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## RACE LIBERALISM AND THE DERADICALIZATION OF RACIAL REFORM

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In the era that followed the formal collapse of white supremacy, efforts to sustain and broaden reformist agendas against the denouement of social justice movements exposed a series of discordant debates on the Left. While many such conflicts surfaced throughout the social order, some of these debates were staged in elite spaces like Harvard Law School. The Harvard Law School boycott of 1982 reflected a rupture among race-reform advocates between what I call “race liberalism,” an ideology that ultimately embodies a “colorblind” model of racial justice that seeks to eliminate “discrimination,” and a “critical race” discourse focused on the distribution of racial power, a perspective requiring the very race consciousness that race liberals saw as the evil that reform aimed to transcend. In the 1980s, the rhetorical battles between these two camps played out in a number of contexts, including, for example, debates about race-conscious affirmative action policies in elite institutions.

The temporal and institutional setting of the battles exposed how knowledge production in legal education was an arena of racial contestation not unlike the lunch counters and ballot boxes that confronted civil rights advocates in the decades before. When students of color demanded a say in how race and law would be conceptualized as a field of inquiry, they challenged the deepest pretense of liberal sensibility — that universities themselves are apolitical arbiters of neutral knowledge rather than participants in the struggle over how social power is exercised.

Harvard Law School was a generative site of struggle over the norms and content of elite legal education, particularly in shaping the contours of liberal-radical conflict about law and social transformation. The liberal project of enhancing social mobility and democratic participation through rationality and rights was a foundational commitment of the Civil Rights Establishment (CRE)<sup>1</sup>. The legal face of race liberalism

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<sup>1</sup> When referring to the CRE, I mean to include organizations and civil rights leaders who embraced an integrationist ideal, that is, a commitment to staying the course of civil rights reform by bringing social practices throughout American society into alignment with the nation’s ideals.

included not only the network of faculty, administrators, judges, and graduates who moved in concert with this commitment, but also the lingua franca of liberal institutions.

Harvard was also a central location in the map of radical thinking about law. Key figures in the Critical Legal Studies (CLS) movement were prominent members of the law school's faculty.<sup>2</sup> During its heyday at Harvard, CLS's critiques of law and its relation to social hierarchy coincided with a period of heightened student activism related to faculty hiring, curricular development, and the interface between legal liberalism and Critical Race Theory. The influence of these communities of thought in shaping an alternative view of racial power was not a simple matter of students' selective incorporation of legal liberalism and CLS. Instead, the unfolding conflict became an interpretive template from which to map the ideological investments of a race project that wasn't critical, utilizing the critical tools of a radical project that was only beginning to interrogate race. The battle over affirmative action at Harvard became a social text that galvanized student critics into articulating an alternative view of racial power, one in which notions of merit and institutional settlement were seen as mere rationalizations for the refusal to interrogate or interrupt the core commitments of elite legal education.<sup>3</sup>

These dynamics unfolded into projects that integrated insights about the relationship between knowledge and racial power that had surfaced in other sites across the university into critical discourses about law. Critical Race Theory and intersectional feminism/antiracism emerged from this interface as a product of ideological tension between race liberals and their left-leaning critics.<sup>4</sup> It took shape within the simultaneous encounters between faculty and students who were struggling to articulate how radical thinking about law and about race could cross-pollinate and find expression as an intellectual and political project.

Part I of this Essay explores liberal responses to the social disruptions that shook the country in the 1960s and 1970s, which reflected a belief

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The legal arm of the CRE included organizations, judges, and other notables whose prestige was built on their ability to wrest important victories from the courts, wielding the law as both sword and shield in the fight against racial injustice.

<sup>2</sup> Some of the Harvard faculty who were among the key figures in the CLS movement at the time were Duncan Kennedy, Roberto Unger, Morton Horwitz, Clare Dalton, David Trubek, and Daniel Tarullo. See Jennifer A. Kingston, *Harvard Tenure Battle Puts "Critical Legal Studies" on Trial*, N.Y. TIMES (Aug. 30, 1987), <http://www.nytimes.com/1987/08/30/weekinreview/harvard-tenure-battle-puts-critical-legal-studies-on-trial.html> [https://perma.cc/6H6P-7ZRU]; Calvin Trillin, *Harvard Law*, NEW YORKER, Mar. 26, 1984, at 56.

<sup>3</sup> See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1275 (2011); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 764–65, 772–73, 777.

<sup>4</sup> See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

that law could facilitate orderly and meaningful reform. For race liberals in particular, the integration of bodies that had been historically underrepresented throughout the nation's elite institutions was a central pillar of post-segregation society. As discussed in Part II, while this response translated into the integration of nonwhite faculty into the elite ranks of legal education, the most committed race liberals maintained their faith in the ideals of a colorblind meritocracy. Although race liberals would occasionally support race-conscious departures from the colorblind norm for select integrative purposes, their idealization of merit as colorblind and "race neutral" set the stage for a nationally publicized eruption over faculty hiring and curricular development. One site of this conflict was the controversy over the Alternative Course at Harvard Law School.<sup>5</sup>

### I. TENSIONS OF THE 1960S AND 1970S

Although integration and its counterpoints — discrimination and bias — are now ubiquitous as the dominant ways of thinking about racial power, they were not always the undisputed center of gravity. Knowledge production about race and social power has always been a contested enterprise in which the very same dynamics that were under study were playing out among those involved in the field. Racialized dynamics of power and prestige contribute to how the center and margins of racial thinking are constructed. In fact, scholars of the early twentieth century such as Oliver Cox and W.E.B. Du Bois theorized racial power differently than those whose frameworks are now imprinted in the public consciousness.<sup>6</sup> Along with other Black scholars,

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<sup>5</sup> See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1806–07 (1989) (characterizing race consciousness as a “deviant mode” of academic evaluation that should not be naturalized into “our conception of meritocracy,” *id.* at 1807). *But see generally* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (labeling Randall Kennedy’s position “colorblind meritocratic fundamentalism,” *id.* at 707, and proposing an argument against “a sharp boundary between meritocratic decision and race-based decision,” *id.* at 711).

<sup>6</sup> Cox, for instance, “exposed the whiteness of sociology” with classic critiques of sociologists Robert Park and Gunnar Myrdal. See Crenshaw, *supra* note 3, at 1257 & n.9 (citing OLIVER CROMWELL COX, *CASTE, CLASS & RACE: A STUDY IN SOCIAL DYNAMICS* 462–77 (1948)); see also W.E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 328 (1935) (arguing that the quality of education matters more than whether schools are separate or integrated). See generally W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* (1935); ERIC FONER, *RECONSTRUCTION* (1988). For accounts of the paradigm-shifting work done by scholars in the nineteenth and twentieth centuries, see Crenshaw, *supra* note 3, at 1301 n.157 (citing James Turner & C. Steven McGann, *Black Studies as an Integral Tradition in African-American Intellectual History*, 49 J. NEGRO EDUC. 52 (1980)); and James E. Turner, *Foreword: Africana Studies and Epistemology: A Discourse in the Sociology of Knowledge, in THE NEXT DECADE: THEORETICAL AND RESEARCH ISSUES IN AFRICANA STUDIES*, at v, vii–viii (James E. Turner ed., 1984)).

they foregrounded a conception of racism in terms of socioeconomic power between Black and white communities rather than as interpersonal interactions distorted by prejudice.

Although Du Bois, Cox, and others presented compelling research conceptualizing racial power beyond the “race relations” models that informed mid-twentieth century conceptions of race liberalism, their projects were subject to disciplinary and institutional containment by powerful white scholars. Melville Herskovits and Robert E. Parks, each of whom sat atop academic fields pertaining to African Americans, guarded their projects against thinkers that they considered to be politically self-interested rather than academically neutral. For example, Du Bois, regarded now as an influential pioneer of multiple disciplines including sociology, Black studies, and international relations — was labeled by Herskovits as an advocate who eschewed “objectivity” in matters pertaining to the inferiority of Black people.<sup>7</sup>

Foundations also played a significant role in shrinking the real estate that might have otherwise grounded a research and advocacy agenda beyond the “race relations” frame.<sup>8</sup> Du Bois, despite his unparalleled expertise, was never entrusted to produce a project on the scale of Gunnar Myrdal’s *An American Dilemma*.<sup>9</sup> The framing of American racial hierarchy by Myrdal as a “dilemma” has shaped thinking about race and reform for over half a century. In this context, the power to punish and reward scholars based on their ideological convergence with white power brokers is one of the many ways that contemporary thinking about racial power has been shaped by prominent whites within the academy and civil society.<sup>10</sup>

White power brokers, however, were not the only forces that sought to corral antiracist thinking into narrow parameters. Like academia, the Civil Rights Establishment also observed performative norms that reflected shared beliefs in the functional legitimacy of mainstream institutions, particularly legal ones. Key among these was the Supreme Court, a respected institution duly regarded by many civil rights advocates as a friend to African Americans. Yet a particularly consequential conflict implicating the tensions between centrist integrationism and a more power-based antiracism was the 1969 publication of an article in

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<sup>7</sup> JERRY GERSHENHORN, MELVILLE J. HERSKOVITS AND THE RACIAL POLITICS OF KNOWLEDGE 9–10 (2004) (describing the manner in which Herskovits dismissed Black scholars as “propagandists rather than scientists,” thus failing to acknowledge that scholarship is inherently political and limiting the impact of his own legacy); Crenshaw, *supra* note 3, at 1302 n.158.

<sup>8</sup> LEAH A. GORDON, FROM POWER TO PREJUDICE 72–77 (2015).

<sup>9</sup> GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944).

<sup>10</sup> See STEPHEN STEINBERG, RACE RELATIONS: A CRITIQUE 75–76 (2007) (describing Marxism as a “convenient scapegoat for . . . racial violence,” *id.* at 75, and noting that Marxist Black scholars had to be careful to avoid backlash from white philanthropists or anti-Marxists).

the *New York Times Magazine* by civil rights lawyer Lewis Steel. The article led to Steel's termination and the resignation of much of the legal staff of the NAACP.

Entitled "A Critic's View of the Warren Court — Nine Men in Black Who Think White," Steel's essay challenged the celebratory view of the Court as a liberationist institution, criticizing the Court's limited remedial remedies for the injuries of segregation.<sup>11</sup> Steel wrote:

[T]he Court chose to act in the manner of the practical political reformer. Rather than ordering sweeping desegregation, it ordered another hearing. A year later, the Court ruled that the South did not have to desegregate its schools immediately, it merely had to do so 'with all deliberate speed.' . . . The Court thereby made clear that it was a white court which would protect the interests of white America in the maintenance of stable institutions. In essence, the Court considered the potential damage to white Americans resulting from the diminution of privilege as more critical than continued damage to the underprivileged.<sup>12</sup>

With neither notice nor an investigation, the NAACP Board fired Steel for writing the article.<sup>13</sup> The decision was subsequently ratified by the NAACP's Executive Director Roy Wilkins as a legitimate response to the article's implicit denigration of the organization and the Supreme Court.<sup>14</sup> Yet Robert Carter, the general counsel of the NAACP — and widely regarded as Thurgood Marshall's Lieutenant General in the battle over American Apartheid — found nothing disqualifying in the article and intimated that Steel's arguments comported with his own views. Carter denounced the Board's actions as antithetical to the purpose of the NAACP's legal advocacy agenda,<sup>15</sup> contending that the goal of civil rights attorneys "was to break new ground and to develop new concepts of law that could be used in the struggle for freedom."<sup>16</sup> Pointedly, Carter stated: "Our aim had always been to fight the status quo, not to join it . . ."<sup>17</sup> Yet in the eyes of the NAACP Board,

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<sup>11</sup> See Lewis Steel, *A Critic's View of the Warren Court — Nine Men in Black Who Think White*, N.Y. TIMES MAG., Oct. 13, 1968, at 56 [hereinafter Steel, *A Critic's View*]. Steel wrote the article after continually seeing what he called "classic white man's justice" and being tormented by the indifference of judges and overwhelmed by feelings stemming from the ineffectiveness of the courts to make meaningful reform in a short time. See LEWIS M. STEEL WITH BEAU FRIEDLANDER, *THE BUTLER'S CHILD: AN AUTOBIOGRAPHY* 151–53 (2016).

<sup>12</sup> Steel, *A Critic's View*, *supra* note 11, at 112.

<sup>13</sup> See STEEL, *supra* note 11, at 155–57.

<sup>14</sup> Letter from Roy Wilkins, NAACP Exec. Dir., to Members of the NAACP Board of Directors (Nov. 12, 1968).

<sup>15</sup> See ROBERT L. CARTER, *A MATTER OF LAW: A MEMOIR OF STRUGGLE IN THE CAUSE OF EQUAL RIGHTS* 201–02 (2005) (describing Steel's argument to be that "the Court had struck down the symbols of racism while condoning or overlooking the ingrained practices that had meant the survival of white supremacy"). Yet this argument is neither radical nor unique. Speculation in this regard has been a consistent theme in legal and historical literature about *Brown* and its legacy.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 202.

Steel had crossed the line of respectability — his analysis expressed contempt both toward institutions like the NAACP, which had marshaled the reform project, and toward the Supreme Court, which had become a trusted ally in the struggle against racial oppression.<sup>18</sup> Carter stood by Steel and demanded his reinstatement.<sup>19</sup> The Board's refusal prompted Carter and "the entire general counsel's office" of the NAACP to resign.<sup>20</sup>

This matter became a red-hot controversy within the wider civil rights community as lawyers and NAACP members from across the country weighed in.<sup>21</sup> Many were appalled that the NAACP would take such summary action against a respected and highly valued lawyer simply because he publicly chastised the high court on points with which many within the CRE agreed.<sup>22</sup> Wilkins and others, however, argued to the contrary.<sup>23</sup> Jack Greenberg,<sup>24</sup> in a letter written to the *New York Times*, penned an institutional defense of the Supreme Court, pointing out that "[t]he judiciary simply does not have the power to right all the wrongs which need correction."<sup>25</sup>

While Greenberg's point did not quite meet Steel's argument that the Court had not fully exercised the power it did have, his letter at least implicitly acknowledged that there was a "tolerated residuum" of white supremacy.<sup>26</sup> The Steel case displayed the deep conflict within the CRE

<sup>18</sup> See Steel, *A Critic's View*, *supra* note 11, at 112.

<sup>19</sup> See CARTER, *supra* note 15, at 200–02.

<sup>20</sup> *Id.* at 202.

<sup>21</sup> See *id.* at 200–02.

<sup>22</sup> See *id.* Among the civil rights advocates who expressed their dismay at the firing of Steel were a leading group of legal scholars at Howard University who said they "believe[d] that the N.A.A.C.P. ha[d] acted in a manner inconsistent with fundamental fairness" and "that [its] action [was] at war with the legal positions which the Association ha[d] taken in various cases before the United States Supreme Court." Letter from Herbert O. Reid et al., Howard Univ. Professors, to NAACP Board of Directors (Oct. 15, 1968), *microformed on Papers of the NAACP*, Pt. 16, Reel 2 (Univ. Pub'ns of Am.).

<sup>23</sup> See Letter from Roy Wilkins to NAACP National Board Members (Oct. 24, 1968) *microformed on Papers of the NAACP*, Pt. 16, Reel 1 (Univ. Pub'ns of Am.) (restating the board's concern that the "average reader" would conclude, from the identification of Steel "as associate general counsel of the NAACP," "that the NAACP joined officially in his criticism"). Wilkins wrote that Steel's article "in effect, declared that the entire NAACP and the Negro general public had been deluded these many decades if it regarded previous successes as being anything more solid than vapor." *Id.*

<sup>24</sup> Jack Greenberg was the second director-counsel of the LDF and tried forty cases before the Supreme Court during his legal career, including *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Griggs v. Duke Power*, 401 U.S. 424 (1971). Jack Greenberg, NAACP LDF, <http://www.naacpldf.org/jack-greenberg-biography> [<https://perma.cc/J3CP-N6TC>].

<sup>25</sup> Letter from Jack Greenberg, NAACP Dir.-Counsel, to the Editor of the *New York Times* (Oct. 17, 1968), *microformed on Papers of the NAACP*, Pt. 16, Reel 2 (Univ. Pub'ns of Am.).

<sup>26</sup> Cf. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, *NEW ENG. L. REV.* 1309, 1320 (1992) (arguing that "some abuse, what I will call the 'tolerated

about how to think about and engage racial power outside the authorized parameters set by Supreme Court discourse. It also reveals that one of the ways the Harvard boycott would be framed — as mortal combat between respectable integrationist lawyers on one hand and hot-headed activists on the other — actually reflected tensions that were entrenched within the CRE itself.<sup>27</sup>

## II. THE IDEOLOGICAL SPLIT WITHIN THE RADICAL WING

### A. *Historicizing Conflict Between Race Liberals and Race Critics*

In the wider culture beyond the CRE, critiques of the terms of integration — particularly critiques that challenged the status quo by foregrounding questions of power — raised the specter of Black Power. Although the call for Black Power was voiced by activists who were diverse in their demands and tactics, legal liberals and the wider CRE often received it as a call for violence and separatism. Promoted by a younger generation of fiery orators like Stokely Carmichael,<sup>28</sup> and later by Black Panthers such as Huey Newton<sup>29</sup> and Black Muslims such as Malcolm X, Black Power was denounced by some of the conventional civil rights leaders as a dangerous and racist infatuation of reckless youth. But this was both more than a generational split and less than the separatist split that it was often portrayed to be. Within the narrower confines of the civil rights community and the university, the discourse around power illuminated ways of thinking about racial problems that transcended the contemporary emphasis on eliminating prejudice. The effort to think about racial power beyond prejudice was

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residuum,' is plausibly attributed to contestable social decisions about what abuse is and how important it is to prevent it").

<sup>27</sup> Another conflict that caused a major split involved Angela Davis, a Black activist whose highly publicized trial for kidnapping and murder was widely regarded by young Black activists as an effort to dismantle the Black liberation struggle. See JACK GREENBERG, *CRUSADERS IN THE COURTS* 405 (1994). Although the NAACP Legal Defense Fund (LDF) staff voted almost unanimously to represent Davis, Greenberg overruled the vote. See *id.* at 404–05. He later argued that while the staff “wanted to be seen as allies of the Black Panthers, students who tore campuses apart and paraded with rifles, draft resisters, and prisoners who fought jailers,” these activities would lead to self-destruction. *Id.* at 405. The LDF Board agreed. *Id.*

<sup>28</sup> Stokely Carmichael, later known as Kwame Ture, took over the leadership of the Student Nonviolent Coordinating Committee after ousting John Lewis in what has been framed as a shift from nonviolence and intergrationism to self-defense and separatism. See generally Michael T. Kaufman, *Stokely Carmichael, Rights Leader Who Coined “Black Power,” Dies at 57*, N.Y. TIMES (Nov. 16, 1998), <http://www.nytimes.com/1998/11/16/us/stokely-carmichael-rights-leader-who-coined-black-power-dies-at-57.html> [https://perma.cc/93GG-J3TY].

<sup>29</sup> Huey P. Newton attended Merritt College where he organized the Black Panther Party for Self Defense with Bobby Seale to protect their community members while taking a more militant stance toward the plight of Black communities. Mark A. Stein, *Even in Death, Newton Stirs Sparks: Family, Friends Bitter at Those Who Label Him a Criminal*, L.A. TIMES (Aug. 24, 1989), [http://articles.latimes.com/1989-08-24/news/mn-1357\\_1\\_huey-newton](http://articles.latimes.com/1989-08-24/news/mn-1357_1_huey-newton) [https://perma.cc/7P8V-YRR7].

not new. The deeper ideological differences between, on one hand, those who ascribed to the centrist integrationist project, and, on the other, those like Derrick Bell, who were sympathetic to Black Power, echoed tensions that surfaced between scholars, lawyers, and activists throughout the twentieth century.

While the goals of the traditionalist wing of the CRE were expressed as integration through the removal of bias, the demand of the radical wing was for power, variously described as power to participate as a people in American society on equal terms, power to determine destinies, power to remake institutions that had been structured on the basis of racial exclusion, and power to choose whether to participate in reformed institutions or to build new ones.<sup>30</sup> There were numerous perspectives and conflicts even among those who identified with the power agenda. But, in its emphasis on deepening reformist sensibilities to interrogate “neutral” or so-called “objective” practices in the production of knowledge and legal rules, it set terms that would eventually shape the course of Critical Race Theory.<sup>31</sup>

The site of the university — and later, the law school — as a field of racial struggle has often been overlooked in favor of more direct symbols of racial power, such as polling places or lunch counters in the South. But, for both traditionalists and more radical advocates, perspectives on the events leading up to the Alternative Course would foreshadow differing views about how access to higher education figured into the broader project of dismantling white supremacy. For the traditionalists, access to higher education was crucial to developing a stable Black middle class.<sup>32</sup> While the educational roadways to middle-class status for white Americans had been paved by the GI Bill and access to other

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<sup>30</sup> See Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1484–85 (2011) (comparing integrationism, which for “many African Americans . . . signified cultural assimilation rather than liberal neutrality,” *id.* at 1484, with Black nationalism, which “involves the centering of race consciousness to identify a Black community, based on the idea that race constitutes African Americans as a distinct social group,” *id.* at 1485); see also Ibram Rogers, *Celebrating 40 Years of Activism*, DIVERSE EDUC. (June 28, 2006), <http://diverseeducation.com/article/6053/> [https://perma.cc/E3C5-ZHH3].

<sup>31</sup> Cf. Crenshaw, *supra* note 3, at 1309–10.

<sup>32</sup> See Donald K. Hill, *Law School, Legal Education, and the Black Law Student*, 12 T. MARSHALL L. REV. 457, 489–93 (1987) (discussing the need for Black students to move from an oral tradition to a reading tradition to help them advance and succeed in different levels of higher education); see also Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 8–9 (1988) (explaining how “considerable increases in the numbers of black officeholders, black professionals, and black students,” *id.* at 8, during the 1980s led to flourishing of the Black middle class).

governmental supports, Black access to higher education and professionalism had been undermined by rules that facilitated segregation in institutions of higher education and other training programs.<sup>33</sup>

Access was also among the core concerns for the newer activists who protested at San Francisco State and elsewhere to demand universal access to higher education.<sup>34</sup> But activists who foregrounded the lack of power rather than the presence of bias as the touchstone of racial injustice marched under a wider indictment of universities as sites of knowledge production that legitimated white supremacy and colonized subordinated people.<sup>35</sup>

For these critics, substantive integration involved a broadening of the curriculum and the creation of programs and departments that set as their objectives the development of expertise in relationship to the needs of colonized communities.<sup>36</sup> They too sought to eliminate a certain sense of “bias” in the educational arena. But in their thinking this project involved interrogating how knowledge-producing industries justify and rationalize widespread inequality.<sup>37</sup> In this frame universities were arenas of struggle in the same way that voting booths were. They were sites where racial power was created, aggregated, and mobilized in ways that legitimized racially inequitable ends. And like polling booths and lunch counters, universities were the sites of widespread organizing by Black students during this era. Indeed, during the upswing of student activism in the 1960s, Black Student Unions were established in every state in the union, and conflicts between students and administrators were fierce and sometimes bloody.<sup>38</sup>

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<sup>33</sup> See Anthony M. Platt, *The Rise and Fall of Affirmative Action*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67, 69 (1997) (“A . . . double-standard of racist and sexist practices for veterans was imposed after World War II when the 1944 GI Bill enabled some 7.8 million, mostly white, male veterans to afford higher education with the help of free tuition and supplies, a living subsidy (including additional payments for children), and low-interest loans for housing. . . . The few thousand African Americans who used the GI Bill to go to college were mostly tracked into segregated, inferior colleges.”).

<sup>34</sup> See generally AGENTS OF CHANGE (Frank Dawson & Abby Ginzberg 2016) (documentary examining college campus protests of the late 1960s).

<sup>35</sup> See, e.g., Randall Kennedy, *supra* note 5, at 1755; cf. STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER 30–32 (1967) (describing the detrimental effect of “adaptation,” *id.* at 30, on the Black community).

<sup>36</sup> See Randall Kennedy, *supra* note 5, at 1755 (“In the 1970’s, activists associated with the Black Power Movement expressed . . . demands concerning academia . . . . Among the demands were that evaluative criteria designed by and for blacks supplement or replace ‘white standards,’ that ‘black studies’ be accorded recognition as a distinct area of scholarly endeavor, and that black studies be taught and governed exclusively or predominantly by black professors and students.”).

<sup>37</sup> *Id.* at 1754–60 (discussing the cultural context of racial critiques and the need to examine the relationship between knowledge and power).

<sup>38</sup> See, e.g., George Lowery, *A Campus Takeover That Symbolized an Era of Change*, CORNELL CHRON. (Apr. 16, 2009), <http://www.news.cornell.edu/stories/2009/04/campus-takeover-symbolized-era-change> [https://perma.cc/BX5M-RQY5].

*B. Student Activism and Derrick Bell*

These divisions were, by the 1980s, well rehearsed both within the CRE and between the CRE and student movements. Protests and agitation for greater university access and curricular reform had spread across the country in the late 1960s, and the reverberations were still felt in universities and colleges long after the sharpest conflicts had receded into history.<sup>39</sup> These issues, however, were fairly distant from the immediate concerns of law school administrators in the 1980s. Efforts to bring greater diversity into law schools were mainly achieved through student recruitment.<sup>40</sup> Harvard was one of the most aggressively committed law schools when it came to matriculating nontraditional students from both the United States and the wider international community.<sup>41</sup> With a “diversity” agenda managed largely by opening a pipeline of students to pass through the institution, the specter of open racial conflict at Harvard Law School was perhaps far from the center of the school’s concerns as the post–civil rights generation made their way to Cambridge. Antiwar politics that had disrupted the law school were distant memories by the 1980s, and the most significant political tensions were associated with young white male leftists, who by 1983 were asserting an intellectual and political agenda that challenged some of the basic premises of mainstream legal education.

As Professor Christopher Edley Jr. noted in a contemporaneous account of the events that erupted over race at Harvard, the seeds of the controversy were planted when Derrick Bell left the school after teaching there for eleven years.<sup>42</sup> A former civil rights lawyer who had worked with the NAACP Legal Defense Fund (LDF) and for the Department of Justice, Bell was recruited and hired by Harvard, becoming its first Black law professor in 1969.<sup>43</sup> As Bell would later say of his hiring, his were not the formal credentials of a typical professor at

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<sup>39</sup> See Ronald Walters & Robert Smith, *The Black Education Strategy in the 1970s*, 48 J. NEGRO EDUC. 156, 157 (1979) (noting that “[t]he protest demands of black students [in 1969] were generally reformist, specific and programmatic in character,” and describing “more black courses,” an “increase [in] black student enrollment,” and “more black faculty” as among the most frequently demanded changes).

<sup>40</sup> See, e.g., Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 53 n.10 (2002) (describing recruiting efforts directed at minority students by Harvard Law School).

<sup>41</sup> See *id.* at 53 & n.9.

<sup>42</sup> See Christopher Edley, Jr., *The Boycott at Harvard: Should Teaching Be Colorblind?*, WASH. POST, Aug. 18, 1982, at A23.

<sup>43</sup> See Derrick Bell, Jr., *A Question of Credentials* [hereinafter Bell, *Credentials*], in BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFFE 467, 471 (Werner Sollors et al. eds., 1993); Fred A. Bernstein, *Derrick Bell, Pioneering Law Professor and Civil Rights Advocate, Dies at 80*, N.Y. TIMES (Oct. 7, 2011), <http://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html> [<https://perma.cc/JVW3-LDGM>].

Harvard, where a degree from a fancy law school, membership on the law review, and a prestigious clerkship were de rigueur.<sup>44</sup> Bell's credentials were developed in another universe populated by a community of civil rights lawyers who strategized and fought for what has since been called a legal revolution. Most of the legal eagles of the civil rights generation were developed in laboratories far removed from elite white schools in the nation. Legal stars like Thurgood Marshall<sup>45</sup> and Robert Carter<sup>46</sup> had executed Charles Hamilton Houston's<sup>47</sup> long-term campaign to upend segregation from headquarters at Howard Law School and the legal offices of the NAACP. It was an unlikely campaign that drew upon technical mastery, creativity, political and social theory, multistate mobilizing, and movement financing to entangle multiple legal actors in a drama that reached its zenith in *Brown v. Board of Education*.<sup>48</sup> It produced scores of lawyers across the country who had hands-on experience with using the same legal system that had facilitated American Apartheid to dismantle it. It touched the lives of millions of Americans. It engaged thousands of judges, administrators, and policymakers. It reformed hundreds of institutions. And in the end, the campaign produced one law professor that Harvard Law School was willing to hire: Derrick Bell. By 1980 when that professor left, the deep pool of Black talent that produced the civil rights revolution had apparently run dry.<sup>49</sup>

While Harvard's administrators likely anticipated that Bell's departure would present institutional challenges given their assessment of the talent pool, there was little to suggest that a crisis was brewing about the curricular gap that opened in the wake of his departure. As administrators admitted to a student delegation that first inquired about Bell's missing course, the school had simply overlooked it. This oversight signaled at least in part the sense that Bell's course was valued mainly as an exercise of academic freedom rather than as a central undertaking of

<sup>44</sup> Derrick Bell, *A Pre-Memorial Message on Law School Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 205, 208 (1997).

<sup>45</sup> See William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 36-37 (1991); THURGOOD MARSHALL: SUP. CT. JUST. & C.R. ADVOC., <http://thurgoodmarshall.com> [<https://perma.cc/Z2SB-YHPP>].

<sup>46</sup> See CARTER, *supra* note 15, at 31-33, 95-96, 146-47, 214-20.

<sup>47</sup> See *A Symposium on Charles Hamilton Houston*, 27 NEW ENG. L. REV. 589, 596-98, 600 (1993).

<sup>48</sup> 347 U.S. 483 (1954). For further background, see generally MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (2004 ed.).

<sup>49</sup> See Abby D. Phillip, *Race Sparked HLS Tension: Lack of Faculty Diversity Sparked Boycotts at HLS*, HARVARD CRIMSON (June 1, 2008), <http://www.thecrimson.com/article/2008/6/1/race-sparked-hls-tension-a-battle/> [<https://perma.cc/3KXX-5HCL>] (“[Dean James] Vorenberg held fast to Harvard's longstanding position that it could not find qualified tenure-track faculty members because the pool of such scholars was limited.”).

a modern law school.<sup>50</sup> That the course may have been regarded as a boutique offering was bolstered by the content of the course itself.<sup>51</sup> “Constitutional Law and Minority Issues” diverged from some of the standard treatments of law in relation to the race problem. It was neither a civil rights “how to” course, nor was it an effort to shoehorn a vision of civil rights into the constitutional ecosystem that protected existing entitlements and values.<sup>52</sup>

A symbolic representation of Bell’s theoretical orientation was embodied in the lithograph of Tommie Smith and John Carlos that was prominently located in the opening pages of his textbook, *Race, Racism, and American Law*.<sup>53</sup> At the 1968 Olympics, Smith and Carlos had raised their fists in a Black Power salute during the ceremonial awarding of their gold and bronze medals for the 200-meter event. Their actions were widely criticized within the mainstream press as an embarrassment to the nation.<sup>54</sup> Many civil rights leaders distanced themselves from the protest actions of these and other athletes of the era. Whether pressed or not, mainstream leaders of the Civil Rights Establishment clung to a vision of racial equality that eschewed most symbols or rhetorical gestures that drew any link between race and power.<sup>55</sup> For Bell, however, the image symbolized the analogous point of departure of the book. Bell would run the race by rendering a thorough engagement with the relevant law. But, like Carlos and Smith, he would not subordinate Black interests to the rituals of the national ego. Thus, throughout Bell’s treatment of civil rights in his text, the principle issues he explored were the doctrinal rules and policy choices that rationalized and constituted the racial disempowerment of Black people.<sup>56</sup> In this sense, Bell’s text diverged significantly from conventional approaches to such topics. Traditional theorizing seemed to require theorists to color inside the lines of federalism and existing rights. But Bell’s view was

<sup>50</sup> See Crenshaw, *supra* note 3, at 1266 & n.35.

<sup>51</sup> See *id.* at 1267 (noting that Dean Vorenberg questioned “what was ‘so special’ about [the] course”).

<sup>52</sup> See Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or “A Foot in the Closing Door,”* 49 UCLA L. REV. 1343, 1349 (2002).

<sup>53</sup> DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW*, at vii–viii (6th ed. 2008) (“This book is dedicated to all those who throughout America’s history have risked its wrath to protest its faults. Courageous black athletes mounted a famous protest against racism at the 1968 Olympic Games. That protest, like so many that preceded it, constituted a prophecy . . .” *Id.* at vii).

<sup>54</sup> See, e.g., Muriel Nitzkin, Letter to the Editor, ‘*Silent Protest*’ at Olympics, CHI. TRIB., Oct. 23, 1968, at 20 (“[They] show[ed] flagrant disrespect for their country and the competition, . . . [and] they have dishonored all Americans — black and white.”).

<sup>55</sup> See Roy Wilkins, Opinion, *The Big Olympic Mistake*, L.A. TIMES, Nov. 4, 1968, at B7 (dismissing the protest as “comparatively mild” and myopic).

<sup>56</sup> See BELL, *supra* note 53, at 683 (“This book is concerned primarily with American racism initiated by whites against blacks, and it reviews the extent to which racial discrimination is legitimated by the law, as well as many of the efforts to utilize the law to remedy racial bias.”).

that these lines themselves constituted the constitutional and legal structure within which white supremacy was maintained. Unlike Professor Herbert Wechsler and other constitutional giants whose holy grail was the elusive neutral principle that could ground racial reform,<sup>57</sup> Bell engaged the law in pursuit of the full liberation of African Americans, a principle that from his point of view was just as political or neutral as any investment in the status quo.<sup>58</sup> Bell's sympathy for the Black Power agenda placed his course and his textbook in an ideological camp decidedly apart from the civil rights leadership, many of whom were embarrassed and repulsed by a new racial justice discourse centered on power.<sup>59</sup>

By the time the students who would eventually lead the Alternative Course arrived at Harvard Law School, Derrick Bell had given notice that he would be leaving to take up the Deanship at the University of Oregon Law School, citing frustration at the slow pace of change.<sup>60</sup> His departure left only one other professor of color on the staff,<sup>61</sup> and as

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<sup>57</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (questioning the legitimacy of the *Brown* decision because he could not identify any neutral principle that would distinguish between the rights of black school children to associate and the rights of white school children not to). For a compelling critique of the conservative underpinnings of *Neutral Principles*, see Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REFORM 561 (1988).

<sup>58</sup> See Derrick Bell, *The Law Student as Slave*, in THE DERRICK BELL READER 278, 283 (Richard Delgado & Jean Stefancic eds., 2005) ("It is time to free yourselves, move your law schools toward liberation, and thereby increase the chances that you and the lawyers who follow you will have the courage as well as the skill to provide this country the leaders we so desperately need — leaders for whom the bottom line is not dollars earned but personal integrity and public service.").

<sup>59</sup> See YVONNE RYAN, ROY WILKINS: THE QUIET REVOLUTIONARY AND THE NAACP 168–69 (2014) ("[NAACP Executive Director Roy Wilkins] went on to define in the harshest, most uncompromising way his views on Black Power. 'No matter how endlessly they try to explain it, the term 'Black Power' means anti-white power. In a racially pluralistic society, the concept, the formation and the exercise of an ethnically-tagged power means opposition to other ethnic powers, just as the term 'white supremacy' means subjection of all non-white people. In the black-white relationship, it has to mean that every other ethnic power is the rival and the antagonist of 'Black Power.' It has to mean 'going-it-alone.' It has to mean separatism[,] . . . [which] offer[s] little to the disadvantaged but the chance to 'shrivel and die. . . . It is a reverse Mississippi, a reverse Hitler, a reverse Ku Klux Klan. Black Power . . . can mean in the end only black death.'" (second and third omissions in original)); STEPHEN L. WASBY, RACE RELATIONS LITIGATION IN AN AGE OF COMPLEXITY 64 (1995) ("[Director-Counsel of the NAACP Legal Defense Fund Jack] Greenberg is said to have shown dislike for staff lawyers who advocated providing legal support to 'radicals' or who themselves seemed to be radical . . ."); *"Black Power" Slogan of Negroes Lambasted and Defended*, CHI. TRIB., July 27, 1966, at 9 ("The Negroes' new slogan 'black power,' was criticized and defended by Negro leaders yesterday . . . [Dr.] King . . . said the term 'black power' was unfortunate . . . [and that] a struggle for black supremacy is as evil as white supremacy.").

<sup>60</sup> See DERRICK BELL, CONFRONTING AUTHORITY 43 (1994).

<sup>61</sup> At the time of Bell's departure from Harvard Law School, the only other Black faculty member was Clarence Clyde Ferguson, a 1951 Harvard graduate who had previously served on the faculty of Rutgers Law School, as dean of the Howard Law School, and as ambassador to Uganda. *Id.* at 43–44; see also Bell, *Credentials*, *supra* note 43, at 472 ("My efforts at Harvard to recruit more

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previously noted, Bell's tenured course was simply removed from the curriculum. For students, Bell's departure left significant gaps to be filled in terms of both personnel and curriculum. The need for more professors of color was obvious and urgent, as was the need for Bell's fourteen-week course "Constitutional Law and Minority Issues" on treatment of the law and its relationship to racial hierarchy.

That the Administration did not share the same sense of urgency was apparent in the reactions of Dean James Vorenberg to a delegation of students who were sent by a consortium of student groups to press for the course and for a Black professor to teach it.<sup>62</sup> The students made the case that the search for someone to teach Bell's course should more broadly identify and recruit scholars of color.<sup>63</sup> As they saw it, the insights that would be derived from someone whose experience included practicing law as a racialized subject were an important perspective that they wanted to engage.<sup>64</sup>

Dean Vorenberg framed his response to the students by proffering two distinct queries. The first was to challenge the students to articulate what they hoped to learn in the now defunct course, "Constitutional Law and Minority Issues."<sup>65</sup> The second was to challenge the students' preference for a Black professor, countering with a hypothetical question about whether an excellent white professor wouldn't be preferable to a mediocre Black one.<sup>66</sup> The first question was especially challenging because students would have had to have taken the course to be able to fully answer it. The second was useful as a pithy but deeply revealing statement about how the Administration and potentially the wider faculty that couldn't be found in the standard constitutional law offering and a stint at legal services saw things.

After Dean Vorenberg set the terms of the contestation about the course and demands to hire more minority law professors, the conflict's unfolding uncovered sharply divergent beliefs about what liberal institutions should be doing to meet the expectations of integration. Matters only escalated when the faculty voted to hire ten white male professors that spring.<sup>67</sup> The Dean continued to point to the pool problem when pressed about the dearth of minority law professors in the class of new

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blacks with backgrounds similar to mine were stymied by faculty who preferred to wait for applicants with academic credentials like their own, but who just happened to be black. Blacks with high-level academic credentials do exist.").

<sup>62</sup> See Crenshaw, *supra* note 3, at 1267.

<sup>63</sup> *Id.* at 1266.

<sup>64</sup> Letter from Irma Tyler Wood to James Vorenberg, Dean, Harvard Law Sch. (Mar. 9, 1982) (on file with the Harvard Law School Library).

<sup>65</sup> Crenshaw, *supra* note 3, at 1267.

<sup>66</sup> Dave Horn, *Third World Coalition Renews Support for Course Boycott*, HARV. L. REC., Sept. 17, 1982, at 1.

<sup>67</sup> See *id.*

hires. For students, the all-white hiring episode reinforced their sense that the faculty imagined the pool of possible colleagues of color to be extremely shallow. The faculty's tolerance for a continuing state of gross underrepresentation seemed especially formalistic in light of their past ability to see and value the qualifications of Derrick Bell. As for the Administration, the evolutionary approach that seemed to students to project any significant integration far into the future wasn't quite the distant possibility that the students feared. Although the Dean had not shared this information with them, he had reason to believe that one Black candidate would join the faculty within the coming months, and others were mulling over their offers.<sup>68</sup> Faculty operating with this knowledge may well have seen the students' frustrations as likely to settle once the Administration's efforts to recruit select candidates were made public. In the meantime, however, the Dean announced that a new course would be offered in the three-week intersession.<sup>69</sup> The course would feature two civil rights lawyers, Julius Chambers<sup>70</sup> and Jack Greenberg, and would cover civil rights litigation. It was widely agreed upon that this offering was a response to student demands for Bell's course to be offered. What was not widely agreed upon was whether this course met the students' expectations.

From the students' perspective, it did not.<sup>71</sup> In response, a broad coalition of student organizations pooled their resources to launch an alternative course that featured a dozen faculty members of color from across the country, each of whom visited the law school to teach a unit from Bell's text. Several Harvard Law School professors associated with CLS offered independent study credit for students who enrolled in the course and produced written work.<sup>72</sup> The Coalition's decision to boycott the Administration's offering in favor of a student-initiated alternative produced two notable outcomes. First, it provided an opportunity for a critical mass of students and young professors to engage with each other in parsing and expanding an intellectual critique of racial liberalism. The themes and ideas that emerged from this collective engagement between students and young professors would eventually cohere as a set of texts that would become part of the Critical Race

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<sup>68</sup> See Edley, *supra* note 42.

<sup>69</sup> Horn, *supra* note 66, at 1.

<sup>70</sup> Julius LeVonne Chambers succeeded Jack Greenberg as the director-counsel of the LDF and tried several cases before the Supreme Court, including *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), which dealt with school desegregation, and *Thornburg v. Gingles*, 478 U.S. 30 (1986), which focused on minority voting rights, during his legal career. *Julius LeVonne Chambers In Memoriam*, NAACP LDF (Aug. 3, 2013), <http://www.naacpldf.org/news/statement-passing-former-ldf-president-director-counsel-julius-levonnie-chambers> [https://perma.cc/T5KV-DRWD].

<sup>71</sup> See Third World Coalition Letter (May 24, 1982), in *BLACKS AT HARVARD*, *supra* note 43, at 457, 457–58 [hereinafter Third World Coalition Letter].

<sup>72</sup> See Crenshaw, *supra* note 3, at 1280.

Theory canon. The Alternative Course also lit a fuse that would explode into a national debate.<sup>73</sup> Exposing the hidden fault lines that had long existed within the civil rights constituency. While many in the CRE saw the students' protest as an embodiment of black power politics that they sought to discredit, the students saw meritocracy as the new lunch counters in the struggle over law, knowledge, and power.

The students argued that the law school's course offered neither an approach to recruit more minority law professors to join Harvard's faculty, nor a substantive treatment that engaged an array of issues beyond the enforcement of civil rights laws.<sup>74</sup> On the former question, neither instructor filled the role that the students imagined — a candidate willing to join Harvard's faculty who could teach about race and the law, and who would model the skills and critical thinking that "Third World" lawyers would likely need. Neither sought a full time position at Harvard, and equally salient for many of the students was the fact that Greenberg would not have integrated the faculty even were he to have expressed interest in Harvard.<sup>75</sup> On the matter of the course, while the nuts and bolts of civil rights litigation were obviously useful, the Administration's offering of it as the only replacement for Bell's class appeared to students to substantively dismiss Bell's broader inquiry into the vexed relationship between law and racial power. This critical orientation toward legal institutions echoed the perspectives of Steel and others who had been punished for venturing down this wayward path. To students who shared the perspective of Black Law Students Association (BLSA) President Muhammad Kenyatta,<sup>76</sup> the Administration's course seemed to confirm critiques raised by Bell and others about who should control the antiracism agenda and whose interests were served. Kenyatta stated bluntly that "[f]or many years the distinction

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<sup>73</sup> Fox Butterfield, *Harvard Law School Torn by Race Issue*, N.Y. TIMES (Apr. 26, 1990), <http://www.nytimes.com/1990/04/26/us/harvard-law-school-torn-by-race-issue.html> [https://perma.cc/CD25-MZ3R].

<sup>74</sup> See Third World Coalition Letter, *supra* note 71; James Vorenberg Letter (July 21, 1982), in BLACKS AT HARVARD, *supra* note 43, at 459, 459–60 (enclosing the letter written by Muhammad Kenyatta — President of the Harvard Black Law Students Association — explaining the organization's intent to boycott the course).

<sup>75</sup> GREENBERG, *supra* note 27, at 502–04.

<sup>76</sup> A critic of racial liberalism, Kenyatta was not a stranger to high-profile agitation, nor the threat of repressive consequences. See *Kenyatta v. Moore*, 623 F. Supp. 224 (S.D. Miss. 1985) (addressing Kenyatta's allegations that the FBI violated his First Amendment rights by surveilling and threatening him under their counterintelligence program). Kenyatta strongly opposed the hiring of Greenberg. The opposition became widely publicized, garnering critiques that Kenyatta opposed Greenberg because of his race, an accusation which Kenyatta rejected, claiming that his letter to the Dean focused on the lack of black faculty members. Brando Simeo Starkey, *Drastic Action: The 1983 Course Boycott at Harvard Law School*, 21 ST. THOMAS L. REV. 56, 62–69 (2008); Michel Marriott, *Muhammad Kenyatta, 47, Dies; Professor and Civil Rights Leader*, N.Y. TIMES (Jan. 6, 1992), <http://www.nytimes.com/1992/01/06/nyregion/muhammad-kenyatta-47-dies-professor-and-civil-rights-leader.html> [https://perma.cc/E7ES-JCGH].

has been blurred between the orthodox liberal agenda and the autonomous aspirations of Afro-Americans.”<sup>77</sup>

The complicated backstory and varied orientations of the students were collapsed into a familiar narrative of Black radicals railing against their white allies in news reports and op-eds that followed the Dean’s framing of the issue to the student body.<sup>78</sup> In a letter to the student population, the Dean included a letter from Kenyatta and went on to say that “to boycott a course on racial discrimination, because part of it is taught by a white lawyer, is wrong in principle and works against, not for, shared goals of racial and social justice.”<sup>79</sup> The Dean’s letter was picked up by the press and in short order a student-led protest over curricular offerings and minority recruitment became another flash point in the continuing struggles between liberals and radicals that had undermined the civil rights movement and threatened its future. The students’ refusal to accept the seminar, laced with a letter from the BLSA President with criticism of Greenberg’s role at the helm of an African American organization, prompted a swift rebuke from the CRE.<sup>80</sup> Stalwarts from multiple quarters of the establishment came to Harvard’s defense, citing the distinguished careers of the two civil rights attorneys and denouncing the students as bigots. The iconic Bayard Rustin<sup>81</sup> declared that the protest was “nothing more than blatant racism.”<sup>82</sup> The more moderate Carl T. Rowan<sup>83</sup> pronounced the students

<sup>77</sup> Muhammad Kenyatta, Letter to the Editor, *At Harvard the Course of Civil Rights Doesn’t Run Smooth*, WALL STREET J., Sept. 13, 1982, at 31.

<sup>78</sup> Media coverage of the course boycott began in July after Dean Vorenberg mailed a series of letters to all returning students. For a reprinting of his letters and some of the responses by other key players, see *The Greenberg-Chambers Incident: Harvard Law School, 1982–83*, in BLACKS AT HARVARD, *supra* note 43, at 457, 457–67.

<sup>79</sup> James Vorenberg Letter, *supra* note 74, at 459–60.

<sup>80</sup> Martin Kilson, a black Harvard government professor, stated that the “[b]lack students who require ethnocentric crutches as part of their academic regime have to start growing up.” Martin Kilson, *Ethnic Arrogance at Harvard*, WASH. POST, Aug. 13, 1982, at A19.

<sup>81</sup> In addition to organizing the 1963 March on Washington, Rustin worked closely with Martin Luther King, Jr., and a number of other leaders, bringing nonviolent protest techniques to the movement. See generally JOHN D’EMILIO, *LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN* (2004); Devon W. Carbado & Donald Weise, *The Civil Rights Identity of Bayard Rustin*, 82 TEX. L. REV. 1133 (2004).

<sup>82</sup> Bayard Rustin, Letter to the Editor, *A Misguided Protest by Blacks at Harvard*, N.Y. TIMES (Aug. 17, 1982), <http://www.nytimes.com/1982/08/17/opinion/l-a-misguided-protest-by-blacks-at-harvard-087725.html> [<https://perma.cc/7QPL-HK6F>].

<sup>83</sup> Carl T. Rowan was a journalist and writer who wrote extensively about race and race relations in America. He served as the U.S. Ambassador to Finland, the first Black Deputy Secretary of State, and the first Black director of the United States Information Agency. See Elaine Scolino, *Carl Rowan, Writer and Crusader, Dies at 75*, N.Y. TIMES (Sept. 24, 2000), <https://nyti.ms/2y5Qb93> [<https://perma.cc/8W74-FQLV>]; J.Y. Smith, *Columnist Carl Rowan Dies at 75*, WASH. POST (Sept. 24, 2000), <https://www.washingtonpost.com/archive/politics/2000/09/24/columnist-carl-rowan-dies-at-75/937ade80-e482-46a5-bb47-5ec416fae97f/> [<https://perma.cc/4DZX-ZPLT>].

to be “racist, anti-intellectual, [and] anti-civil-rights.”<sup>84</sup> Yet beneath the assertion of “principle” was a disagreement about the principles that should dictate the terms of institutional engagement. No invocation of “shared goals” could justify for the students a state of institutional affairs that appeared to differ little from the preceding decades.

Having been condemned by civil rights elders for essentially biting the hands that fed them, student leaders viewed the CRE critics as compromised by their embrace of liberal institutional values — values that blinded them to the ways in which the earlier generation’s struggles against white supremacy on busses and at lunch counters were being played out again in law schools and elsewhere in American society. The student critics were dismayed that their critique of the Administration’s actions could be written off so effortlessly, particularly in light of the use of rationales like “qualifications” and gradualism that civil rights lawyers had found to stymie meaningful reform elsewhere.<sup>85</sup> The fact that Harvard Law School administrators and faculty were liberal allies in elite spaces no doubt contributed to a willingness to assume good faith on their part. But from the student’s perspective, the issue was never one of bad faith. The problem for the students was the opposite: the establishment’s unshakable belief that fidelity to what it viewed as neutral institutional practices was appropriate and fair.<sup>86</sup> The foundational belief that had long characterized race liberals was that racial disparities would eventually fade as people of color were shorn of their particularities and absorbed into race-neutral spaces.

There had been reason to think that in the context of a new social regime, institutions like Harvard might have thoroughly reevaluated the content of their curriculum in light of the new communities and values they might serve. After all, as noted above, Harvard was far from a bastion of conservative resistance to integration. It had stepped up its recruiting of minority students in the 1970s, and some of its faculty were engaged in efforts to bring about social change elsewhere. The Dean

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<sup>84</sup> Carl T. Rowan, *Harvard Blacks Fail Bias Test*, PITTSBURGH POST-GAZETTE, Aug. 15, 1982, at B-2.

<sup>85</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that aptitude tests used in hiring practices having a disparate impact on ethnic minorities must be reasonably job related). In addition to legal challenges against tests and other measures used to exclude Black applicants from access to employment and promotions, civil rights lawyers had reason to be suspicious of the use of meritocratic discourse to justify the exclusion of Black teachers. As Carter explains, Black teachers and administrators were sometimes fired en masse in the wake of integration on the grounds that they were comparatively unqualified. CARTER, *supra* note 15, at 156–57. Carter notes that these arguments were specious, and that sometimes Black educators had acquired credentialization that outpaced their white counterparts. *Id.*

<sup>86</sup> See Third World Coalition Letter, *supra* note 71, at 456–57.

himself was on the Executive Committee of the premier civil rights litigation organization, the NAACP Legal Defense Fund.<sup>87</sup> Underlying the school's inability to reconsider the source of the pool problem, however, was a failure on its part to constructively critique its own everyday practices and norms. There was a gold standard that remained in place — immune from reassessment — and it translated into an inability to reevaluate and rethink those dimensions of law school practice that were forged in, and consistent with, unwarranted exclusionary criteria. From the critics' perspective, there was nothing essential or compelling about the "standard" criteria that justified the refusal to consider alternative "qualifications." This critique included the assertion that knowledge gained from the particular experience of being a lawyer of color in post-apartheid American society could indeed constitute an important consideration.<sup>88</sup> From this point of view, race could be a meaningful consideration if solving the "race problem" had been viewed in terms of addressing the ways that law in general and legal teaching in particular were sites in which racial power was mediated and justified.<sup>89</sup>

But addressing underrepresentation in terms of racial power ran against the liberal grain of framing discrimination as bias; that is to say, a distortion of institutional procedures. Bias, once identified, could be managed through embracing neutral practices — ideally through a colorblind prism — rather than normalizing the practice of measuring racial progress through substantive benchmarks.

The tensions between the students and the CRE were also shaped by disparate conceptions of what the role of "integrating" students was meant to be. Among the most fundamental commitments of the integrationist vision was the idea that exposing different races to one another would confirm that race was a meaningless social category, a set of assumptions that reflected habits of the mind rather than realities anchored in the material world.<sup>90</sup> To civil rights elders, having fought so hard alongside white allies to dislodge beliefs that racial outsiders were ill-suited to compete in elite environments, the last thing they wanted to hear were demands that those institutions accommodate racially grounded requests to abandon "neutral" criteria of inclusion.<sup>91</sup> The sense of dismay among the senior generation was palpable. Not

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<sup>87</sup> Vorenberg, *Ninth Dean of Law School, Dies*, HARV. GAZETTE (Apr. 20, 2000), <http://news.harvard.edu/gazette/story/2000/04/vorenberg-ninth-dean-of-law-school-dies/> [<https://perma.cc/9W8Z-KQPB>].

<sup>88</sup> See Bell, *Credentials*, *supra* note 43, at 473 ("The correlation between good grades and academic success is not so close that the school should reject the students' suggestion that at least one civil rights teacher, in a school with so large a faculty, should have experienced, as well as worked to end, racial discrimination.").

<sup>89</sup> See Duncan Kennedy, *supra* note 5, at 718.

<sup>90</sup> An example of this rhetoric is found in the Supreme Court's doctrine of using diversity as the justification for the use of race-conscious measures in universities. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>91</sup> See GREENBERG, *supra* note 27, at 502–04.

only had students failed to meet the expectations of the integrationist project, but also, in protesting the actions of liberal whites, they had disrespected their allies and threatened the principles that were central to the multiracial coalition of integrationism. By contrast, from the students' perspective, if integration was to be meaningful at all, it could not be realized by simply assimilating into institutions shaped by the very practices that had rationalized the exclusion of people of color in the past. Moreover, race consciousness in recruiting faculty as well as students was not an evil that needed to be suppressed. It was instead a basis for transforming institutions and for identifying and serving historically constituted communities.

The ideological conflict between race liberals and those who sympathized with a more radical tradition, then, revealed that the way that race and racism were conceptualized was linked to how practices that reproduce the status quo are perceived. To the students, Harvard's response to the curricular and faculty deficiencies that prompted the controversy helped to clarify that what counted as qualified and what viewpoints about race and law were valued had been built on established practices from the past. The claim that they were neutral and necessary obscured the fact that reliance on such criteria reflected unwarranted policy choices rather than institutional necessities. By contrast, to administrators and faculty, what the students saw as institutional deficits were simply opportunities waiting to be filled with the right kind of candidate.

Beyond the internal defenses of the curricular and hiring practices, students were stunned that their CRE critics failed to see, much less interrogate, how the same baselines that were used to frame the students as "biased" were also operating to frame other race-conscious policies as reverse discrimination across the societal terrain.<sup>92</sup>

### III. CONCLUSION: THE RISE OF CRITICAL RACE THEORY

The generation of students and young professors who entered elite law schools during the post-civil rights era found scant intellectual space within these institutions to interrogate the implications of the civil

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<sup>92</sup> Harvard's relatively aggressive recruitment of minority students was not matched by a similar commitment to recruit faculty, leading student protestors to note that if *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), justified using race as a factor in admissions, then surely Harvard could consider race as a factor in employment. See, e.g., Donald Christopher Tyler & Cynthia Muldrow, Letter to the Editor, *Goal of a Boycott at Harvard Law*, N.Y. TIMES (Aug. 20, 1982), <http://www.nytimes.com/1982/08/20/opinion/1-goal-of-a-boycott-at-harvard-law-094699.html> [<https://perma.cc/YZ3N-YN4KJ>]; see also Donald Christopher Tyler, Letter to the Editor, *The Law School Controversy: Two Views*, HARV. CRIMSON (Sept. 16, 1982), <http://www.thecrimson.com/article/1982/9/16/the-law-school-controversy-two-views/> [<https://perma.cc/ZW7T-XCU5>].

rights retrenchment that was unfolding across society.<sup>93</sup> Set in the context of the retreating project of racial reform, the pitched institutional struggle at Harvard Law School over curricular offerings and faculty hiring marked ideological tensions within the civil rights constituency. The unexpected fracture within the CRE that underwrote the conflict was matched by an equally unexpected convergence between students and faculty of color and the largely white, newly situated left-leaning theorists who constituted CLS.<sup>94</sup> The CLS approach to law was irrev- erent, critical of both the rule of law and faith in rights-based reform. It was committed to demystifying the ways that legal ideology worked to generate consent to conditions of inequality.<sup>95</sup>

As the insights around institutional struggles in law schools across the country brought out the limitations of the prevailing dialogues, critical thinkers took up a more sustained project of examining doctrinal discourses that replicated the naturalization of racial power the contro- versy had revealed. Responding to rollbacks of race-conscious policies and the narrowed scope of equal protection doctrine, critical race theo- rists developed an alternative line of argumentation. Influenced in many ways by its early associations with CLS, CRT emphasized the ways that legal rules continued to facilitate the social construction of race, not simply as a long-term consequence of past segregation, but through rules that helped constitute racial interests and that continued to insulate them from both judicially and legislatively mandated redistribution.<sup>96</sup>

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<sup>93</sup> The rise of neoconservatism in the 1970s and 1980s called for the end of affirmative action, class-based remedies, and other race-specific remedial measures. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247, 250 (2011). Additional examples of retrenchment include “Reagan’s attempt to fire members of the United States Commission on Civil Rights, the Administration’s opposition to the 1982 amendment of the Voting Rights Act, and Reagan’s veto of the Civil Rights Restoration Act.” *Id.*

<sup>94</sup> I have reviewed related elements of this narrative in other works. See Crenshaw, *supra* note 52, at 1364; Crenshaw, *supra* note 3, at 1277–87; see also CRITICAL RACE THEORY xxii (Kimberlé Crenshaw et al. eds., 1995) (noting that the “Alternative Course exemplified [the importance of] . . . contest[ing] the . . . dominant legal discourse”).

<sup>95</sup> See Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGAL- ISM/LEFT CRITIQUE 178, 199 (Wendy Brown & Janet Halley eds., 2002).

<sup>96</sup> See Crenshaw, *supra* note 3, at 1294 n.133. For the first generation of white male crits who focused on debunking the naturalness of market ideology, the contested baseline was the common law distribution of rights and entitlements. For feminists, the embeddedness of male power in the everyday assumptions of social practices was central. For Race Crits, the unspoken norm of white- ness that sat at the center of colorblind analysis was the point of departure. Intersectionality tar- geted conceptions of whiteness and maleness that were embedded in both legal doctrine and polit- ical discourses pertaining to sex and race discrimination. These lines of argumentation were in some ways contestatory both in their initial articulation and response. But, this collection of moves deepened a sense of how the more significant struggles were not simply about the permissible scope of any potential remedy, but about the baselines from which particular social conditions would be

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Although Harvard Law School celebrates its bicentennial thirty-seven years after Professor Derrick Bell's departure to Oregon, the need for reform and the critical orientation in legal education that he embodied remains as salient as ever. Indeed, just in 2016, Harvard Law student activists called on the school to create a Critical Race Theory program to help contextualize the school's curriculum, describing their efforts as "intellectually descended from the numerous student movements that have arisen time and again at Harvard Law School."<sup>97</sup> Like the struggles at Harvard in the 1980s, today's student activism must be read as a chapter in the ongoing conflict between the liberal center and the critical left on how to conceptualize the contemporary implications of American Apartheid. From yesterday's contestations over the ideals of colorblind meritocracy to today's interment of the short and bitter-sweet romance with post-racialism, race liberals and their radical critics have struggled over the terms of engagement with legal institutions and their role in reproducing racial hierarchy. Understandably, these historical conflicts may seem to offer little analytic value in the face of the seismic shift to the right on race matters, evidenced from Charlottesville to the White House. The resurrection of pre-civil rights discourse in today's *post-* post-racial America may underwrite the assumption that the historic tensions between centrist liberals and race radicals are utterly irrelevant in understanding this moment. But ideological struggles over how social power is framed and contested in one era do not simply fade away with the rightward shifts and ideological reboots in the next. To the contrary, these histories track how ideological conflicts over the scope of racial reform were resolved in ways that depoliticized the revolt against racial power in American institutions, further entrenching defenses that naturalize the racial status quo.

The story of race, reform, and retrenchment is an endlessly renewable narrative in American history, one in which legal discourse has played a recurring starring role.<sup>98</sup> This enduring problem calls for a rigorous examination of the law and its role in reproducing racial hierarchy. Not only is this critical project far from obsolete within liberal institutions, the continuing saga of race and racism in American society underscores the need for it.

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framed as either natural or illegitimately imposed. For Critical Race Theorists, the move to interrogate baselines opened up a wider template from which to challenge the relationship between law and racial power. It also extended the critique of race liberalism to a set of policies that now constitute its post-racial successor.

<sup>97</sup> Claire E. Parker, *Law School Activists Occupy Student Center*, HARV. CRIMSON (Feb. 17, 2016, 9:43 PM), <http://www.thecrimson.com/article/2016/2/17/activists-occupy-wasserstein/> [<https://perma.cc/HP6J-M4RM>].

<sup>98</sup> See *id.* (noting a student's discontent that "the Law School's current curriculum often approaches law as if it were created in a vacuum without regard to its implications for minorities").