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CRITICAL RACE THEORY EXPLAINED

BOOK REVIEW OF VICTOR RAY, *ON CRITICAL RACE THEORY: WHY IT MATTERS AND WHY YOU SHOULD CARE* (RANDOM HOUSE (2022) 209 PP.)

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Victor Ray's new book, *On Critical Race Theory*, offers non-specialists the best available introduction to critical race theory. Before its publication, the standard introductions have been the classic works by legal scholars Kimberlé Crenshaw and by Richard Delgado.¹ They were largely intended for legal theorists and academics; they had become somewhat dated, on the one hand, by the burgeoning application of the insights of critical race theory outside the law, and by the increasing controversy about critical race theory in the broader political and public discourse. Ray, a sociologist and an advocate of critical race theory, expressly tries to fill this gap, both explaining the expanding scope of critical race theory and defending it against its critics. Ray writes clearly and precisely about sometimes complex arguments. As a result, *Critical Race Theory* performs these two missions admirably.

Ray's book is a simple, almost journalistic, contribution to the defense of critical race theory. That's not a weakness; just such a work is what our public, political discourse requires. As Ray notes, his first draft was written in "a three-month sprint." (p. 125) The book should be judged on this basis, rather than as a more deliberative assessment of the theory and its limitations. From this

* I am grateful to Alvilda Joblanko and Stuart Schoder for comments on earlier drafts of this review.

¹ See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012); KIMBERLÉ CRENSHAW, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1996).

perspective, it's hardly fair to call out omissions that a reviewer might find significant in what is intentionally and self-consciously only a survey of an expansive, multi-disciplinary project. Readers will undoubtedly find their own gaps. Ray's book offers a defense of critical race theory. It doesn't pause to expressly acknowledge any substantive or rhetorical overstatement by critical race theory's advocates. There are necessarily trade-offs in such an expedited publication schedule, both in the scope and the depth of the resulting product. In general, the pay-off in accessibility and timeliness that *Critical Race Theory* achieves more than outweighs these costs.

I

Ray's ambitious introduction contextualizes critical race theory's historical origins and development and lays out the political stakes associated with its claims. He then organizes his substantive account of critical race theory around ten of its central concepts. These topics cover the emerging field, including, among others, the social construction of race, structural racism, colorblind racism, the myth of racial progress, interest convergence in the civil rights movement, white and Black identity politics, and intersectionality. Although his focus is on the expanded role that the concepts and methods of critical race theory play outside the legal academy, much of his analysis explores legal and constitutional issues. Because Ray's book is intended as an introduction to critical race theory rather than an original contribution to this scholarship, I won't examine his exposition more comprehensively.

Two aspects of Ray's account warrant particular note, however. First, Ray criticizes the attention that has been given to the plight of less educated, often rural, whites, particularly males who hold traditional values. Ray argues that even with the declining income and health such white Americans face, their plight is no worse than the lives many African Americans have led for decades. Ray suggests that the eager focus on the troubles of whites is itself an expression of the systemic racism in American society. Second, Ray takes an expansive view of when we should be prepared to characterize whites and their behavior as racist. Thus, for example, he is prepared to discount individuals' express commitments to racial equality if they display unconscious racial prejudice and act in racially discriminatory ways. The issues of who should be counted as a racist may be more complex than he acknowledges.

Ray's book raises two questions that extend beyond the scope of his introductory exposition. The first is why the critics of critical race theory are so harsh in their assessment of the methods and tone of critical race theory. John

McWhorter exemplifies this approach best.² Second, why have critics of critical race theory failed to offer a thoughtful analysis of its flaws. Ironically, as Ray suggests, this absence is perhaps most effectively explained by critical race theory itself.

II

Ray rejects the account of American racism that describes the nation as if hit by a neutron bomb: there are no living racists, but the institutional structures of racism remain standing. (pp. 41–47) There can't be racism without racists, on his account. There's no doubt that the face of American racism has changed over time, with covert appeals to racial prejudice and white identity—dog whistles—replacing the ugly overtly racist rhetoric and violence as the formal law and practice of the Jim Crow regime were dismantled in the mid-twentieth century. Understanding the social and conceptual structures of contemporary American racism requires a subtlety that was unnecessary a half century or so ago. But it's not as clear that the problem of racial discrimination and injustice is entirely a matter of racist action, and it's not even clear that critical race theory is committed to such an account, in light of its emphasis on the structural character of much American racism.

Ray criticizes the implicit values underlying the sociological and epidemiological scholarship that focuses on the plight of less educated rural whites. He discounts the deaths of despair that are savaging broad parts of America. (pp. 119–20) Ray appears mistaken in his suggestions that recognizing the plight of these Americans reinforces American racism, undermines the pursuit of racial justice, or is inconsistent with critical race theory. It may be—indeed it's likely—that the improved living standards of less educated white Americans in the mid-twentieth century were constructed in part on the foundation of exclusion of and discrimination against African Americans. But this origin doesn't preclude recognizing the human suffering that is occurring as traditional racialized, patriarchal social, economic, and political structures are dismantled—particularly as another discriminatory, self-serving meritocratic structure of domination is being erected in their place. Critical race theory or a commitment to racial equality don't call for us to ignore this suffering or deep anxiety.

The most charitable reading of Ray's criticism of white unconscious bias as racist is that there are strands in our public political discourse in which insisting on the importance of white claims tacitly devalues deeper African American claims,

² See JOHN MCWHORTER, *WOKE RACISM: HOW A NEW RELIGION HAS BETRAYED AMERICA* 1–4 (2021).

and tacitly excuses unconscious bias as not culpable or needing to change at all. But even to the extent this is so, Ray conflates these threads with the important work that is chronicling what's going wrong in the American heartland.

Ray takes an expansive view of when we ought to characterize behavior as racist and when we ought to characterize individuals as racist. He describes with approval Bonilla-Silva's analysis of how white Americans espouse a commitment to racial equality while minimizing the structural racism in America and endorsing normative commitments that Bonilla-Silva characterizes as "cultural racism." Ray characterizes these individuals as racist. (pp. 42–47)

It's important to recognize what's at stake in making these judgments imputing or attributing cultural racism to individuals in contemporary America. Publicly calling someone racist, in large parts of American life, has profound consequences. John McWhorter, among others, views this characterization as effectively ending further dialogue between the speaker calling out the behavior and the alleged perpetrator. He cites a number of modest transgressions that have triggered profound adverse consequences and stigmatization as racist for individuals who might instead have been found to have been insensitive.³ He's not alone in raising these concerns; indeed, it's become a central theme of attacks on critical race theory from the Right. The stakes of defining who qualifies as a racist are high.

Ray's expansive definition of racism for our public discourse is misguided for three reasons. First, his focus on the element of personal moral failure in behavior characterized as racist is inconsistent with the fundamental commitment of critical race theory to a systemic, structural analysis of American racism. The alternative that critical race theory rejects emphasizes what Ray and other critical race theorists term the *perpetrator perspective*.⁴ Briefly, critical race theory eschews accounts of racism in America as the result of individuals' bad, discriminatory choices, and looks for systemic and structural descriptions that explain the role of race and pervasive racial discrimination by reference to interest and power. In this structural account of American racism and racial discrimination, individuals, both white and African American, are both subjects and objects. This critical insight into the nature of racism in America is obscured by the somewhat simplistic characterization of persons with and even acting on unconscious bias as racists.

³ *Id.* at 1–4.

⁴ VICTOR RAY, ON CRITICAL RACE THEORY: WHY IT MATTERS AND WHY YOU SHOULD CARE 17-18; *see, e.g.*, L. Song Richardson, *Implicit Racial Bias and the Perpetrator Perspective: A Response to Reasonable but Unconstitutional*, 83 GEO. WASH. L. REV. 1008, 1019–20 (2015).

At a more conceptual level, Ray's dismissal of the deaths of despair misunderstands the character of mutual recognition and respect. Hegel introduced the powerful parable of the master and slave, showing how the project of domination is incoherent.⁵ The quest for domination must ultimately reverse the formal roles of the master and slave by making the master dependent upon the slave's recognition and acknowledgment of the master's domination. This parable applies both to American patterns of racial domination and hegemony and to the domination of systemically disadvantaged whites. This parable tells us that the deaths of despair are as much a challenge to the integrity and freedom of disrespected and struggling African Americans as to white American elites, basking in their meritocratic achievements, affluence, and power. Moreover, to the extent that the government response to rural adversity and hardship has been limited by conservative, rural opposition to a broader governmental social safety net, Ray implies that these are troubles of the heartland's own making. (p. 120)

This assessment appears flawed. The political account emphasizing the role of white voters appears simplistic. More fundamentally, whatever responsibility rural white voters may have, the hardship they and their families, including their children, are suffering is substantial. Nothing in critical race theory requires or is advanced by disregarding this human suffering.

Second, the systemic account of racial prejudice, bias, and discrimination is inconsistent with the severity of the inherent moral judgment expressed in characterizing any person as a racist in contemporary American public discourse. Elizabeth Anderson has offered in *The Imperative of Integration* one of the clearest arguments against the expansive approach that Ray adopts.⁶ Anderson argues that the very systemic, structural features of racism in American society create, among other forms of prejudice, unconscious bias, and make moral judgments more complex than a binary of racist or anti-racist can capture. Anderson begins by distinguishing six types of cognitive bias. They range from in-group biases to coherentist biases that exaggerate the justness of the world in which we live. While these biases may reflect a flawed doxastic hygiene, subjects who suffer from them are not otherwise morally culpable.

Anderson then distinguishes four distinct aspects of racially stigmatizing beliefs: content, consciousness, endorsement, and practical engagement. The *content* of a racially stigmatizing belief is the inferential or conceptual substance of

⁵ GEORG WILHELM FRIEDRICH HEGEL, *THE PHENOMENOLOGY OF SPIRIT* 115-18 (A.V. Miller trans., Oxford University Press 1977) (1807).

⁶ ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 44-50 (2010).

the stigmatizing belief. *Consciousness* determines whether the belief is unconscious or is instead recognized by the subject. More subtly, Anderson recognizes that we may hold or act on beliefs that we disavow or deny, thus raising the question whether a subject *endorses* a stigmatizing belief. Finally, *practical engagement* determines whether a subject can and does act on the racially stigmatizing belief.⁷ Distinguishing these dimensions of racially stigmatizing beliefs permits us to make discriminating judgments about subjects who hold stigmatizing beliefs, including judgments about their culpability and blameworthiness.

Anderson argues that only if an individual *holds* beliefs that are *consciously* racially stigmatizing in their *content* and *endorses* or *affirms* these beliefs ought this individual to be characterized as racist.⁸ Even if the *practical engagement* by an individual is racially discriminatory or stigmatizing, unless the beliefs on which she acts include all three of these elements, Anderson argues that we ought not to characterize the individual as racist. Anderson's argument for this conclusion is that this judgment is too harsh for the relative culpability of the conduct in question.

When we recognize unconscious bias, we don't have to accept it as an immovable constraint on racial progress. We don't have to abandon our efforts to change such beliefs and their associated behaviors. Anderson argues that such behavior ought not to be permitted to continue and expressly endorses strategies with the goal of changing just these racially stigmatizing beliefs and their associated racially discriminatory behavior. We need to recognize that indulging the invective of characterizing those with unconscious racial bias as racists will be counterproductive for change. Anderson here gets it more right than Ray. Anderson's approach is, moreover, more consistent with the structural emphasis of critical race theory.

It might be argued that Ray's expansive definition of racism is necessary to construct a more powerful constitutional equal protection law. This argument appears to assume that the definition that we adopt in our public discourse ought to control for legal and constitutional equal protection law. At first impression, it may appear that employing different definitions in these two contexts would be puzzling, since we're talking about the same thing. But our definitions have different functions in the two contexts. In the public discourse, we do have to frame its norms and to set the limits that determine transgressions. By contrast, in the constitutional discourse, perhaps we ought not to be so much concerned with

⁷ *Id.* at 47.

⁸ *Id.* at 48–50.

culpable behavior as with acts, practices, and institutions that result in discrimination.⁹

This suggested approach is not, of course, a description of our current constitutional law of racial discrimination.¹⁰ But it is consistent with the direction that critical race theory would take the law in. If we focused our constitutional anti-discrimination law on discriminatory practices and results, we could largely avoid the thorny normative questions of defining racism and determining who qualifies as a racist. These options may become more plausible if we are less committed to the kind of expansive definition of racism that Ray defends.

Third, characterizing the unconscious bias and other features of systemic racism in contemporary America as sufficient to make someone a racist is counterproductive to forging the political coalitions necessary to take effective remedial action against racial discrimination. In contemporary American politics, racial progress will require commitment by a majority of Americans. Ray and other critical race theorists appear insensitive to the political hazard inherent in defending harshly critical positions that can be effectively attacked by the Right. I don't think that critical race theory can deflect this criticism on the ground that it is a theoretical, analytical project. It's called *critical* race theory because its genealogy traces back to the projects that rejected Hegel's idealism and sought to change as well as understand the world. For critical race theory to move past theory to effective social and political action, it must reject the siren call of exclusionary, virtue-signaling rhetoric of the more impassioned anti-racism.

III

Critical race theory gets lavish, if superficial, attention in our public discourse. Indeed, the concept is treated as so much a matter of our common knowledge that Governor Sarah Huckabee Sanders, speaking to a national television audience in her Republican response to President Joseph Biden's 2023 State of the Union Address, didn't even feel the need to spell it out—she referred simply to the threat of CRT.¹¹ Governor Huckabee Sanders' apparent indifference to being understood by a broader, uninitiated audience gives us a powerful insight into the performative force of this utterance.

⁹ See Richardson, *supra* note 4, at 1022.

¹⁰ *Id.*

¹¹ Jacob Bliss, *Full Text: Arkansas Gov. Sarah Huckabee Sanders' GOP Response to Biden's State of the Union*, BREITBART (Feb. 7, 2023), <https://www.breitbart.com/politics/2023/02/07/full-text-arkansas-gov-sarah-huckabee-sanders-gop-response-to-bidens-state-of-the-union/>.

All Governor Huckabee Sanders had to say, moreover, was that she had banned critical race theory (CRT) in the Arkansas schools. She also claimed to have singlehandedly banned racism, too, suggesting that critical race theory somehow *introduced* racism into Arkansas schools. Without an argument, that's a pretty implausible claim. Governor Huckabee Sanders likely tacitly assumed arguments like those offered by John McWhorter.

McWhorter emphasizes the efforts of critical race theorists and other wokeist believers in the schools. As McWhorter puts in a tellingly dramatic claim, "These people are coming after your kids."¹² This, far more than the occasional injustices to whites and others who are found or accused of displaying racially stigmatizing or even insensitive views, is what motivates McWhorter's project.

McWhorter argues that the discourse and practice of critical race theory and other strands of contemporary American leftist thought is indifferent to evidence and reasoned argument and surprisingly committed to orthodox expressions of virtue and canonical, doctrinal commitment. McWhorter's challenge is methodological: he asserts that the dominant form of American leftist thought, including critical race theory, is doctrinaire, replete with recitations of canonical catechisms and mandatory expressions of virtue. On his account, it has more in common with the religions and cults of true believers than with the practice of inquiry of scientific, enlightenment, or liberal intellectual communities and disciplines. This characterization challenges the very rationality of this Leftist thought and critical race theory.

McWhorter's challenge asks whether critical race theory is a *religion* or a rational branch of inquiry. Here McWhorter tacitly adopts distinctions, rooted in Kant and the Enlightenment, and generally accepted in modern social science, as to the nature of religion and the difference between the beliefs and practices of religion and those of rational and scientific inquiry and belief. Contemporary definitions of religion focus on the beliefs about the world and its order that are taken to be so (and the associated individual and social practices) rather than upon beliefs that are true and the evidence and methods that prove them to be so.¹³ The nature of discourse that reinforces or subverts religious belief is different not only from scientific or social science discourse, but from practical reason generally.

Critical race theory has been criticized as challenging the norms of rationality and reasoned argument by thoughtful critics since the theory first gained traction in the legal academy. Daniel Farber and Suzanna Sherry have argued that

¹² McWHORTER, *supra* note 2, at 22.

¹³ See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

a collection of late twentieth century legal theories, including critical race theory, attacked the fundamental norms and commitments of truth and rationality.¹⁴ In doing so, on their account, these theories ceased to be rationally coherent. The tacit premise on which Farber and Sherry make their argument is that there are objective truths about constitutional law that can be articulated and defended by close reading of authoritative legal texts and formal argument. There are a lot of reasons to question that narrow, positivist description of our constitutional law as a complete or adequate description of our constitutional doctrine and practice.¹⁵ Our practice of precedent, in which the meaning and force of precedents are subject to restatement by the Court in adjudication, has been described in a much more expansive way by constitutional theorists as different as Ronald Dworkin, Philip Bobbitt, and Robert Brandom.¹⁶ Without Farber and Sherry's representational, positivist foundation, the kinds of rhetorical strategies that informed Bell's argument in *The Space Traders* will appear less problematic.

McWhorter adopts a similar attack on critical race theory as rationally incoherent but frames it as a characterization of the doctrine as a religion rather than a rational field of practical reason. McWhorter argues that he has the rational high ground against the claims of critical race theory and that he can defend that high ground without engaging the substantive claims of critical race theory. Implicitly, McWhorter distinguishes the field-specific research and analysis that Ray surveys from the practical claims that critical race theory makes in our public discourse and political debate. In his failure to *treat* the claims of the critical race theorists as rational McWhorter misses an opportunity to recognize the insights offered by critical race theory and to explore how they may be harmonized with the broader projects of reason.

One express implication of McWhorter's premise is that he concedes that his rational arguments will not reach defenders of critical race theory, any more than rational arguments would convince evangelical Christians to become atheists and deny the existence of God. Neither is he speaking to the religious Right, for the same reasons. His audience is the rationalist Left and Center who, he suggests, find themselves uncomfortable with and unpersuaded by the claims made by critical

¹⁴ DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH* (1997).

¹⁵ See André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131 (2014).

¹⁶ See Robert Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, in *PRAGMATISM, LAW, AND LANGUAGE* 19 (2014).

race theory in the public sphere.¹⁷ His key message is that we should push back against the claims of critical race theory and the so-called woke Left, without trying to engage its advocates—the Elect—in rational, reasoned arguments.

Even if McWhorter is right that critical race theory and other doctrines of the Left are best viewed as elements of religious faith, why ought the rationalist heirs of the enlightenment to abandon efforts to bring these believers into a more tolerant version of their faith? The answer has to lie in McWhorter's conclusion that the wokeism of the elect is not just a religion, it is a *Manichean* religion. In its dualism, it sorts everyone—at least every American—into anti-racist and other categories. This feature and its associated virtue signaling and inquisitorial discipline troubles McWhorter.

McWhorter's argument invokes Richard Rorty's account of the history of the late twentieth century American Left in *Achieving Our Country*.¹⁸ Richard Rorty, a renowned analytical philosopher originally focused on traditional questions of the philosophy of mind and language, emerged in the late 20th century as a leading, albeit controversial, post-modern progressive public intellectual. Rorty argued that the Left became disillusioned with America after the Viet Nam War and the decline of the Civil Rights Movement. The Left moved from political action to the creation of a parochial culture in which its values and hopes could be expressed and shared with fellow travelers. Rorty argued that to reclaim its political relevance the Left must forge a new, inclusive, less nationalistic patriotism. Classically, critics of the American Left haven't been persuaded by this program, instead treating Rorty as a relativist contributor to the decline of traditional norms of discourse and as another culprit in the decline of liberalism and the post-enlightenment world.

McWhorter presses Rorty's critique of the Left into service as the foundation for a critique of critical race theory. McWhorter argues that the ultimate product of this shift has been the creation of a new form of religion in the woke Elect. Passive, politically ineffectual if not irrelevant (except as a focus of power reactionary politics), dominated by the strength of its commitments to a canonical catechism, intolerant of dissent or even shades of affirmation, and self-absorbed, critical race theory provides a refuge from engagement in the consequential political discourse and debate of the Nation. This argument warrants our careful attention.

¹⁷ MCWHORTER, *supra* note 2, at xi–xii.

¹⁸ RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH CENTURY AMERICA* (1998).

Rorty's thought appears inconsistent with McWhorter's project. Rorty's anti-foundationalism and rejection of the classical project of epistemology, along with related positivist Enlightenment projects of reason would appear to undermine anything like McWhorter's attack on critical race theory and woke anti-racism as erroneously substituting religion for the firm path of science. Rorty would have been at best intensely skeptical of the attack on critical race theory as flawed by the strength of its doctrinal commitments and its parallels with the practice of religion.

Rorty took a deflationary stance toward the methodological and epistemological claims of science.¹⁹ On his account, the methods of science worked very well in the areas in which it was first applied, the physical sciences, and reasonably well in the life sciences to which it was extended. But it was not a particularly helpful model for how all inquiry should be conducted and it precipitated a wrong turn in western philosophy. In the world of practical reason, like law, Rorty welcomed the decline of the model of science.²⁰ For Rorty, characterizing a style of inquiry as not science is not a powerful way to discredit its project.

Rorty explained moral progress as a matter of expanding the class of persons who we treat as like ourselves, for whom we have empathy and to whom we owe respect. He expressly linked the expansion of empathy with telling stories that led us to accept others as like ourselves. This occurred for Rorty, principally through fictional narratives, not through moral argument.²¹ It's not clear that the narratives of critical race theory McWhorter criticizes are very different from the kinds of discourse Rorty thinks potentially valuable and important.²²

Rorty's skepticism towards the valorization of science as a extends to projects like that McWhorter undertakes in *Woke Racism*. An example of the kind of narrative method that critical race theory employs may help make this clear. The most celebrated example of such a narrative is Derrick Bell's science fiction narrative *The Space Traders*.²³ This narrative asks us to consider the science fiction account of the arrival of a powerful extraterrestrial alien race who offer to solve white humans technological and economic problems in exchange for payment of

¹⁹ RICHARD RORTY, *Science as Solidarity*, in OBJECTIVITY, RELATIVISM, AND TRUTH 35 (1991).

²⁰ Richard M. Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 91 (Michael Brint & William Weaver eds., 1991) ("Nobody wants to talk about 'a science of law' anymore.")

²¹ RICHARD M. RORTY, *Human Rights, Rationality, and Sentimentality*, in TRUTH AND PROGRESS 167 (1998).

²² MCWHORTER, *supra* note 2, at 63, 78.

²³ DERRICK BELL, *The Space Traders*, FACES AT THE BOTTOM OF THE WELL 158 (1992).

the entire black population of America. Bell then imagines how the political and legal argument and discourse might go, with the result that a constitutional amendment is adopted permitting the exchange and all of the Nation's African Americans are exchanged for the promised material benefits. Bell's pointed science fiction so nicely highlights the kinds of racial bias that figures in the American public sphere (including in the American legal academy) that we ought not to have been surprised by the anger and resistance that were triggered by it. Indeed, it brings to mind Jonathan Lear's provocative psychoanalytic interpretation of the trial of Socrates as arising out of resistance and transference.²⁴ Yet Bell's science fiction narrative epitomizes the kind of method that McWhorter condemns and rejects.

Why should we reject Bell's method and implicit argument as illegitimate? While not cast as science fiction, Hegel's parable of the master and slave seems methodologically quite similar to Bell's account. Rorty himself employs the science fiction example of the extraterrestrial alien race of Antipodeans as an organizing metaphor for his challenge to classical philosophical accounts of minds and mental events in *Philosophy and the Mirror of Nature*.²⁵ Bell's approach is also effective, forcing us to reconsider our premises about equality in America.

McWhorter's criticism of narrative strategies as an alternative or complement to more traditional argumentative strategies is unpersuasive. McWhorter is more persuasive in arguing that critical race theory fails to advance progress to move past racial discrimination and toward greater racial equality. Critical race theory risks arming its right wing critics when it adopts a harsh rhetoric of allegations of racism and rejects a common cause with disadvantaged whites.

Finally, McWhorter argues that all the sound and fury of the critical race theory discourse and practice is of little moment in enhancing racial equality and creating paths of opportunity—educational, political, economic, and social—for African Americans. This is a serious challenge. McWhorter argues that critical race theory often takes its eyes off the prize of real, practical progress in favor of an exaggerated emphasis on doctrinal purity. For some of the reasons I have described above, this is not an unfair criticism.

²⁴ See generally JONATHAN LEAR, *An Interpretation of Transference*, in *Open Minded: Working Out the Logic of the Soul* 56, 69–73 (1998).

²⁵ RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 70–77 (1979). Such hypothetical examples are well within the methodological mainstream of contemporary analytic philosophy. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 17–22, 136–42 (1971) (introducing the fictions of the original position and the veil of ignorance to describe a decision process to determine the requirements of distributive justice).

The second strand of the most sophisticated popular discussions of critical race theory have been authored or published by the Heritage Foundation. *Critical Race Theory: Knowing It When You See It and Fighting It When You Can*'s treatment is light on its treatment of the substance of critical race theory's claims.²⁶ When the Heritage Foundation's analysis does engage substantively, it appears particularly interested in the provenance and genealogy of critical race theory. The Heritage Foundation traces the history of critical race theory from its earliest roots in the leftist critical theory of Weimar Germany's Frankfurt School, through Critical Legal Studies.²⁷

Critical race theory, by contrast with critical legal studies, is best understood as offering an enriching, not a reductive, account of the role of race and racial bias and discrimination in American law.²⁸ This claim needs qualification; some critical race theorists adopt a reductive account. Delgado and Stefancic embrace the legal indeterminacy claim of critical legal studies. (To the extent that critical legal studies is better understood as merely making a claim of underdetermination, the doctrinal genealogy is more direct, but still doesn't suggest that critical race theory offers a reductive account of law.)

In any case, a reductive account is not central to the thrust of critical race theory, however, and it is not part of the seminal texts, like Bell's interest convergence analysis of the civil rights movement. McWhorter distorted critical race theory when he argues that it is irretrievably committed to such nihilistic, reductive accounts. Critical race theory asks us to consider whether and how race should figure in our legal, historical, sociological, and psychological explanations and theories of law. Moreover, unlike some of the most radical claims of critical legal studies, while it is inconsistent with theories that assert the absolute autonomy of law, it's not inconsistent with accounts that assert a limited autonomy—or the importance of the rule of law.

²⁶ THE HERITAGE FOUNDATION, *CRITICAL RACE THEORY: KNOWING IT WHEN YOU SEE IT AND FIGHTING IT WHEN YOU CAN* (n.d.).

²⁷ *Id.* at 7; see also Mike Gonzalez, *The Five Lies of CRT*, HERITAGE FOUNDATION (Nov. 29, 2021), <https://www.heritage.org/education/commentary/the-five-lies-crt> (“Critical race theory came straight out of Critical Legal Theory (sometimes known as Critical Legal Studies), which came out of the Critical Theory of the Frankfurt School, which was the first and most important of the Western Marxist schools and which (along with Antonio Gramsci) replaced Karl Marx’s economic determinism with the view that the cultural superstructure (or hegemony) was what dictated the actions or non-actions of the workers, not material relations.”).

²⁸ See Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1240 (1989) (review essay about MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988)).

Ray emphasizes how critical race theory is driving exciting work in the social sciences that is no longer merely derivative of the research agenda of legal scholarship. While I'm not competent to engage this claim in the sociological and psychological fields, critical race theory has already proven a fruitful framing for work in our legal history and constitutional theory.

Three examples demonstrate how such analysis can advance our understanding. Derrick Bell and Mary Dudziak argued that the Civil Rights Movement must be understood in the context of Cold War geopolitics.²⁹ The introduction of this prudential perspective of *Realpolitik* need not discount the moral leadership of Martin Luther King and the progress that the Civil Rights Movement achieved. It did not even diminish the political leaders' contribution to the racial progress that was made. It merely placed the Movement in a richer historical account.

When Michelle Alexander asked us to consider the exceptional American system of mass incarceration as *The New Jim Crow*, she didn't reject the rule of law or discard the doctrinal dimensions of American criminal justice.³⁰ She asked us to consider how the two systems of racial regulation—the Jim Crow regime and the contemporary system of mass incarceration—deliver parallel kinds of results, and why.³¹ As the response to Alexander has demonstrated, it's a fair and important challenge to address.

In our constitutional history, Lawrence Lessig shows in *Fidelity and Constraint* how understanding the force and power of racism in the South in Reconstruction enables us to understand how the Privileges and Immunities Clause of the Fourteenth Amendment had to be given such a crabbed reading.³²

Substantively, the Heritage Foundation's *Critical Race Theory* identifies the systemic, structural claims made about American racism by critical race theory as the core claims that must be rejected.³³ In response to critical race theory's claims, the Heritage Foundation appeals to the legal requirements of the 1964 Civil

²⁹ MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

³⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2011)

³¹ *Id.* at 3–15.

³² See LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 301–20, 333–34 (2019) (explaining that the Court's infamous *Cruikshank* and *Civil Rights Cases* decisions were constrained by the realities of Reconstruction politics).

³³ THE HERITAGE FOUNDATION, *supra* note 17.

Rights Act and the Civil Rights Movement, concluding that there's *no* "evidence to suggest that our social order is oppressive and dangerous."³⁴ While arguments may be made that there has been progress toward eliminating racial discrimination, asserting that there is no evidence of continuing racial discrimination is risible.

The Heritage Foundation offers a formalistic argument, based upon the laws we have enacted, not the results that we have achieved. The Heritage Foundation doesn't acknowledge the enormous, continuing racial disparities with respect to income, wealth, longevity, health, or infant mortality. It doesn't address how, three-quarters of a century after *Brown*, we still have largely segregated public schools where African American pupils now receive education that is separate but unequal, denying them even the equality promised in 1896 by *Plessy v. Ferguson*.³⁵ Justice Douglas predicted this result fifty years ago in his poignant dissent in *Milliken v. Bradley*.³⁶ There's a lot to discuss and debate about the nature of racism and racial discrimination in America, but it's hard to engage seriously with the Heritage Foundation's arguments.

Despite all the talk about critical race theory, there doesn't appear to be anything like Ray's book yet on offer from critical race theory critics. Why is there no corresponding introductory substantive examination of the claims of critical race theory by its critics?

Ray argues that the response from the Right to critical race theory has been distortive and dishonest. (pp. xxiv–xxix). The explanation for the critics' failure to engage more deeply may be that it is not easy to challenge the most fundamental claims of critical race theory. To the extent that critical race theory argues, as Randall Kennedy has put it, that racial prejudice and discrimination has been systematic and systemic in America and that the twentieth-century civil rights movement failed to dismantle all of the legal, social, and economic structures of racial discrimination, it's hard to imagine how the contrary argument would go.³⁷ To the extent that the Heritage Foundation purports to do so, its response is formulaic and unpersuasive. In the absence of substantive arguments against the fundamental claims of critical race theory, the better rhetorical strategy for critics is to offer associational and *ad hominem* objections. But some of these arguments have rhetorical force, and while the constraints of time and space may have

³⁴ *Id.* at 4.

³⁵ *Brown v. Board of Education*, 349 U.S. 294 (1955); 163 U.S. 537 (1896).

³⁶ 418 U.S. 717 (1974).

³⁷ *Interview: Randall Kennedy on Why Critical Race Theory is Important*, CURRENT AFFS. (Mar. 2, 2022), <https://www.currentaffairs.org/2022/03/randall-kennedy-on-why-critical-race-theory-is-important>.

prevented Ray from engaging these arguments more directly, there might have been value in confronting them more directly.

The absence of substantive engagement by the Right with the most fundamental claims of critical race theory substantively raises the question whether Ray's book will make a difference in our public discourse. There's no indication that the Right is moving to engage Ray's ideas and arguments. Ray's book offers an explanation for why such smart folks as Senators Ted Cruz and Josh Hawley and Governors Sarah Huckabee Sanders and Ron DeSantis have instead got so het up.