body of scholarship, and a sense of group identity began to emerge. This group identity grew out of shared values and politics as well as the shared personal experience of our search for a place to do our work, for an intellectual and political community we could call home. Our identity as a group was also formed around the shared themes, methodologies, and voices that were emerging in our work.

We turned to new approaches. Borrowing from and critiquing other intellectual traditions, including liberalism, Marxism, the law and society movement, critical legal studies, feminism, poststructuralism/postmodernism, and neopragmatism, we began examining the relationships between naming and reality, knowledge and power. We examined the role of liberal-capitalist ideology in maintaining an unjust racial status quo and the role of narrow legal definitions of merit, fault, and causation in advancing or impairing the search for racial justice. We identified majoritarian self-interest as a critical factor in the ebb and flow of civil rights doctrine and demonstrated how areas of law ostensibly designed to advance the cause of racial equality often benefit powerful whites more than those who are racially oppressed. Our work presented racism not as isolated instances of conscious bigoted decisionmaking or prejudiced practice, but as larger, systemic, structural, and cultural, as deeply psychologically and socially ingrained.

New forms of scholarship began to emerge. We used personal histories, parables, chronicles, dreams, stories, poetry, fiction, and revisionist histories to convey our message. We called for greater attention to questions of audience—for whom were we writing and why? None of these methods was unique to our work, but their frequent use by scholars of color as a part of a race-centered enterprise indicated the emergence of a genre or movement. It was this 1980s generation of liberation scholarship that came to be known as critical race theory.

In a search for a tentative expository answer to the question "What is critical race theory?" critical race scholars have identified the following defining elements:

1. Critical race theory recognizes that racism is endemic to American life. Thus, the question for us is not so much whether or how racial discrimination can be eliminated while maintaining the integrity of other interests implicated in the status quo such as federalism, privacy, traditional values, or established property interests. Instead we ask how these traditional interests and values serve as vessels of racial subordination.
2. Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy. These claims are central to an ideology of equal opportunity that presents race as an immutable characteristic devoid of social meaning and tells an ahistorical, abstracted story of racial inequality as a series of randomly occurring, intentional, and individualized acts.
3. Critical race theory challenges ahistoricism and insists on a contextual/historical analysis of the law. Current inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear. More important, as critical race theorists we adopt a stance that presumes that racism has contributed to all contemporary manifestations of group advantage and disadvantage along racial lines, including differences in income, imprisonment, health, housing, education, political representation, and military service. Our history calls for this presumption.
4. Critical race theory insists on recognition of the experiential knowledge of people of color and our communities of origin in analyzing law and society. This knowledge is gained from critical reflection on the lived experience of racism and from critical reflection upon active political practice toward the elimination of racism.
5. Critical race theory is interdisciplinary and eclectic. It borrows from several traditions, including liberalism, law and society, feminism, Marxism, poststructuralism, critical legal theory, pragmatism, and nationalism. This eclecticism allows critical race theory to examine and incorporate those aspects of a methodology or theory that effectively enable our voice and advance the cause of racial justice even as we maintain a critical posture.
6. Critical race theory works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression. Racial oppression is experienced by many in tandem with oppression on grounds of gender, class, or sexual orientation. Critical race theory measures progress by a yardstick that looks to fundamental social

transformation. The interests of all people of color necessarily require not just adjustments within the established hierarchies, but a challenge to hierarchy itself. This recognition of intersecting forms of subordination requires multiple consciousness and political practices that address the varied ways in which people experience subordination.

Critical Race Scholars Enter the First Amendment Debate

How is it that the four authors whose essays appear in this book have found themselves at the center of the debate on assaultive speech? What has drawn us to this work? How has our identity and our political identification shaped the way we think about the first amendment?

Our entry into the contemporary discourse on assaultive speech and the first amendment is impelled and informed by the practice of liberationist pedagogy and by the emerging discipline of critical race theory. We joined this dialogue at different times and places. We focus on different aspects of this complex problem and suggest different solutions, but all of the work in this book is part of a larger project that we share. All of us found ourselves increasingly drawn into writing, speaking, and engaging in public debate as incidents of assaultive speech increased in recent years. We did not enter this debate to demonstrate our skill at intellectual swordplay. Nor did we become involved because it had become a faddish hot topic. Assaultive speech directly affected our lives and the lives of people for whom we cared: family, friends, students, and colleagues.

Our work is a pragmatic response to the urgent needs of students of color and other victims of hate speech who are daily silenced, intimidated, and subjected to severe psychological and physical trauma by racist assailants who employ words and symbols as part of an integrated arsenal of weapons of oppression and subordination. Students at Stanford, at the universities of Wisconsin and Michigan, at Duke and Yale and UCLA needed protection from the most flagrant forms of verbal abuse so that they could attend to their schoolwork. Political organizers in Detroit and Alabama, working men and women breaking color and gender barriers in factories and police forces, needed to have their stories told. Our colleagues of color, struggling to carry the multiple burdens of token representative, role model, and change agent in increasingly hostile environments, needed to know that the institutions in which they worked stood behind them.

Each of us knew that we were inclined to be more cautious, less outspoken and visible, after a rash of hate tracts had appeared in our mail or been stuffed under our doors. We knew that we walked more quickly to our cars after late nights at the office and glanced more often over our shoulders as we jogged the trails around our campuses. We needed theory and analysis to articulate and explain our reality, to deconstruct the theories that did not take our

experience into account, to let us know that we were not crazy, to make a space for our voices in the debate.

For example, Charles Lawrence's chapter "If He Hollers Let Him Go: Regulating Racist Speech on Campus," began as an effort to articulate the injury and exclusion experienced by Black students at Stanford in the wake of what became known as the Ujamaa incident.³

Two white freshmen had defaced a poster bearing the likeness of Beethoven. They had colored the drawing of Beethoven brown, given it wild curly hair, big lips, and red eyes, and posted it on the door of an African-American student's dorm room in Ujamaa, the Black theme house. The two white students involved had been in an argument with the Black student the night before. They had contested the Black student's assertion that Beethoven was of African descent. Another poster, advertising a Black fraternity dance, was also found defaced on the dorm bulletin board. The word "niggers" had been written in large letters across the face of the poster. After investigating the incident the university's office of general counsel held that the offending students could not be disciplined under the university's disciplinary rules because their actions constituted protected speech.

The immediate reaction of many white students and faculty on campus to the Ujamaa incident was to treat it as an unfortunate boyish prank by misguided undergraduates. They could not understand the intensity of the strong emotional reaction by Black students. They saw the incident as unique, as unrepresentative of the racial climate at Stanford, and as a relatively mild example of the kind of racial harassment that was becoming increasingly common on American campuses. Surely, they argued, the danger to free speech and intellectual debate that would result from punishing speech of this sort counseled tolerance of this isolated case. The Black students' call for regulations was the worst kind of censorship. Hadn't they learned about the first amendment?

Lawrence experienced the incident very differently. The Sambo-like caricature drawn on the poster injured him quite directly. It was not an injury to an unknown other. Upon first hearing of it, he felt the blow of its message. The message said, "This is you. This is you and all of your African-American brothers and sisters. You are all Sambos. It's a joke to think that you could ever be a Beethoven. It's ridiculous to believe that you could ever be anything other than a caricature of real genius."

The clarity of this message, the painful impact of its blow, was the genesis of legal theory. This was injury to a group. To privatize it ignored the greatest part of the injury. The power of the poster's message was derived from its historical and cultural context, from the background of minstrel shows, of racist theories about brain size and gene pools and biblical ancestors that has shaped our conscious and unconscious beliefs about the intellectual capacity of Blacks. Without that context the defacement had no

meaning. Moreover, the intent and impact of this message was to end discussion, not to continue it. It was not a rebuttal to the substance of the Black student's argument. It was an attack on his standing to engage in intellectual exchange.

Lawrence experienced the defacement as representative of the university community's racism and not as an exceptional incident in a community in which the absence of racism is the rule. As a token Black faculty member at Stanford, he had heard many stories from victims of hate speech that went unreported and unheard by his white colleagues. These were stories he'd heard throughout his life. He had been the target himself more times than he could count.

In considering how best to frame an analysis that might serve students and colleagues of color seeking to be heard in a debate framed by his white colleagues as one concerning the threat posed by censorship to academic freedom, Lawrence placed race at the center of his analysis. His first and ultimate inquiry was how the analysis advanced or hindered the goal of eliminating racial oppression and other mutually reinforcing forms of subordination.

It was this methodology that led him to see *Brown v. Board of Education* as a case about the nature of the injury of hate speech. In recognizing the inherent unconstitutionality of segregation, the Supreme Court identified the defamatory symbolism of segregation as central to its unconstitutionality and showed that racism achieves its purpose by the construction of meaning. As the critical race scholar Kendall Thomas says, "We are raced." We are acted upon and constructed by racist speech. The meaning of "Black" or "white" is derived through a history of acted-upon ideology.

It was this methodology that led Mari Matsuda to antisubordination as the guiding principle to determine when hate speech is antithetical to the underlying liberal democratic principles that inform both the first amendment and the equal protection clause. In "Public Response to Racist Speech: Considering the Victim's Story," Matsuda asks that we listen first to the voices of the victims of hate speech. She is not content simply to tell the victim's story. Their liberation must be the bottom line of any first amendment analysis.

Matsuda's work is influenced by the use of narrative and the authority of personal experience that characterizes strands of both feminist thought and critical race theory. In developing her analysis of hate speech and the first amendment, she spoke with students at universities throughout the country and worked with community groups involved in antiracist struggle. The connection between hate speech and violence, and loss of liberty experienced by targets of hate speech, compelled her to confront the contradiction between first amendment absolutism and the goals of liberty and equality.

Matsuda's parents were labor and civil rights activists who paid a price for their unpopular beliefs during the McCarthy period. Censorship, black-

listing, and intimidation affected her family in a concrete way. Mindful of this experience, Matsuda draws a distinction between dissent—or the right to criticize the powerful institutions that govern our lives—and hate speech, which is directed against the least powerful segments of our community. This distinction, Matsuda argues, is a principled one, given the historical contexts of subordination that she uses as a starting point for developing legal theory.

Likewise it is the methodology of critical race theory that prompted Kimberlè Crenshaw to examine the intersectionality of race and gender subordination in the alarming incidence of violence against women of color and to ask about the role that speech, or the representation of women of color in mass culture, plays in constructing the unique combinations of racism and patriarchy that limit and endanger the lives of women of color. In examining the obscenity prosecution of the Black rap group 2 Live Crew, Crenshaw found herself torn between defending these three Black men against the racist attack of selective prosecution and opposing the frightening explosion of violent imagery against Black women that was represented in their music. Faced with the question of how to construct a Black feminist approach to the virulent misogyny of 2 Live Crew, Crenshaw saw the need to understand the larger issue of gender violence. “Beyond Racism and Misogyny: Black Feminism and 2 Live Crew” explores the ways in which the politics and discourse of race and gender have worked to exclude and marginalize women of color. It is an example of the critical race theorist revealing the connections between representational, political, and material dynamics of subordination. Crenshaw takes a case that came to the courts as a case about free speech and shows us that much more is at stake than whether 2 Live Crew’s album *As Nasty As They Wanna Be* is protected by the first amendment.

Richard Delgado’s “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling” was the first article to explore the injuries inflicted by racist hate speech and the potential tensions between legal remedies for those injuries and the first amendment. This path-breaking article was first published in 1982 when critical race theory was still in its infancy. But Delgado’s use of cases to graphically portray the injury; his use of psychology, sociology, and political theory to explain the nature of the harm; and his exploration of common law doctrine that was moving toward providing a pragmatic remedy for those suffering from racial subordination foreshadowed the methodology that critical race theorists later sought to define and name. Delgado pointed out that values central to the first amendment itself were subverted by racist speech and identified racism as the reason for such selective disregard.

Building Theory Through Reflection on Action

Central to the methodology of critical race theory and liberationist pedagogy is an ongoing engagement in political practice. The Brazilian

educator and philosopher Paulo Freire has said that liberationist teaching contains two dimensions, “Reflection and action, in such radical interaction that if one is sacrificed—even in part—the other immediately suffers.”⁴ In our work on hate speech and the first amendment we have sought to follow this precept, seeking always to inform our understanding and analysis by critical reflection on political action.

This continuing search means that the positions reflected in these essays are contingent, not static. Our work has been shaped and continues to be shaped in the crucible of dialogue, debate, consciousness raising, and political struggle. As we have traveled around the country giving speeches, participating on panels, listening to students, and consulting with community activists, faculties, administrators, legislators, and judges, we have continued to learn much about the nature of this political project. We have learned that even as we understand and name the world we see, it changes and must be understood and named again. This introduction would not be complete without some discussion of audience. To whom have we been speaking? What have been the range of responses to our work and what are the tentative understandings we have gained from those responses?

First amendment hard-liners have been our most vocal and most predictable audience. Political pundits across the political spectrum from George Will to Nat Hentoff have attacked our efforts as the work of “thought police,” “leftist censors,” and “first amendment revisionists.” The attention that these more inflammatory and contentious attacks have received in the media has meant that we have spent a great deal of our time and energy responding to the position of these first amendment fundamentalists. The articles in this book answer in some detail the questions most frequently put by those who adhere to the absolutist or near-absolutist position that any regulation of assaultive speech is too much. Lawrence reflects on the source of these first amendment fundamentalists’ resistance to even narrowly framed regulations of hate speech in contexts in which the courts have already permitted the regulation of expression. Noting that there are already many places in first amendment law in which competing interests such as privacy, individual reputation, protection of intellectual property, and regulation of economic markets are judged to justify infringements on speech, he asks if the reluctance to regulate hate speech is related to unconscious racism.

Although the civil liberties community is deeply ambivalent about this difficult set of issues, we have found that many confirmed civil libertarians are open to our ideas and that the narratives and analyses contained within this book have convinced many of them to move away from a more absolutist position. The 1989 biennial conference of the ACLU devoted a plenary session and two days of debate to the issues raised in these essays, and two years later the national board of the ACLU issued a policy statement that reflected a new sensitivity to the harm that assaultive speech may do to both its victims and to the political discourse we seek to protect with the first

amendment. Those individuals in our audience who read and listen to our work and find themselves questioning previously held assumptions are testimony to the power of story telling and cross-cultural translation that is central to critical race theory and liberation pedagogy.

Perhaps our most important audience has been the community of individuals who are the victims of subordinating speech—people of color, Jews, women, gay men, and lesbians—who are regularly subjected to taunts and threats. Matsuda describes the beginnings of her insights into the pervasive injury done by sexual harassment and assaultive speech as follows:

Five years ago I began speaking to university and community groups about sexual harassment. An eerie pattern emerged in these speaking forays. After I would give my talk about the legal analysis of sexual harassment, throwing in a little bit of feminist theory and answering a predictable array of questions about what is and what isn't sexual harassment, I would conclude and prepare to leave. The crowd would thin out, and a woman would remain on its edges, waiting to talk to me. When she was certain the others were out of hearing range, she would come up to me and say, in a voice both guilty and grateful for the chance to speak, "It happened to me." Secretaries told me of bosses who chased them around desks—men they were afraid to be in elevators with, jobs they'd had to leave because "he couldn't keep his hands off me." Students told me of professors who would call them into the office for special conferences that turned out to be sexual propositions. I heard these stories regularly about the downtown law firms, about the beautiful campus where I work. Suddenly the elegant offices, the broad, tree-lined walkways of my university looked different, because underneath the appearance of normalcy, I came to see an epidemic of hateful behavior toward women. Students would call me anonymously to tell me harassment stories rich with the kind of detail that comes from truth. A therapist wrote to me to tell me of her patient, date-raped by a colleague. I learned the techniques of the academic harasser, how particularly adept some of them are at exploiting the student's wishes for more intimate contact in a large university, how the antihierarchy of phony liberalism is used to confuse students about the limits of appropriate intimacy in academic relationships.

As I heard these stories, as I heard from women who had left school, who had gone into therapy, who blamed themselves for the aggression of others, I perceived an emergency, appropriately responded to by regulations against sexual harassment. To my surprise, many of my colleagues disagreed. Rules against sexual harassment, particularly rules against so-called voluntary sexual relations between students and faculty, were seen as violations of academic freedom and personal choice. Women have to toughen up, I was told. They need to stop thinking like victims and learn to stand up to harassers. Regulations against harassment could lead to a chilling effect, preventing warm student-teacher relations. Proposals for regulations were antisex, antilove, authoritarian, and violative of basic civil liberties.

In the meantime, I was also researching and writing on the topic of racist speech and traveling to various universities making legal arguments that are

viewed as heresy by many civil libertarians. I argued for narrow restriction of racist speech because of its impact on victims. At every single university at which I spoke—north, south, east, and west—I learned of serious incidents of racist or anti-Semitic assault. University administrators reported that they had never seen anything like it. A pattern emerged in the 1980s of the new integration colliding with the new racism—or the new old racism. The universities—long the home of institutional and euphemistic racism—were now seeing something different: the worst forms of gutter racism. Swastikas appearing on Jewish holy days, cross burnings, racist slurs, and verbal assaults so degrading and vicious I found I could not reprint some of them, even for educational purposes, in the article I wrote.⁵

Too often victims of hate speech find themselves without the words to articulate what they see, feel, and know. In the absence of theory and analysis that give them a diagnosis and a name for the injury they have suffered, they internalize the injury done them and are rendered silent in the face of continuing injury. Critical race theory names the injury and identifies its origins, origins that are often well disguised in the rhetoric of shared values and neutral legal principles. When ideology is deconstructed and injury is named, subordinated victims find their voices. They discover they are not alone in their subordination. They are empowered. This empowerment, this helping others to find their voices as we find our own, is the most important part of our work.

The political education that is gained in the debate itself—participants hearing their own stories and the stories of others, hearing the arguments framed and learning to make them themselves—is what gives new strength to embattled students and political activists. This, more than getting a university to adopt a regulation or changing the thinking of first amendment fundamentalists, is the work that must be done.

Toward a Postcolonial University: Reflections on the Right to Be Racist

One of the things that we have discovered as we engage in the debate over hate speech and the first amendment is that we often find ourselves in familiar intellectual territory. We hear ourselves making arguments we have made before, in other settings and with reference to other legal issues. We find ourselves echoing themes that were introduced in our work on school desegregation, affirmative action, reparations, religious freedom, and legal history. This sense of *déjà vu*, this experience of traveling an often-traveled terrain, is not coincidental. It reflects the grounding of our work in lived experience and political purpose. It is inevitable that our work on the first amendment brings us to intellectual and political crossroads we have come to

before, because these intersections are found on the path that defines the tradition and practice of radical teaching that we have chosen as our own.

One of these intersections bears special mention in this introduction. This is the reemerging debate over affirmative action and the meaning of diversity within our colleges and universities. Contemporaneous with the recent outbreak of gutter hate speech and racial harassment, there is an emerging and increasingly virulent backlash against the extremely modest successes achieved by communities of color, women, and other subordinated groups in our efforts to integrate academic institutions run by and for white male elites. The chief spokespersons for this more refined sentiment against persons and voices that are new and unfamiliar to the campus and intellectual discourse are not the purveyors of gutter hate speech. They are polite and polished colleagues. The code words of this backlash are words like merit, rigor, standards, qualifications, and excellence. Increasingly we hear those who are resisting change appropriating the language of freedom struggles. Words like intolerant, silencing, McCarthyism, censors, and orthodoxy are used to portray women and people of color as oppressors and to pretend that the powerful have become powerless.

These colleagues mourn the passing of an era when we "all" read the "great books," when we knew what it meant to be an "educated man," and when we were not afraid to require our students and colleagues to meet that standard. They call for the reinstitution of compulsory courses on "Western Civilization" and resist the inclusion of significant non-European or women's writings in those courses. They are profoundly critical of any effort to change the composition of the academic community or the content of the intellectual discourse by giving attention to the race or gender of potential participants.

We have been fighting this battle over affirmative action, multiculturalism, the meaning of merit, and the inclusion of historically excluded persons and voices for all of our professional lives. The struggle against institutional, structural, and culturally ingrained unconscious racism and the movement toward a fully multicultural, postcolonial university is central to the work of the liberationist teacher. This is at bottom a fight to gain equal access to the power of the intelligentsia to construct knowledge, social meaning, ideology, and definitions of who "we" are.

Now the defenders of the status quo have discovered, in the first amendment, a new weapon. The debate about affirmative action and the inclusion of historically excluded groups is being recast as a debate about free speech. We have begun to hear a rhetoric from those of our colleagues who are most fearful of change that sounds much like what we hear from first amendment fundamentalists: Arguments for absolutist protection of speech made without reference to historical context or uneven power relations. Academic freedom and intellectual pursuit are alleged to be threatened by "leftist speech police." People of color, women, gays, and lesbians who insist on the

inclusion of their voices in academic discourse and who speak out against persons and practices that continue to injure and demean them are said to impose a "new orthodoxy" upon the academy. Tenured professors say that they are afraid to raise controversial issues, use humor in their classes, or express friendliness toward their students for fear of being called a racist, a sexist, or a homophobe by "oversensitive" students.

Stripped of its context this is a seductive argument. The privilege and power of white male elites is wrapped in the rhetoric of politically unpopular speech. Those with the power to exclude new voices from the official canon become an oppressed minority. Academic freedom to express one's beliefs is decontextualized from the speaker's power to impose those beliefs on others. The isolated Black, Brown, or Asian faculty member, the small group of students who risk future careers in raising their voices against racism, are cast as powerful censors.

The first amendment arms conscious and unconscious racists—Nazis and liberals alike—with a constitutional right to be racist. Racism is just another idea deserving of constitutional protection like all ideas. The first amendment is employed to trump or nullify the only substantive meaning of the equal protection clause, that the Constitution mandates the disestablishment of the ideology of racism.

What is ultimately at stake in this debate is our vision for this society. We are in this fight about the first amendment because it is more than a fight about how to balance one individual's freedom of speech against another individual's freedom from injury. This is a fight about the substantive content that we will give to the ideals of freedom and equality—how we will construct "freedom," as a constitutional premise and a defining principle of democracy.

This is the same fight that is the subject of all of our work. It is a fight for a vision of society where the substance of freedom is freedom from degradation, humiliation, battering, starvation, homelessness, hopelessness, and other forms of violence to the person that deny one's full humanity. It is a fight for a constitutional community where "freedom" does not implicate a right to degrade and humiliate another human being any more than it implicates a right to do physical violence to another or a right to enslave another or a right to economically exploit another in a sweatshop, in a coal mine, or in the fields.

In this book we use the words of law and politics to fight the words that wound and exclude. We seek a legal system that recognizes and remedies the harm of the structures of have and have-not, and we express our solidarity with all who join us in that quest.