

# Towards a '(post-)apartheid' critical race jurisprudence: 'Divining our racial themes'

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## 1 Introduction

In this article, I repeat arguments made elsewhere on the importance of critical race scholarship in South African legal thinking.<sup>1</sup> Critical 'outsider' jurisprudence is a developing genre of legal enquiry and needs to be considered in analyses of legal reform, human rights, constitutionalism, transformation, transitional justice and reconciliation. While divergent feminist legal theories, certain strands of 'queer' legal theory, US and Euro-Brit Critical Legal Studies (CLS) have received wide coverage within South African legal scholarship, vibrant jurisprudential movements such as Critical Race Theory (CRT), postcolonial jurisprudence and Black Feminism have remained largely absent from post-apartheid critical legal discourse. Not only does the markedly 'white' character of South African critical and postmodern legal theory explain the paucity of critical race theory – the general critique levelled at CLS scholars in the US by CRT scholars for their failure to come to terms with the particularity of race and racism in their analysis of how law is a site for the production of ideological practices, politics and social power applies also to South African Critics and postmodern legal theorists in their engagement with the post-apartheid legal culture.<sup>2</sup>

However, given South Africa's unique history of totalitarian white supremacist rule and institutionalised anti-black racism, the shocking silence of critical race discourses cannot merely be dismissed as an oversight. It explains the extent to

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<sup>1</sup>See Modiri 'The grey line in between the rainbow' (2011) *SAPL* 177-202; 'The colour of law, power and knowledge' (2012) *SAJHR* (forthcoming).

<sup>2</sup>See Harris 'Foreword: The jurisprudence of reconstruction' (1994) *California LR* 743; Bracamonte 'Foreword: Minority critique of the Critical Legal Studies movement' (1987) *Harvard Civil Rights-Civil Liberties LR* 297; Delgado 'The ethereal scholar: Does critical legal studies have what minorities want?' (1987) *Harvard Civil Rights-Civil Liberties LR* 301.

which black people have been pushed into the subaltern and how deeply entrenched our subordinate status has become. The harms we experience, our needs and suffering are incapable of intelligibility within traditional forms of legal discourse and social meaning. To my mind, the absence of CRT in South African legal thought corresponds with the broader exclusion of black people, black experiences, black values and black needs in society and the overwhelming dominance of whites in all spheres of life. To account for this deep feeling of racial alienation under the law, I suggest that we turn to the conceptual tools and methodologies developed by critical race theorists to illustrate the ways in which the social construction of race is present in legal systems and how power and knowledge production, specifically, but not only in law, are also racially structured.<sup>3</sup> I also suggest that CRT is needed in the South African legal context because of the ideological inadequacy and technocratic assumptions of current traditional (formal/liberal/conservative) approaches to equality in South Africa. CRT allows us to examine racial issues more critically and directly in the context of their social, economic and political implications for law and legal rules.

It provides a different and much-needed approach to thinking about the contemporary challenges of race and racial domination. CRT, in contrast to liberal approaches which view racism as the outcome of individual prejudice and hostility and which posit law as a neutral and apolitical mediator of racial conflict, understands racism as a structural manifestation of white social, economic and cultural power and views law as a site for the reproduction and concealment of that power.<sup>4</sup> In other words, law is a constitutive element of race itself and reproduces the structures and practices of racism and racial domination (white supremacy) through the legal tradition and myriad legal rules which may often seem unconnected to race itself.<sup>5</sup>

In offering a race-conscious yet non-essentialist account of the complex interaction between race, law and power, CRT carries out the progressive groundwork for a radical politics of anti-subordination and social justice. This is particularly significant in a country like South Africa where, despite ostensible legal reforms and a comprehensive Bill of Rights, anti-black racial subordination and discrimination persists and the privileges unjustly accrued to whites are virtually self-perpetuating.<sup>6</sup> My argument is for CRT to intervene in the paradox of the coexistence of the constitutional promise of formal legal equality and non-racialism with the realities of material inequality and the ongoing racial oppression of Blacks,

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<sup>3</sup>See Delgado and Stefancic *Critical Race Theory: An introduction* (2001).

<sup>4</sup>See Fitzpatrick 'Racism and the innocence of law' in Fitzpatrick and Hunt (eds) *Critical legal studies* (1987) 119.

<sup>5</sup>Crenshaw *et al* (eds) *Critical race theory: The key writings that formed the movement* (1995) xxv.

<sup>6</sup>See Mamdani 'When does reconciliation turn into a denial of justice?' in Nolutshungu (ed) *Memorial lectures* (1998) 1; Gibson 'What happened to the promised land: A Fanonian perspective of post-apartheid South Africa' (2011) *Antipode* 1-27.

and to challenge colour-blind and race-neutral responses to racial politics and the discourse of equality. By placing race as a central theme (or 'category of analysis') in the construction of law and legal theory, and by viewing racial issues (including those sometimes deemed as not being racial issues) from the perspective of the racially oppressed, our approaches to legal analysis could be radically altered and moved closer to the quest for racial justice, equality and freedom.<sup>7</sup> In CRT, the experiences of Blacks – which are by no means monolithic or universal – are used as a frame of reference for understanding the brutal effects of institutionalised racism and racial ideology because the experiential viewpoints of Blacks offer a different insight into race from those within the dominant culture (whiteness).<sup>8</sup> It is also important to note the absolute centrality of historical and social analysis in CRT's engagement with race and law. Therefore, if South African CRT research employs the tools, approaches and methodologies of US CRT, these must still be grounded in the specific social, economic, political and legal dynamics of South Africa and its unique historical and present context.<sup>9</sup>

In this article, I argue for law and legal theory to move towards a critical race jurisprudence in a way that will address some of the issues set out above. I do not, however, offer a full examination of CRT's applicability to the South African situation, and suffice it to say that I believe that it is highly applicable and relevant. I also do not argue that CRT should replace or supplant existing critical theories of law, but rather that legal analysis, including 'critical' legal analysis would benefit from being attentive to the voices of racially marginalised and excluded communities. To illustrate these arguments further, I proceed (in section 2) to focus on a few critical writings on race in South Africa, and internationally, which further motivate the need for adopting CRT. I suggest that CRT offers an intellectual and theoretical vocabulary of critique that can expose law's role in rationalizing unjust social hierarchies based on race, class and gender (among many other categories). In the South African context, CRT is a timely challenge to the overwhelming reliance on the rhetoric of formal racial equality and constitutional optimism by exposing the ongoing symbiosis between the suffering, poverty and inequality experienced by Blacks and the privileges, dominance and longevity experienced by whites. Thereafter, (in section 3) I discuss a few 'racial themes' which could be incorporated in an analysis of law and legal doctrine. Each theme amplifies the call of CRT for the problematisation and reconfiguration of the manner in which law constructs knowledge about race and participates in the 'race-ing' of South African society. In conclusion, I argue for a critical

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<sup>7</sup>Tuitt *Race, law, resistance* (2004) xiv.

<sup>8</sup>See Matsuda 'Looking to the bottom: Critical legal studies and reparations' (1987) *Harvard Civil Rights-Civil Liberties LR* 323.

<sup>9</sup>See Macdonald *Why race matters in South Africa* (2006); Magubane *The making of a racist state: British imperialism and the Union of South Africa, 1875-1910* (1996); Rycroft *Race and the law in South Africa* (1987); Seeking and Natrass *Class, race and inequality in South Africa* (2005).

jurisprudence that recalls and remembers the spectrality of race and racism in the lives and laws of (post-)apartheid South Africa.

## 2 Why CRT? Recalling 'race'

Racism is so universal in this country, so widespread and deep seated, that it is invisible because it is so normal.<sup>10</sup>

US CRT scholar, Derrick Bell, in the opening chapter of the book in which he argues that blacks remain the 'faces at the bottom of society's well' and contends that racism is an 'integral, permanent, and indestructible component' of society, reflects on growing up in the years before the Second World War.<sup>11</sup> It is the striking similarity of his account to the South African experience that I try to draw out.

Bell writes that during that time, the slave heritage of African-Americans was more a 'symbol of shame than a source of pride'.<sup>12</sup> This was because, as Bell himself puts it, '[it] burdened black people with an indelible mark of difference as we struggled to be like whites'.<sup>13</sup> Struggle and survival meant moving on and rejecting slavery as he and others would sometimes claim – erroneously, as he later found out – that they were descendant of the free Negroes. Self-delusion, by denying one's history of slavery and racist exploitation, brought ease and comfort to Bell and other African-American youths at the time. Slavery was barely mentioned in schools or public discourses by the descendants of the victims and survivors of slavery. The culture at the time 'encouraged and enhanced individual denial of our collective, slave past'.<sup>14</sup>

However after the Second World War, and particularly in the 1960s, this changed when a few academics and activists began writing and republishing books and out-of-print volumes that regenerated interest in the subject of slavery. Bell recalls that although all the narratives and literature depicted slavery as egregious and awful, they also depicted a division between two camps of whites: the good and benevolent whites who eased the slaves' anguish and a few bad and evil whites who shouldered all the blame for slavery.<sup>15</sup> This narrative of good white/bad white has allowed whites to simultaneously feel outrage and revulsion for slavery without necessarily recognising slavery as a burden upon America's history and certainly not as a burden that required reparations (that is, because they all identified as 'good whites' as a strategy to avoid confronting the fact that white supremacy as a system works to the benefit of all whites irrespective of the degree of their personal commitment to white supremacist beliefs and values).<sup>16</sup>

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<sup>10</sup>Chisholm, quoted in Johnson *Heart full of grace* (1995) 223.

<sup>11</sup>Bell *Faces at the bottom of the well: The permanence of racism* (1993).

<sup>12</sup>*Id* 1.

<sup>13</sup>*Ibid.*

<sup>14</sup>*Id* 2.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

He writes further that even though most whites take comfort in existing racial stereotypes and are fearful that Blacks will get ahead of them, many of them respond to race-based measures either with a sympathetic headshake or victim-blaming rationalisations. Both responses, Bell notes, lead many to conclude that complaints about racial discrimination by Blacks are excuses used by people who are unwilling to compete on an equal basis in society. Most discourses on redress and Affirmative Action in post-slavery America represent blacks as slothful, lacking in ambition and as needing special treatment in life, with no reference to historical context. The effect of these discourses is to relieve white communities of their responsibility and to avoid confronting their complicity. Accordingly, Bell suggests that there is a need to reassess our assumptions about race and the persistence of racism in society.

Such a reassessment of the racial situation will of course be difficult in the contemporary context because racial discrimination is less visible as a result of formal civil rights reform. The absence of overt racism and visible signs of discrimination has created an atmosphere of post-racialism and racial neutrality that has encouraged many whites and privileged blacks to believe that racism is a thing of the past. However, Bell insists that despite the formal end of slavery as well as judicial precedent and civil rights statutes to prohibit racial discrimination, 'the fact of slavery refuses to fade'.<sup>17</sup> Racial discrimination against Blacks continues, their careers and lives are often under threat due to race, while poverty, low income and unemployment still characterise the black condition. Bell warns that what is designated as 'racial progress' is often not a solution to the problem and in fact can become a 'regeneration of the problem in a particularly perverse form'.<sup>18</sup> While there are statistics that confirm the erosion and ineffectiveness of civil rights advances for Blacks, even those statistics cannot begin to express the havoc caused by joblessness, misery, poverty, anarchy, crime, poor public education, drugs and disrupted family life, which are all social conditions informed by the history of slavery. Furthermore, in the present context, where racism is not openly practiced but masked by neutral standards, Blacks are constantly confronted with the interpretive dilemma of whether the setbacks that they suffer are due to race or some other individual quality or characteristic. The idea that racism is an aberration, rather than a banal entrenched practice as Bell sees it, has disarmed its victims of the resources to perceive a racist act when it is being perpetrated against them. This ensures that whites can deny both their collective racial dominance and their individual culpability for racist practices. It also means that Blacks who complain about racial discrimination are often maligned and accused of racism themselves or of 'playing the race card'.

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<sup>17</sup>*Id* 3.

<sup>18</sup>*Ibid*.

Bell explains that the failure of civil rights reforms is rooted in the failure to transform the 'racial policy' which is made up of thousands of individual practices, symbols, and norms whereby Blacks are subordinated to whites. Bell also argues that the most formidable barrier to racial equality is the 'stabilising role' played by Blacks in society and the economy. By this, he means that Blacks are either the scapegoats or guinea pigs of failed economic and political policies. Another significant issue Bell raises, given the worsening economic and social conditions, is the relationship between liberal democratic values and racism – which for him reveals not an 'apparent anomaly' but an 'actual symbiosis'. Liberal democracy and racism in countries marked by racialised inequality such as the United States and South Africa historically, and even inherently, reinforce one another.<sup>19</sup> This leads Bell to question whether current legal reforms have made an indelible improvement or marked a decisive break from the past:

The fact is that, despite what we designate as progress wrought through struggle over many generations, we remain what we were in the beginning: a dark and foreign presence always the designated 'other'. Tolerated in good times, despised when things go wrong, as a people we are scapegoated and sacrificed as distraction or catalyst for compromise to facilitate resolution of political differences or relieve economic adversity.<sup>20</sup>

For Bell, racial oppression and the permanence of the subordinated status of Blacks is the key racial theme that needs to be explored by critical race theorists. He wants us to question why even in countries which extol the values of equality, dignity, freedom and are part of the global cult(ure) of human rights, Blacks remain racially oppressed and subordinated, and as Bell puts it, at the bottom of society's well.

We should recognise that the notion of formal racial equality, while comforting to privileged whites and the black elite, remains illusory to the majority of Black people. Substantive reform (in principle) often tends to translate (in practice) into weakly worded and poorly enforced laws, vague, ineffectual and indeterminate judicial decisions, token positions in the public and private sector, corrupt enrichment of a small black elite, and public spectacles.<sup>21</sup>

Despite comparative differences in chronology, demography and legal culture, Bell's arguments (made in the context of the United States) are for the most part apposite and accurately describe the race situation in 'post'-apartheid South Africa.<sup>22</sup> Similar trends in response to the post-slavery era can also be discerned in race discourses in post-apartheid South Africa.

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<sup>19</sup>*Id* 10.

<sup>20</sup>*Ibid* 10.

<sup>21</sup>*Id* 14.

<sup>22</sup>For comparative literature on race in South Africa and the United States, see Fredrickson *White supremacy: A comparative study of American and South African history* (1982); Marx *Making race and nation: A comparison of South Africa, the United States and Brazil* (1998); Hamilton (ed) *Beyond racism: Race and inequality in Brazil, South Africa and the United States* (2001).

From the outset, I should mention that I share Bell's distrust of formal legal reforms and their capacity to effect real and substantive change. I also question why Blacks remain a racial underclass in a country with what is often hailed as 'the most progressive constitution in the world'.<sup>23</sup> In South Africa we also experience a climate in which the true horrors of apartheid are slowly becoming forgotten, in which racial injustices and inequalities which were created by apartheid are becoming normalised. In the same way as narratives and literature about slavery obscured the past, so too did the Truth and Reconciliation Commission silence many voices and relieve whites of their responsibility and complicity in the systemic violence, exploitation and oppression which took place under apartheid.<sup>24</sup> The TRC focused on activists and political elites rather than on beneficiaries and victims and thereby followed a narrow and strategic process of 'reconciliation' which embraces hegemonic ideals like nation-building and unity which claim to speak for all.<sup>25</sup> The consequence of this was that the continuance of past oppressions and privileges remained unquestioned and the possibilities of social reconciliation, social justice and an enlarged (ethical) vision of equality were negated.

Eighteen years after the abolition of legalised racial segregation and institutionalised racism, the implementation of numerous legal reforms and the elaboration of a 'substantive equality'-based Court jurisprudence, *the fact of apartheid refuses to fade*. Thus Bell's scepticism towards what we deem as racial progress (part of the package of South Africa's constitutional optimism) must be heeded, including the danger that such racial progress and redress measures might regenerate the race problem in many more perverse ways (such as colour-blind racism, racial essentialism, reduction or assimilation of complex differences or conservative interpretations and readings of the Constitution and other equality legislation which close off the search for future alternative refigurings of equality, freedom and justice). The ANC government's embrace of global capitalism and liberal democratic values also colludes with existing structures of racial disadvantage and inequality to further subordinate Blacks.<sup>26</sup>

Achille Mbembe echoes these concerns in his discussion of the 'post'-apartheid South African experiment at creating 'the first credible non-racial society on the planet'.<sup>27</sup> He notes that even after the *formal* end of apartheid, which was

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<sup>23</sup>Sachs *The strange alchemy of life and law* (2009) 27.

<sup>24</sup>See Van Marle and Le Roux (eds) *Law, memory and the legacy of apartheid: Ten years after AZAPO* (2007); Mamdani 'Amnesty or impunity? A preliminary critique of the report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) *Diacritics* 33-59.

<sup>25</sup>See Mamdani (n 6).

<sup>26</sup>See Madlingozi 'Post-apartheid social movements and the quest for the elusive "new" South Africa' in Motha (ed) *Democracy's empire: Sovereignty, law, and violence* (2007) 77. See also Marais *South Africa limits to change: The political economy of transition* (2001) 153; Terreblanche *A history of inequality in South Africa 1652 – 2002* (2002); Bond *Elite transition: from apartheid to neoliberalism in South Africa* (2005).

<sup>27</sup>Mbembe 'Passages to freedom: The politics of racial reconciliation in South Africa' (2008) *Public Culture* 5.

based on firmly entrenched race hierarchies, the struggle for racial equality has not ended. In general, whites still control the commanding heights of the national economy and top management positions and the distribution of wealth, income and opportunities is still racialised.<sup>28</sup> He argues that '[the] moment when South Africa will be able to recognise itself and be recognised as a truly non-racial community is still far away'.<sup>29</sup> He bases his argument mainly on the continuation of racist prejudices in the private sphere which keep breaking wide open, often in the guise of matters that at first glance have nothing to do with race (such as poverty, crime, corruption, language rights, sports, cultural pluralism, disease, renaming of roads and public places to name a few). He writes that white racism and the operation of white privilege have had to change in *modus operandi*, and have become more subtle, covert and unconsciously practiced. He notes, in a similar vein to Bell, that although most whites generally purport to support racial equality in principle, they would later reject policies designed to implement equality and continue to hold on to the privileges of a white skin, constantly attempting to restore their normalcy.<sup>30</sup>

The standard meaning of reconciliation by 'former beneficiaries of past racial atrocities' writes Mbembe is that racism is dead and 'blacks should forget about the past and move on'.<sup>31</sup> Most whites have retreated to a comfortable position of personal non-culpability for past misdeeds by ignoring the enormous nature of their social and economic advantage as a group. In other words, whites have cast themselves as 'non-responsible rather than irresponsible'.<sup>32</sup> As Clarkson writes, 'to be irresponsible is to affirm a responsibility has been breached. To be non-responsible is to deny that one falls within the ambit of a responsible field. In fact it amounts to a denial that such a field exists at all'.<sup>33</sup> Mbembe connects this mentality of non-responsibility to the uncritical acceptance of the liberal conservative notion of the autonomous self-made and self-reliant subject. He argues that it is pretence to believe that white racism is not or is no longer the main cause of black poverty and the troubling gaps in life's opportunities experienced by Blacks in comparison to their white counterparts.<sup>34</sup> Another source of race denialism which he identifies is the overreliance on the constitutional promise of formal legal equality which creates the impression that no further action is needed once the law has granted such equality.

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<sup>28</sup>Mbembe (n 27) at 6. See also Durrheim *et al* *Race trouble: Race, identity and inequality in post-apartheid South Africa* (2011) 16-24.

<sup>29</sup>Mbembe (n 27) 6.

<sup>30</sup>*Id* 10.

<sup>31</sup>*Id* 9.

<sup>32</sup>Clarkson 'The time of address' in Veitch (ed) *Law and the politics of reconciliation* (2006) 234.

<sup>33</sup>Clarkson (n 32) 234.

<sup>34</sup>Mbembe (n 27) 9.



Mbembe adds that this also leads to the erroneous assumption that racial disparities are either the result of corruption, maladministration and poor economic planning but also as simply a manifestation of the moral failure of Blacks (who are accused of not working hard enough, of feeling over-entitled, not living an ethical life and being prone to crime, corruption, baseness and illness). Measures aimed at achieving transformation are also charged by advocates of liberal capitalism with interfering with market rationality, discouraging foreign investment and acting as a form of reverse discrimination.<sup>35</sup> Mbembe connects this to the urgent questions of social justice, democracy and political stability by arguing that these will not be achieved as long as whites still cling to 'the rule of property' and maintain monopoly over land ownership, capital, access to schools and universities, corporate boardrooms and earnings that, on average, are six times more than blacks doing the same work.<sup>36</sup> He warns that 'a radical revision of South Africa's white supremacist ideology is therefore taking place'.<sup>37</sup> It has shifted from asserting the natural inferiority of blacks and denying their humanity to questioning the moral legitimacy and political appropriateness of racially-based redress measures. He also warns that the apologetics for racial inequalities and the maintenance of unjust systems of power and social hierarchies may come in the language of rights, fairness and equal opportunity, but goes on to say that actually they will be an 'effort to institutionalise a racial privilege that is trying to mask its racial nature'.<sup>38</sup> In essence, then, the denial of the fact that past racial injustices can (to some extent) and should be rectified through legal remedies has the effect of protecting and preserving existing distributive injustices, power differentials and inequalities and so postpones the imperative of justice and reparations indefinitely.<sup>39</sup>

Mbembe and Bell offer useful starting points for understanding both the ethical and pragmatic questions facing CRT. The ethical questions entail an exploration of alternative agencies and subjectivities that defy reified racial categories, resisting the need to suppress or essentialise differences, reflecting on memory, mourning and heritage, and a concern with the becoming of a radical post-apartheid/post-colonial/post-modern politics, plurality and community. The pragmatic questions entail what further measures for addressing racialised disadvantage and distributional inequalities are required, what economic policies and developmental agendas should frame those measures and what theoretical concepts and intellectual traditions should be drawn upon in analysis of legal doctrine and equality jurisprudence. Although I situate my concern more within the ethical aspect, the pragmatic and material questions remain important. I am interested in theories that disrupt and displace and that question the standards

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<sup>35</sup> *Id* 10.

<sup>36</sup> *Id* 17.

<sup>37</sup> *Id* 10.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Id* 11.

and assumptions about race which we have come to accept as culturally-neutral and self-evident rather than as situated and normative.

Talking and thinking about race today requires us to understand the suppressed and silenced dimensions of racial power. To this end, Peggy McIntosh's seminal essay on unpacking the 'invisible knapsack' of white privilege is instructive.<sup>40</sup> McIntosh's essay began with an observation of 'men's unwillingness to grant that they are over privileged, even though they may grant that women are disadvantaged'.<sup>41</sup> She notes the irony in how most men may be willing to advance the status and position of women in society, but are unable to support the idea of lessening men's status and position. Not surprisingly, she realises that the denial of male privilege (and later also white privilege) protects that privilege from 'being fully acknowledged, lessened or ended'. She also notices how, because social hierarchies are interlocking, although her gender disadvantages her, her race puts her at an advantage. For McIntosh, racism is more than individual acts of meanness and hostility; it is also a system that confers dominance and power on white people.<sup>42</sup> What is critical here is how she exposes the interplay between privilege and disadvantage – that they are two sides of the same coin (white privilege = black disadvantage). She argues that whites have been carefully taught and socialised not to recognise how being white privileges them, in the same way men are conditioned and taught not to recognise male power and privilege:

I began to understand why we are justly seen as oppressive, even when we don't see ourselves that way. I began to count the ways in which I enjoy unearned skin privilege and have been conditioned into oblivion about its existence. My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person or as a participant in a damaged culture.<sup>43</sup>

McIntosh describes the deeply false consciousness of whites as follows:

Whites are taught to think of their lives as morally neutral, normative, and average, and also ideal, so' to be more like 'us'.<sup>44</sup>

This was also the crux of Steve Biko's critique of white liberal activists and academics during the apartheid era:

It is not as if whites are allowed to enjoy privilege only when they declare their solidarity with the ruling party. They are born into privilege and are nourished by and nurtured in the system of ruthless exploitation of black energy.<sup>45</sup>

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<sup>40</sup>McIntosh 'White privilege and male privilege: A personal account of coming to see correspondences through work in women's studies' in Center for Research on Women Wellesley College working paper no 189 (1988).

<sup>41</sup>*Ibid* at 1.

<sup>42</sup>Ansley 'White supremacy (and what we should do about it)' in Delgado and Stefancic *Critical white studies: Looking behind the mirror* (1997) 592-595.

<sup>43</sup>McIntosh (n 40) 4.

<sup>44</sup>*Ibid*.

<sup>45</sup>Biko *I write what I like* (1978) 66.

McIntosh then goes on to list a range of over 50 privileges which inhere to white people and often operate in an oppressive and hostile manner against black people. She does this to point out how racism is a lifestyle of whites in the sense that it naturalises unearned white privilege at the expense of blacks in the same way as Himani Banerji shows how racism is the very principle of self-definition of European/Western societies.<sup>46</sup> I list some of the most evocative privileges identified by McIntosh for these purposes:<sup>47</sup>

- If I should need to move, I can be pretty sure of renting or purchasing housing in an area which I can afford and in which I want to live.
- When I am told about our national heritage or about 'civilisation', I am shown that people of my colour made it what it was.
- I do not have to educate my children to be aware of systemic racism for their own daily physical protection.
- I can be pretty sure that my children's teachers and employers will tolerate them if they fit the school and workplace norms; my chief worries about them do not concern others' attitude towards their race.
- I can swear, or dress in second hand clothes, or not answer letters, without having people attribute these choices to the bad morals, poverty or illiteracy of my race.
- I am never asked to speak for all the people of my racial group.
- I can remain oblivious to the language and customs of persons of colour.
- I can be sure that if I need legal or medical help, my race will not work against me.
- I can worry about racism without being seen as self-interested and self-seeking.
- If I declare there is a racial issue at hand, or there isn't a racial issue at hand, my race will lend me more credibility for either position than a person of colour will have.
- I feel welcomed and 'normal' in the usual walks of public life.

Again she shows how whiteness has become an asset – a property available to whites for their prosperity, protection and comfort.<sup>48</sup> This leads her to conclude that 'white privilege has turned out to be an elusive and fugitive subject' and that meritocracy is a 'myth'.<sup>49</sup> Indeed to re-imagine and re-design social systems, we must acknowledge (not just know about) their colossal unseen dimensions. If white privilege is not directly displaced, any attempts at equality, equity, transformation and reconciliation will remain empty and incomplete. The discourse on white privilege, whiteness and white subjectivity became prominent

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<sup>46</sup>Banerji *Thinking through: Essays on feminism, Marxism and anti-racism* (1995) at 46.

<sup>47</sup>McIntosh (n 40) 5-9.

<sup>48</sup>McIntosh (n 40) 11. See Harris 'Whiteness as property' (1993) *Harvard LR* 1709.

<sup>49</sup>*Id* 9.

in South Africa in 2011 after the publication of an article by Samantha Vice, in which she considered the question of how whites should 'live in this strange place'.<sup>50</sup> Vice's primary thesis was set out as follows:

South Africa is still a visibly divided and suspicious land. All South Africans are required to feel pride in their country, and expats are urged to return to build the nation and participate in the miracle that the early post-apartheid days made not impossible to believe in. At the same time, our equally famous history of stupefying injustice and inhumanity feels still with us: its effects press around us every day, in the visible poverty, the crime that has affected everyone, the child beggars on the pavements, the *de facto* racial segregation of living spaces, in who is serving whom in restaurants and shops and in homes.<sup>51</sup>

Vice seeks to explore the possibilities of living an ethical life in South Africa in the aftermath of apartheid, a South Africa which she describes as a 'strange and morally tangled place to live'.<sup>52</sup> Although her focus falls on the ethics of whiteness in post-apartheid South Africa, the questions she is raising inevitably address and relate to race relations and to the constitutional vision of non-racialism, equality and freedom. We cannot begin to think of these questions without considering Vice's secondary thesis, namely, that in South Africa 'the self is so thoroughly saturated in histories of oppression or privilege'.<sup>53</sup> Vice points out that even though whites have lost '*de jure*' or formal political power, whiteness still remains a 'social location of structured privilege' in which whiteness and the perspectives of whites are emphasised and the economic, social and political advantages accrued to whites are seen as normal and unremarkable. But despite appearing as normal, universal and 'just the way things are', Vice points out that whiteness and white privilege is 'unearned, unshared and nonuniversal'.<sup>54</sup> Thus, a problematisation of whiteness in South Africa might lead to a deconstruction of conventional understandings of race and racial power.<sup>55</sup> Vice argues that given the fact that an honest and sincere public dialogue about race has not taken place in South Africa, philosophers (and I would add lawyers, legal academics, judges and law students) need to engage with the (past and present) politics of race and oppression.<sup>56</sup>

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<sup>50</sup>Vice 'How do I live in this strange place?' (2010) *J of Social Philosophy* 323. See also 'The whiteness debate' *Mail and Guardian Online* at <http://mg.co.za/tag/whiteness-debate> (accessed 2012-01-22).

<sup>51</sup>Vice (n 50) 323.

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Id* 325. See Yancy (ed) *What white looks like* (2004) 227; Lopez (ed) *Postcolonial whiteness: A critical reader on race and empire* (2005) 121; Rasmussen *et al* (eds) *The making and unmaking of whiteness* (2001).

<sup>55</sup>See Sullivan *Revealing whiteness: The unconscious habits of racial privilege* (2006) 4.

<sup>56</sup>Vice (n 50) 324.

I do not wish to enter the 'whiteness debate' initiated by Vice; rather my aim is to think through the messages that her ultimate contention (that white South Africans should feel shame, guilt and humility) communicates about race and racism, and also about redress and transformation. Firstly, there is always a danger in burgeoning disciplines such as critical whiteness studies (and also masculinity studies) that focus too much on the moral burdens of whiteness, of 'being white' in particular contexts, on the life of the oppressor, might in effect result in a further entrenchment of the centralisation of whiteness in society. Also, one can argue that the emphasis on whites simply acknowledging their unjustly privileged position rather than working to actively disavow it and rework their identification with Blacks on a plane of radical horizontality amounts to what Sara Ahmed refers to as 'non-performative anti-racism'.<sup>57</sup> It reduces reparations and redress – which have material and non-material dimensions – to benevolent and morally aware whites changing their behaviour. This in turn also reveals another reduction: Under Vice's view on whiteness, racism is reduced to misunderstanding, intolerance and a lack of a social conscience by over-privileged whites. This view removes, or downplays, structural power, systemic dominance and institutionalised ideologies as the fundamental framers that define race and racial identity.

I do agree with Vice that 'whiteness' needs to be exposed as culturally situated rather than as an invisible norm. The operation of whiteness as a silent normative benchmark is also present in the foundations, suppositions, methods, principles, doctrines and practices of South African law, its legal culture (which is formalistic and conservative) and in legal education and untransformed law faculties – and this does need to be exposed and questioned. However, her concern with the personal and individual elements of race, as well as her suggestion that whites should be silent and humble rather than to embrace 'a change of tongue'<sup>58</sup> shows little sensitivity to the need to construct an active pluralistic public sphere and to the becoming of a post-apartheid community, sociality, politics and ethics. I am concerned that in attempts to heal racial divisions and address inequalities and injustices, our strategies and methods seek to close, fix and settle rather than unsettle, open and displace our existing beliefs about the connections between race and racism and the new constitutional order.

If there is a main point that can be gleaned from the different theoretical reflections by Bell, Mbembe, McIntosh and Vice it is that race must remain a central and socially significant category of perception, representation and analysis.<sup>59</sup> Our existing concepts about race and racism are in a constant state of flux as the dynamics of race and racism themselves also undergo invariable change. The absence of a critical race discourse in law causes these existing concepts to

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<sup>57</sup>Ahmed 'The non-performativity of anti-racism' (2006) *Merideans: Journal of Women, Race and Culture* 104-126.

<sup>58</sup>See Krog *A change of tongue* (2003).

<sup>59</sup>Crenshaw *et al* (n 5) xv.

stagnate and become reified but more pertinently, this absence has also led to lawyers, judges and legal academics (and law students) ignoring marginal identities, difference and relationships and opting to follow traditional modes of analysis (wrongly conceived as objective, neutral and rigorous) in their examination of, and conversations on, human rights, anti-discrimination, constitutionalism, and also private law and commercial law doctrines. A return to race through CRT might force lawyers and academics wedded to traditional legal canons to confront the intractable structural racism that remains hidden yet embedded within the salient functioning of legal categories. Uncovering the racial view of law through theories grounded in the realities of the racially oppressed might illuminate particular experiences and voices left out of modern legal consciousness. In the section that follows, I further contemplate a few racial themes that respond to this need to refigure and transform our understandings of the relationship between law and race, specifically in the post-apartheid context.

### 3 Contemplating racial themes in post-apartheid times

We are so quick to reject and deny racism and sexism in ourselves that we overlook how they are embedded in all aspects of society, including the law and legal institutions.<sup>60</sup>

In CRT writings, a number of conceptual themes can often be identified.<sup>61</sup> As CRT is still a developing, albeit diverse, body of jurisprudence, these themes should be understood as starting points, angles of approach and focus areas rather than comprehensive frameworks and prescriptive methodologies. CRT, its concepts and aims, is still open, exploratory and transforming.<sup>62</sup> My aim in this section is to briefly introduce a few other racial themes to deepen the race intervention in South African critical legal thought. What unites the themes I discuss below is an orientation around 'race' that seeks to observe and critique the relationship between law, racism and power and an overt concern with ethical politics, social justice, radical difference and anti-subordination.<sup>63</sup>

#### 3.1 *Race-consciousness*

Race-consciousness as a mode of legal criticism is, as the word suggests, an approach to legal analysis that is *conscious* of race and racism and open to

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<sup>60</sup>Van Marle 'Reflections on teaching Critical Race Theory in law schools/faculties' (2001) *Stellenbosch LR* 86.

<sup>61</sup>See Delgado and Stefancic 'Critical Race Theory: An annotated biography' (1993) *Virginia LR* 461.

<sup>62</sup>Calmore 'Critical race theory, Archie Shepp and fire music: Securing an authentic intellectual life in a multicultural world' 1992 *Southern California LR* 2126.

<sup>63</sup>Bell 'Who's afraid of critical race theory?' 1995 *University of Illinois LR* 898.

considering the effects of racial identities and histories of racial domination. It is an approach that undermines formalist/liberal/colour-blind approaches that associate the eradication of racism with the transcendence of a racially conscious standpoint, and with the forgetting of race and racial classifications.<sup>64</sup> Ironically these colour-blind ideologies are said to be more pervasive in racially-stratified societies (such as South Africa and the United States).<sup>65</sup> Colour-blind approaches (understood as conservative/liberal/formalist) have been shown to undercut their own 'non-racist' goals by ignoring the racial dynamics that shape society thereby also maintaining established privileges and denying the complex differences between people. They also fail to properly understand the structural effects of racialisation and thus often rely on non-racial explanations to explain even apparent racial disparities. CRT has responded by proffering a style of legal analysis that pays explicit attention to race, racism and racialisation. However in order to *live in the tension* between race-consciousness and anti-essentialism, CRT approaches race from what Joshua Glasgow refers to as a 'reconstructionist' angle.

The notion racial *reconstructionism* (or 'race as a social construct') as proposed by Glasgow does not treat race as a biological or scientific fact. Race does not refer to any self-evident biological or genetic traits or common characteristics but instead to a complex phenomenon which is at once historically constituted and socially, economically, politically and legally constitutive. Glasgow suggests that the meaning, concept and utility of race should be *reconstructed* as a social phenomenon through which people can address the legacies and ramifications of racialised history – the ways in which certain groups have been subordinated and some privileged through the medium of racial discourse and practice.<sup>66</sup> Simply put: *in order to transcend race, one must openly confront racism*. Such a race-conscious approach recognises the unstable, tentative and relational nature of identity categories and acknowledges that race is entwined with class, gender, disability, religion and a myriad other factors.<sup>67</sup>

CRT however also distances itself from what Crenshaw *et al* refer to as the 'vulgar anti-essentialism' of some conservative and even postmodern approaches.

'Vulgar' anti-essentialism is the claim that since racial categories are not 'real', or 'natural' and instead socially constructed, it is theoretically and politically undesirable, impossible or absurd to posit race as a category of analysis or as a basis for legal redress, political activism and mobilisation.<sup>68</sup> To be progressive and non-essentialist need not mean that the voice of race should be lost as, in Drucilla

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<sup>64</sup>Peller 'Race consciousness' (1990) *Duke LJ* 758.

<sup>65</sup>See Bobo 'Inequalities that endure? Racial ideology, American politics and the peculiar role of the social sciences' in Krysan and Lewis (eds) *The changing terrain of race and ethnicity* (2004) 13-42.

<sup>66</sup>Glasgow *A theory of race* (2009) 152.

<sup>67</sup>Harris 'Race and essentialism in feminist legal theory' (1990) *Stanford LR* 581.

<sup>68</sup>Crenshaw *et al* (n 5) xxvi. See also Lee 'Navigating the topology of race' (1994) *Stanford LR* 747.

Cornell's words, 'there is a materiality to how we are placed in a society, which we cannot simply escape from by attempting to disidentify with who we have been shaped to be'.<sup>69</sup> Indeed while race, like gender, is a social and cultural construct, and thus not 'real' in any scientific or ontological sense, the Blacks whose lives are inscribed within and trapped by those constructions are very real. Their subordination to whites is real; their exploitation by whites is real; the racialised poverty, violence, exclusion, and stereotyping that they experience and whites do not are real.

This is what distinguishes CRT's progressive, anti-racist and critical race-consciousness from race discourses which still rely on naturalist conceptions of race or which seek to repudiate race and eliminate race discourses altogether. In South Africa, race-consciousness in law enters into a public, legal and social space which reflects a society that is seemingly tired of speaking about race and the hauntings and horrors of racism in post-apartheid times. Yet on a regular basis we see police using lethal force against 'suspects' and protestors. We hear about shack fires, evictions and open-air toilets; about people dying due to unsafe electrical cables, drowning in floods and in taxi and bus accidents. Issues such as crime, poverty, poor public healthcare and educational facilities and unemployment dominate most discussions on South African politics and economics. Most middle-class South Africans employ (read: exploit) Blacks as domestic workers, gardeners and car guards. What unites these seemingly disparate issues and incidents is that they are racialised social conditions that are directly traceable to apartheid and are continuing because of the lack of reparations and a dearth in commitment to genuine social change. Race-consciousness shows both how law participates in these systems of racial violence and how this participation has specifically devastating consequences for Blacks. It is thus a corollary premise of race-consciousness that if race disappears from the horizon of law, or from the view of the world, so will the lives and experiences of Blacks.

### 3.2 *Conceptual fidelity: Racism and white supremacy*

CRT's intellectual origins owe a great deal to the broad field of feminist theory – and specifically the sophisticated, complex and rich treatment of sexism, misogyny and patriarchy as distinct but interconnected political systems and also as practices of oppression, subordination and power. Similar conceptual analysis can also be identified in CRT's treatment of racism and white supremacy. In general, CRT scholars as well as radical black thinkers are concerned with the ideological and structural effects of racism and white supremacy, and specifically its material and psychic effects on its main victims: Black people.<sup>70</sup> As such, the conception of race

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<sup>69</sup>Cornell 'Revisiting *Beyond accommodation* after twenty years' (2011) *Feminists @ Law* 5.

<sup>70</sup>See Wilderson III *Incognegro: A memoir of exile and apartheid* (2008); Kilomba *Plantation memories: Episodes of everyday racism* (2008); Farley 'The black body as fetish object' (1997) *Oregon LR* 457.



followed in CRT does not locate race and racism exclusively in social relations such as prejudice and stereotyping based on skin colour but rather understands racial oppression as primarily an institutional and systemic problem.<sup>71</sup> The definitions and meanings attached to the concepts of racism and white supremacy is an obviously important question as it determines how legal and political institutions treat and apply them in approaching constitutionally-based notions such as equality, redress, transformation, multiculturalism and non-racism.

In CRT, racism is an integral, routine, and regular component of society and an ingrained feature of all facets of life, law, politics, relationships and discourse. It is banal, not aberrational, and its ubiquity, not its absence characterises the normal state of social structures.<sup>72</sup> In a country like South Africa with a long and lingering history of institutionalised and legally sanctioned systems of white supremacist terror (slavery, colonialism and apartheid), race is central to everything including 'patterns of perception, logic, symbol formation, thought and speech, action and emotional response as conducted, simultaneously in all areas of human activity (economics, education, entertainment, labour, law, politics, religion, sexuality and war)'.<sup>73</sup> White supremacy accordingly does not refer to right-wing extremist racist hate groups that consciously promote white domination and superiority but rather denotes a *system* (political, legal, social, economic and cultural) in which whites maintain overwhelming control and power not just in a material sense but in a symbolic sense as well.<sup>74</sup> The 'critical' in CRT signifies its critique of (legal) liberal understandings of racism. Liberalism conceives of racism as an irrational, aberrational act based on a valorisation of race categories committed by an individual wrongdoer deviating from otherwise 'normal' and 'impartial' ways of acting, thinking and treating human beings. It then also views law as 'innocent' and 'pure', as detached from social and political concerns, and thus incapable of complicity in racial discrimination.<sup>75</sup> CRT, like much of CLS scholarship, rejects this liberal view of racism and takes a critical stance towards liberalism's preference for incremental, 'step-by-step' and programmatic legal reforms (such as anti-discrimination legislation) based on rights as the main, if not the only, solution to ending racism. An apt example is the aims of anti-discrimination legislation (such as the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>76</sup>) which is to identify isolated perpetrators (through certain 'bad acts' like racist speech or sexual harassment) and victims (through discharging often onerous burdens of proof).<sup>77</sup> Similar trends can be identified in labour court cases where black

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<sup>71</sup>See Feagin *Systemic racism: A theory of oppression* (2006).

<sup>72</sup>See Delgado and Stefancic (n 3) 7.

<sup>73</sup>Welsing *The Isis papers: The key to the colours* (1990).

<sup>74</sup>Ansley (n 42) 592-595.

<sup>75</sup>See Fitzpatrick (n 4) 121.

<sup>76</sup>Act 4 of 2000.

<sup>77</sup>Valdes *et al* 'Battles waged, won and lost: Critical Race Theory at the turn of the millennium' in Valdes *et al* (eds) *Crossroads, directions and a new critical race theory* (2002) 2.

employees struggle to prove racial discrimination because of the courts' reliance on reasonableness tests and formal notions of causation and intention which do not take into account the already existing unequal power relationships between white employers/supervisors and black employees and the deep-seated racism already embedded in labour practices (hiring and promotion) and standards (such as merit).<sup>78</sup>

### 3.3 *The alchemical fire of a remembering constitution: Constitution as monument and race critique as memorial*

A primary motivator for the need to reassess our racial themes in South African constitutionalism and human rights is the argument that most covert racist practices and the legacy of colonial apartheid have been normalised and concealed under the veil of the Constitution. I share the sentiment that a critique of the relationship between law, racial ideology and power relations cannot be separated from an attendant critique of the liberal constitutional order (based as it is on constitutional supremacy, human rights and rule of law) under which that relationship is sanctioned and enabled.<sup>79</sup> Two such critiques can be cited: Mogobe Ramose has argued that the foundation of the Constitution does not mirror the needs and aspirations of the majority and will accordingly always prevent genuine reform, reconciliation and transformation.<sup>80</sup> Mabogo More, focusing on the land issue, claims that the constitutional settlement 'offered black people the right and not the means to own land while it simultaneously entrenched white ownership of the unjustly appropriated land'.<sup>81</sup> He then concludes, with reference to Frantz Fanon, that South Africa is a neo-colonial (or 'neo-apartheid') state because the constitutional changes that occurred in the 1990s amount to mere formal decolonisation and 'pseudo-independence' and not true liberation and sovereign independence.<sup>82</sup> The Constitution thus does not exist outside of, or above, the racial politics that CRT seeks to explicate, but is an active part of that politics – implicated by and embroiled within it.

One way to understand the Constitution and to approach its relationship with race, redress and equality is the distinction between monument and memorial as espoused by Lourens du Plessis.<sup>83</sup> Du Plessis defines memorial constitutionalism

<sup>78</sup>See, eg, *Mafoane v Rustenburg Platinum Mines* (2003) 10 BLLR 999 (LC); *Ntai v SA Breweries Ltd* (2001) 22 ILJ 214 (LC); *Mangena v FILA South Africa (Pty) Ltd* (2010) 31 ILJ 662 (LC).

<sup>79</sup>See Sibanda 'Not purpose made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2012) *Stellenbosch LR* 482.

<sup>80</sup>In memoriam: Sovereignty and the "new" South Africa" (2007) *Griffith LR* 310.

<sup>81</sup>'Fanon and the land question in (post-)apartheid South Africa' in Gibson (ed) *Living Fanon: Global perspectives* (2011) 173-187.

<sup>82</sup>See Fanon *The wretched of the earth* (1968); *Towards the African revolution* (1967).

<sup>83</sup>Du Plessis 'The South African Constitution as memory and promise' (2000) *Stellenbosch LR* 385; Snyman 'Interpretation and the politics of memory' in Bradfield and Van der Merwe (eds) *Meaning in legal interpretation* (1998) 312.

as 'a constitutionalism of memory, in a South Africa (still) coming to terms with its notorious past', and as 'a constitutionalism of promise moving along the way of (still) getting to grips with a fulfilled and transformed future'.<sup>84</sup> Memorial, in contrast to *monumental*, constitutionalism does not remember the past by celebrating historic and grand spectacles of political reconciliation or by building monuments and statues of heroic leaders. Instead it focuses on the ordinary day-to-day experiences of ordinary South Africans; it commemorates past (and present) victims of gross human rights violations, socio-economic inequalities and injustices in their daily (public and private) lives. Whereas monumental constitutionalism – through abstract theories that focus on universality and generality – fixes, closes and settles, memorial constitutionalism, through a respect for difference, Otherness and an awareness of the complexity of life resists the closure and is open to tensions and nuances.

In the context of race, I identify the Constitution and the constitutional order itself with the monument, and I view a constitutional optimism fixated on the vision of non-racialism, as a belief that the formal *de jure* end of apartheid has occasioned the end of black suffering and white supremacy as well as colour-blind, race-neutral and liberal conservative approaches that try to contain race issues within the confines of law and rights as examples of monumental constitutionalism. I argue that such approaches, although originating from different sources, share a failure to recognise the legal historical significance of race, and accordingly will only maintain or repeat the racial status quo and prevent new approaches to racial justice from coming into view.

Correspondingly, I identify the progressive and postmodern race-consciousness and critical outsider perspective of CRT as representing the memorial and memorial constitutionalism. These approaches are concerned with the remembering and recalling of the past, its atrocities and its victims, with living in the tensions of post-apartheid being and becoming, and with recognising the limits of law and constitutionalism.<sup>85</sup> Whereas a monumental approach is instrumental and functionalist and concerned with implementing policies, programmes and legal rules designed to eradicate racialised inequality, discrimination and injustice, the memorial represents a return to radical politics, struggle and resistance and critical questioning. Whereas a monumental approach views transformation and redress as a linear (procedural) process and focuses exclusively on material needs, a memorial approach is open to multiple directions and movements, and recognises both the material and non-material needs of people. Here I would briefly want to contrast the dignity-based approach to equality, the notion of substantive equality and the *Harksen* test (which together represent the monumental approach to equality) to the rights utopianism

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<sup>84</sup>Memorial constitutionalism in action?' 2008 *African Human Rights LJ* 401.

<sup>85</sup>Van Marle 'The spectacle of post-apartheid constitutionalism' (2007) *Griffith LR* 419.

of critical race theorist Patricia Williams (which represents traces of a memorial approach).

The notion of 'substantive equality' which purports to take into account material group-based disadvantage and concrete circumstances into account suffers firstly from itself being formalised in the *Harksen* case<sup>86</sup> into a three-step formulaic test which reduces the struggle for racial equality to a set of considerations regarding differentiation, specified or analogous grounds, legitimate government purpose and justifiability of rights limitations. Secondly, it is couched firmly within a liberal, individualist emphasis on dignity that is blind to unequal power relations and structural discrimination. The notion of substantive equality, placing dignity at the heart of the right to equality and the creation of a purportedly comprehensive test represents a constitutional pact based on unattainable promises and grand claims which have made, and can make, no substantive change in the lives of Blacks. Like the *monument*, the Constitution merely stands *there* -- stagnant and motionless -- leaving the small gains made and reforms achieved to slide into irrelevance and ineffectiveness as patterns of racial domination and privilege reproduce and adapt.

Williams' response to the CLS rights critique (that they are vague, disutile and indeterminate, that 'exactly what people don't need is rights'<sup>87</sup>) and specifically its own reaction to liberal civil rights scholarship represents a much greater responsiveness to history, context, relationality, ethics, narrative, lived experience and thus, a memorial approach. While Williams supports the CLS thesis on rights, she argues that instead of being discarded, rights should be expanded and unlocked -- freed up rather than enclosed. Rights rhetoric, or the language of rights, should not be abandoned; instead we should 'become multilingual in the semantics of evaluating rights'.<sup>88</sup> Robin West argues that Williams undermines the CLS rights critique by showing how the history of racist brutality is actually 'one of a failure of rights commitment, rather than an excess of rights assertion'.<sup>89</sup> In essence, Williams argues that a much deeper problem lies not with rights themselves but with the legal culture or 'legal universe' in which they exist. Williams also seeks to emphasise how rights, meanings of rights and their socio-political significance are experienced differently -- something which (the mainly white male leftist) CLS scholars did not pay sufficient attention to:

[W]here one's experience is rooted not just in a sense of illegitimacy but in *being* illegitimate, in being raped, and in the fear of being murdered, then the black adherence to a scheme of both positive and negative rights -- to the self, to the sanctity of one's own personal boundaries -- makes sense.<sup>90</sup>

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<sup>86</sup> *Harksen v Lane* NO 1998 1 SA 300 (CC).

<sup>87</sup> Gabel and Kennedy 'Roll over Beethoven' (1984) *Stanford LR* 33.

<sup>88</sup> Williams *The alchemy of race and rights* (1991) 51.

<sup>89</sup> West 'Spirit murdering the spirit: Racism, rights, and commerce' (1992) *Michigan LR* 1795.

<sup>90</sup> *Id* 154.

Williams' articulation of the utopianism and social change inherent in rights also fits in with Angela Harris' suggestion that CRT should *inhabit*, and *live within* the tension between modernist optimism (emancipation through law which is normatively reconstructionist) and postmodern pessimism (radical critique of law which is normatively deconstructionist).<sup>91</sup> Rather than projecting the tension into an image of balance and bringing it to finality, Williams and Harris suggest that CRT should use that tension in ways that are creative rather than paralysing. Such an approach is tentative and continuously open to transformation and reimagining. It also prevents the slippage from memorial to monument represented by the CLS critique of rights ('trashing')<sup>92</sup> which can itself become fixed and static and reified if it does not take into account difference and lived experience in the way suggested by Williams:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round – but its opposite. This was the resurrection of life from ashes four hundred years old. The making of something out of nothing took immense *alchemical fire* – the fusion of a whole nation and the kindling of several generations.

Williams urges a generous approach to human rights that is grounded neither in a 'misguided complacency with present liberal rights discourse, nor in a resigned or bitter discontent'.<sup>93</sup> It is a notion of rights imbued with a hope for, and love of, community, transformation, affirmation of life, integrity of self, care and concern and a refusal to exploit, violate, devalue, objectify and reduce.

### 3.4 *Black invisibility*

A central theoretical concern in CRT, and also in Africana philosophy and Black existentialism and phenomenology is the notion of 'black invisibility'.<sup>94</sup> Its starting point is that anti-black white supremacist racism espouses a notion of the world that is predicated upon, and improved by, the absence/disappearance/fungibility of Blacks.<sup>95</sup> An enquiry, even if unstated, into how the structure of legal thought, its tools, standards and traditions, reinforce the invisibility of Black people, their

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<sup>91</sup>Harris (n 2) at 743.

<sup>92</sup>See Kelman 'Trashing' (1984) *Stanford LR* 293. See also: Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1984) *Texas LR* 1563-1599; Gabel and Kennedy (n 87) 1-55; Tushnet 'An essay on rights' (1984) *Texas LR* 1363.

<sup>93</sup>West (n 89) at 1796.

<sup>94</sup>Gordon 'Existential dynamics of theorising black invisibility' in Gordon (ed) *Existence in black: An anthology of black existential philosophy* (1997) 72.

<sup>95</sup>Gordon 'Introduction: Black existential philosophy' in Gordon (ed) (n 94) 6.

experiences and needs stands central to any CRT critique of law. Monumental, colour-blind and liberal approaches (taking either the form of judicial decisions, legislative schemes or academic research), which I pointed out above could reinforce this invisibility. Indeed Blacks have been rendered not just 'invisible' but also voiceless by a society where white standards and beliefs are not only accepted as the norm, but also falsely disguised, and uncritically perceived, as neutral, objective and logical. This invisibility becomes more forceful and pervasive when dressed up in the formal legitimacy of the law and its claims to objectivity, race-neutrality and apolitical innocence. Richard Schmitt, reflecting on the legacy of Fanon, argues that we should be less concerned with the questions of whether the idea of 'race' is defensible or whether racism is an emotional, neurological or intellectual defect. We should rather ask the question '*what does racism do to people*'?<sup>96</sup> In Fanon, according to Schmitt, the answer is simple: *racism objectifies – and exploits, confines, hardens and imprisons*.<sup>97</sup> Racism denies freedom, forecloses the possibility of having genuine human relationships and 'makes man into a thing'.<sup>98</sup> He outlines what he refers to as the many faces of racism, namely: infantilisation; denigration; distrust; ridicule; exclusion; scapegoating; violence; and *rendering invisible*. He writes that:

The excluded become invisible. Their concerns are unknown, their lives are of no interest to anyone but themselves. A whole world becomes invisible behind the dark skin. The culture of white Europeans is still universal. It is simply 'western culture' or 'culture' without qualification.<sup>99</sup>

In law and legal theory, the invisibility described by Schmitt can take (and has taken) numerous forms. Blacks are excluded, ignored and neglected in white-dominated and white-made theories. We are alienated through strategies that purport to take our perspective and view into account but which end up marginalising or distorting the Black experience(s). Our social, economic and cultural realities of difference, inequality and un-freedom are decontextualised by whiteness masquerading as the universal and abstract norm. Blackness is placed within dualisms that devalue black people or it is misrepresented by means of naturalist accounts and meanings of race that are taken for granted. Narratives, images and symbols about who we 'are' and can be are appropriated and reversed, used by whites in ways that trivialise black activities and practices, and turn us into inferior uncivilised stereotypical exotic natives. In this vein, the constitutional transition and constitutional ideals themselves, as the outcome of a formal technocratic negotiated settlement, need to be critically considered.

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<sup>96</sup>Schmitt 'Racism and objectification: Reflections on themes from Fanon' in Gordon *et al* (eds) *Fanon: A critical reader* (1996) 35 (original emphasis).

<sup>97</sup>See Fanon *Black skin, white masks* (1967).

<sup>98</sup>Schmitt (n 96) 36.

<sup>99</sup>*Id* 37.

Martin Chanock exposes the inherent racism in the formation of South African law and legal culture by describing the common law as an integral part of white cultural nationalism and, ultimately, white supremacy.<sup>100</sup> Chanock also shows a connection between this racist legal culture with the formalism of most lawyers, the judicial deference approach of judges who saw themselves as 'above politics', the choice of liberalism as the central political ideology of the new order, the continuation of global capitalist empire as well as a general insistence on 'law and order' (the rule of law ideal).<sup>101</sup> Most forcefully he argues that a new form of colonisation took place in the 1990s, however, not by the Westminster system but by the 'Constitutional State'.<sup>102</sup> The question of whether genuine transformation (a radical change in the system and its subjects) as opposed to mere evolution or formal change took place in 1994 continues to be posed.<sup>103</sup> The answer to this question will be found in the extent to which the new post-apartheid order undoes, breaks away from, redefines and radically questions the assumptions and premises upon which the apartheid system was based. This means that what we view as 'normal' must be re-evaluated, and what some call (incorrectly to my mind) the 'substantive' or 'legal' revolution of South Africa needs to be constantly revisited through critical accounts like Chanock's in order to prevent the invisibility and disappearance of Blacks from the public space, and from the nation's political memory.

#### 4.5 *White backlash politics*

When white people say 'justice', they mean 'just us'.<sup>104</sup>

The notion of 'white backlash politics' has been central to post-apartheid legal and public race discourses, and it has even played itself out in Constitutional Court decisions on affirmative action and restitutionary equality most prominently in *Walker*<sup>105</sup> and *Van Heerden*<sup>106</sup> in which privileged white men brought claims of unfair discrimination. Mbembe, under the heading 'amnesia' describes this white backlash politics as follows:

It is one of the many ironies of the 1994 'negotiated settlement' that a large number of white South Africans can simultaneously stigmatize the project of 'transformation' and continue to feel entitled to their privileged position in society. They are willing to fight for their constitutional rights, but they are not ready to

<sup>100</sup>Chanock *The making of the South African legal culture 1902 -1936: Fear, favour and prejudice* (2001) 527.

<sup>101</sup>*Id* 512.

<sup>102</sup>*Id* 518.

<sup>103</sup>Cornell *Transformations: Recollective imagination and sexual difference* (1993) 1.

<sup>104</sup>Black American aphorism quoted in the frontispiece of Mills *The racial contract* (1997).

<sup>105</sup>*City Council of Pretoria v Walker* 1998 2 SA 363 (CC).

<sup>106</sup>*Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

contemplate, and deal with, the accumulated atrocities on which these privileges rest.<sup>107</sup>

White backlash politics in essence describes the legal strategies, rhetorical discourses and discursive habits, political mobilisation efforts, conscious and unconscious practices, attitudes and mindsets by which whites seek to preserve their interests and privileged status and justify the disproportionate disadvantage suffered by Blacks. In South Africa, the 'white backlash' against non-racial democracy comes in the form of language and cultural rights politics, claims of unfair discrimination or reverse-racism against whites, the appropriation of minority rights issues, purportedly principled calls for equal opportunity, colour-blindness and merit, dismissive and accusatory discourses which disarm the charge of racism (such as 'playing the race card'; 'my best friends are black'; 'you're being too sensitive') as well as seemingly race-neutral concerns about crime, corruption, failures in service delivery, and wasteful expenditure by government. It characterises the political principles and policies of both conservative, right wing pro-white organisations (such as the Freedom Front Plus, AWB, and Afriforum) and also liberal-capitalist democratic formations dominated by whites (such as the Democratic Alliance, and FW De Klerk Foundation). Also, the main arguments put forward by this white backlash politics relies heavily on the Constitution, the principle of non-racialism (often invoking the hypnotic names of Nelson Mandela and Desmond Tutu) and rests primarily on the belief in formal legal equality.

I do not wish to recount the extent of white privilege and the economic, social, cultural dominance that is associated with whites and whiteness, suffice to say that this is well-documented.<sup>108</sup> I want to raise questions about how the formalistic and neutral pretensions of law, and the complete disappearance of reparations and its replacement by perfunctory redress measures, liberal individualism and 'socio-economic rights-talk' machinates with the global system of white supremacy that is central to white backlash politics to once again, enslave, subordinate, impoverish, marginalise and render Blacks invisible. More pertinently I am interested in why, in the aftermath of apartheid, many whites still not only lack a critical self-awareness of their subject and group position, but they also view that position as an unquestionable birthright. What does this say about the challenges of post-apartheid being and becoming, about the possibilities of new agencies and new subjectivities and a different way of living together in a 'multicultural' democratic 'community'? Given the inherently conservative enterprise that law is, and the racist heritage of the South African legal system, the aspects of white backlash politics described above should come as no surprise.

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<sup>107</sup>Mbembe (n 30) 12.

<sup>108</sup>See, eg, Dei *et al* (eds) *Playing the race card: Exposing white power and privilege* (2004).



The self-centred, self-interested and privatist nature of this white backlash politics is problematic because it encourages what Bell refers to as 'racial bonding by whites' which 'means that black rights and interests are always vulnerable to diminishment if not outright destruction'.<sup>109</sup> It reflects a white community struggling to disavow the racist ethos of apartheid which deprived, and still deprives, all of us of ethical human fellowship with one another. That liberal, legal and even 'democratic' explanations and justifications are available for use by white backlash politics augments my cynicism about rights and distrust of law. It also returns us to the dangers immanent in liberal human rights discourses and formal constitutional guarantees which despite creating the illusion of substantive change are seemingly incapable of effecting that change.

#### 4 Concluding thoughts: Spectres of race

Charles Mills laments that in mainstream political philosophy, 'race barely exists'.<sup>110</sup> The silence of race is as 'as if nonwhites were on a separate planet rather than very much a part of one world interconnected with and foundationally shaped by the very region studied by First World theory'.<sup>111</sup> He traces the problem to what he refers to as an 'exclusionary theoretical dynamic' in which the presuppositions and methodologies of existing canons and systems of knowledge 'offer no ready point of ingress, no conceptual entrée, for the issues of race, culture and identity'.<sup>112</sup> Race has become an afterthought in mainstream philosophy, and also in legal theory. Mills notes that typically what one gets is 'an attempt to piggyback the problem of race onto the body of respectable theory'.<sup>113</sup> Either liberals view racism as a violation of liberal individualist ideology or Marxists explain race and racism within a Marxist paradigm. He writes that 'one starts from a pre-existing conceptual framework ... and then tries to articulate race' within this framework.<sup>114</sup> Following the example of feminist theory's use of gender, Mills suggests that 'we place race at center stage rather than in the wings of theory'.<sup>115</sup> So rather than starting with some theory and then smuggling in race, *we should begin with the fact of racial subordination*. That way race is treated as a political system and mode of domination with its own 'specific norms for allocating benefits and burdens, rights and duties; its own ideology; and an internal, at least semi-autonomous logic that influences law, culture and consciousness'.<sup>116</sup>

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<sup>109</sup>Mbembe (n 27) 9.

<sup>110</sup>Mills *Blackness visible: Essays on philosophy and race* (1998) 97.

<sup>111</sup>Mills (n 110) 97.

<sup>112</sup>*Ibid.*

<sup>113</sup>*Id* 98.

<sup>114</sup>*Ibid.*

<sup>115</sup>*Ibid.*

<sup>116</sup>*Ibid.*

In the introduction, I echoed Mills' concern about the silence of race in the context of South African jurisprudence. I noted a similar 'exclusionary theoretical dynamic' at work in South African law and legal scholarship – including within 'critical' and 'progressive' circles.<sup>117</sup> I advocated the move towards post-apartheid critical race jurisprudence on the basis of two underlying premises. The first being that CRT distances itself from traditional (liberal, conservative, formalist) beliefs about both law and race which necessarily places it in opposition to the entire South African legal culture and post-apartheid legal order. The second is that, contrary to colour-blind, race-neutral and post-racial ideologies, race is still a defining feature of the South Africa's (post-)apartheid polity and reality. While South Africa, through its Constitution and the establishment of a liberal democratic multicultural political order, has seemingly rejected white supremacy as a 'normative vision', this rejection has not been tethered to a transformative social commitment to eradicate the substantive conditions of Black suffering and racial subordination.<sup>118</sup> Because South Africa was, for over 350 years, organised expressly around white supremacist principles, it cannot simply cease to be white supremacist through a formal declaration of racial equality and non-racialism. Thus *South Africa remains white supremacist* due to the institutional momentum and systemic replication of white supremacist values and practices in the spheres of culture, language, epistemology, political economy, social standards and especially law. As Mills writes:

[a] case can be easily made that white supremacy continues to exist in a different form, no longer backed by law but maintained through inherited patterns of discrimination, exclusionary racial bonding, cultural stereotyping, and differential white power deriving from consolidated economic privilege.<sup>119</sup>

Correspondingly the more we remain oblivious to its continuance, the deeper it will sink into the roots of the 'post'-apartheid constitutional order, which will in turn normalise and preserve it.

To stress the theoretical centrality of race, I began by 'recalling' race with reference to Bell's observations on American race discourse in the post-slavery era, and, through Mbembe, compared these to the racial politics of 'post'-apartheid South Africa. Both contended that while the private and public face of racism had changed, it remained nevertheless prevalent – and thereby demonstrated the

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<sup>117</sup>I do not claim that no critical or progressive legal scholar in South Africa has ever mentioned race in their writings, but rather that race does not feature prominently or independently in South African legal scholarship. The few works that do mention race explicitly either do not identify it as or draw upon CRT, or they are the antithesis (or a distortion) of the approach to race proffered by CRT. Legal writing in South Africa, including critical legal writing, is marked by a severe absence of race as a serious area of study and engagement.

<sup>118</sup>Crenshaw 'Race, reform and retrenchment: Transformation and legitimization in antidiscrimination law' (1988) 101 *Harvard LR* 1336.

<sup>119</sup>Mills (n 110) 102.

failures and shortcomings of constitutional legal reforms, especially ones determined and structured by liberalism, capitalism and conservative legalism. I then spent some time considering the argument that the ending of racism and the achievement of racial justice and equality necessitated a challenge to and problematisation of whiteness and white privilege.<sup>120</sup> Following McIntosh, I concluded that the end of racism is innately connected to the end of white privilege. Following Vice, I concluded that the oppression and moral damage that characterised apartheid have rendered the constitutional ideals of non-racialism, racial equality and justice *incomplete*, and perhaps even unattainable. I thereafter reflected on a few themes which could animate more thinking on race and law. I defended a race-conscious standpoint in legal critique and analysis and a radical political interpretation of the concepts 'racism' and 'white supremacy' that focuses on structural power and systemic oppression. I supported a memorial, in contrast to a monumental, approach to race and constitutionalism. I proposed 'black invisibility' as one starting point for contemplations on race. Finally, I described 'white backlash politics' as one of the major barriers to the transformation and reconstruction of the South African public space, and as a negative obstacle to the project of post-apartheid being and becoming.

If it was not clear in the tone and flow of this article, I should mention that I situate the project of a post-apartheid critical race jurisprudence within the general concern with the notion of a 'post-apartheid jurisprudence', and with critical legal perspectives on post-apartheid law.<sup>121</sup> In the context of the present configuration of a South African CRT, apartheid is not cast as over and complete, but rather as a 'returning past' or 'continuous present'. The 'post' in post-apartheid does not signal *the* end of apartheid, but the delayed beginning of that end, the struggle to become *post*-apartheid, a moment continually deferred. Post-apartheid jurisprudence, like critical race theory, is a jurisprudence of rupture, rather than continuity, of disruption, rather than normality, of the margins, rather than the mainstream, of the ordinary, rather than the spectacle, and of un-decidability rather than predictability. It involves an opening, not a closing or settling of, the many tensions, histories and complexities of 'race' in our daily lives.

Race is indeed a global obsession. With a dark history steeped in racist ideologies and laws, issues of race have divided South African society since its creation and yet they remain both inescapable and obligatory to all our conversations and discourses. The legal, political and cultural systems of this country can never be immune from the past, present and future effects of anti-black racism and oppression. In fact they have only served to amplify and

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<sup>120</sup>See Delgado 'The current landscape of race: Old targets, new opportunities' (2006) *Michigan LR* 1271 where it is said: 'White privilege ... demands the serious attention of every race scholar'.

<sup>121</sup>See Van Marle 'Reflections on post-apartheid being and becoming in the aftermath of amnesty: *Du Toit v Minister of Safety and Security*' (2010) *Constitutional Court Review* 347.

perpetuate the destructive and violent nature of racism.<sup>122</sup> As the introduction alludes, the purpose of this article is to highlight the importance of critical race theory in the South African post-apartheid context. However, behind this academic and theoretical discussion are the real and concrete lives (and deaths), experiences and histories of black people, which cannot be contained or catalogued by any theory, ideology or doctrine. It is they who are the betrayed, forgotten and unseen. It is they who cry out 'what happened to the promised land?'<sup>123</sup> and ask aloud 'where have all the rainbows gone?'.<sup>124</sup> It is they who haunt 'post'-apartheid South Africa. As with Jacques Derrida's spectre/ghost, to write black people's lives into the metaphor of the ghost, which remains 'beyond being' and yet 'which never dies', is to do so 'in the name of justice'.<sup>125</sup> The apartheid past and its continuing reach into the lives of South Africans also symbolises the Derridean ghost: 'it remains always to come and to come back'.<sup>126</sup> It is this dark ghostly presence that shall leave us with haunting inequalities and with a haunting-in-equality, haunting injustices and a haunting-in-justice. But it is also a spectre, a debt and a demand, that shall one day *re-turn*, and keep returning. For as Derrida writes, '[t]he ghost begins by coming back'.<sup>127</sup>

Like the monument with its cracks exposed, we are left with what I see as a haunting (in)equality – every act of equality will be haunted by its own exclusions. This is also a haunting from within. The haunting, the coming back of the forgotten, the cracks on the wall represent the call of the political and of a radical politics that continues to trouble the liberal imagination, constitutional optimism, human rights activism ... and other attempts to evade politics, responsibility, judgement and ultimately the call for justice.<sup>128</sup>

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<sup>122</sup>McMorris 'Critical Race Theory, cognitive psychology, and the social meaning of race: Why individualism will not solve racism' (1998-1999) 67 *University of Missouri-Kansas City LR* 695.

<sup>123</sup>Gibson (n 69).

<sup>124</sup>Gqola 'Where have all the rainbows gone?' (2004) *Rhodes Journalism Review* 6-7.

<sup>125</sup>Derrida *Specters of Marx: The state of the debt, the work of mourning, and the new international* (1994) xix.

<sup>126</sup>*Id* 99.

<sup>127</sup>*Id* 10.

<sup>128</sup>Van Marle 'Haunting (in)equalities' in Hunter (ed) *Rethinking equality projects in law: Feminist challenges* (2008) 146.