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### Time is a Flat Circle: Lessons from Past and Present Conspiracy Theories

Lucille A. Jewel

*University of Tennessee College of Law*, [ljewel@utk.edu](mailto:ljewel@utk.edu)

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# Time is a Flat Circle: Lessons from Past and Present Conspiracy Theories

*Lucy Jewel\**

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\* University of Tennessee College of Law, [ljewel@utk.edu](mailto:ljewel@utk.edu)

## ABSTRACT

This essay analyzes how conspiracy theories were viewed in the 1990s, particularly in the context of the then-existing debate over racial differences in perception, and how they are dealt with today, where prevalent conspiracy theory adherents are White and conservative (QAnon, Pizzagate, and widespread voter fraud) in the 2020 election). In the 1990s, conflict over conspiracy theories was part of a larger culture war involving critical race theory, conspiracy thinking, truth, reason, and post-modern theory. These cultural flashpoints are obviously still with us today. But now, high-profile persons holding false, unreasonable beliefs often hail from the right and are assailed by those on the left. This pattern is visible in congresswoman Marjorie Taylor Greene, who has supported tenets of the QAnon conspiracy theory<sup>1</sup> as well as House Republicans who have expressed skepticism and hostility for Covid-19 vaccine efforts.<sup>2</sup>

This essay begins by looking at two prominent sources from the 1990s—Regina Austin’s *Beyond Black Demons & White Devils: Anti-Black Conspiracy Theorizing and the Black Public Sphere*<sup>3</sup> and Jeffrey Rosen’s *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, which engages in part with Austin’s ideas about conspiracy theories.<sup>4</sup> It then contextualizes these two pieces within the raging conflict over Critical Race Theory that was occurring in law schools at the time.

Next, the essay discusses trends that have emerged since the 1990s that shed light on the topic. How have things changed and how have they just remained the same? Critical Race Theory remains a tremendous flash point, but the dynamics are different now. There is a greater consensus (as first articulated by critical race theorists) that people do arrive at

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1. See Jack Brewster, *Marjorie Greene Claims She Stopped Believing in QAnon in 2018—A Recent Tweet Suggests Otherwise*, FORBES (February 4, 2021), <https://www.forbes.com/sites/jackbrewster/2021/02/04/rep-majorie-taylor-greene-i-stopped-believing-qanon-in-2018-media-is-just-as-guilty/?sh=ca282c225a4f> [https://perma.cc/G5AU-AX4W].

2. Lisa Lerer, *How Republican Vaccine Opposition Got to this Point*, THE N.Y. TIMES (last updated Sept. 12, 2021), <https://www.nytimes.com/2021/07/17/us/politics/coronavirus-vaccines-republicans.html> [https://perma.cc/7R4Z-NYMB].

3. Regina Austin, *Beyond Black Demons & White Devils: Anti-Black Conspiracy Theorizing and the Black Public Sphere*, 22 Fla. St. L. Rev. 1021 (1995).

4. Jeffrey Rosen, *The Bloods and the Crits*, THE NEW REPUBLIC (December 9, 1996), <https://newrepublic.com/article/74070/the-bloods-and-the-crits> [https://perma.cc/8744-CBR2].

perceptions differently, based on differing social realities, especially race. On the other hand, there is still strong opposition to the view that race and racism continue to plague U.S. society, which has resulted in recent legislation that restricts the teaching of Critical Race Theory in public education settings.

The paper's next sections discuss post-modernism, critical race theory, and the emergence of conservative post-modernism. How has post-modern and neoliberal culture, refracted into social media forms, revamped how we engaged with "the truth." After our forty-fifth President won and held office, we live in a world where a post-modern aphorism "truth is not truth" emanates from public figures on the right.<sup>5</sup>

Because this study raises two important foundational items—conspiracy theories and post-modern modes of thought—this essay delineates an intellectual history that includes post-modernism, neoliberalism, the rise of "conservative post-modernism," and relevant social-science literature on conspiracy theories. In conclusion, the essay identifies common threads and lessons from the intellectual history. Ultimately, there is some overlap in these folk thought forms, whether they come from the right or the left. If we look at the underlying subtext within conspiracy theories, there are bridges that can be built, particularly in rethinking how we level scapegoating and shame as a form of social control, how people might legitimately feel marginalized, and how unchecked elitism sows seeds of resentment and mistrust.

## INTRODUCTION

### A. Pessimism

*"Time is a flat circle."*

—True Detective (HBO Pictures 2014).

"Time is a flat circle" is one of the many maxims that Louisiana State homicide detective Rust Cohle (played by Matthew McConaughey) shares with us in the first season of *True Detective*. The quote expresses a form of philosophic pessimism, the idea that history is doomed to repeat itself, a rough paraphrase of a Nietzschean concept.<sup>6</sup> It is easy to become

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5. Rebecca Morin and David Cohen, *Giuliani: 'Truth isn't Truth'*, POLITICO (August 19, 2018), <https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161> [<https://perma.cc/837J-G3PL>].

6. Lawrence J. Hatab, *Time is a Flat Circle: Nietzsche's Concept of Eternal Recurrence in TRUE DETECTIVE AND PHILOSOPHY: A DEEPER KIND OF DARKNESS* 177-185 (William Irwin, Jacob Graham & Tom Sparrow eds., Wiley 2017).

demoralized when looking at the many adherents of unfounded conspiracy theories and seeing the material damage that they can do (such as the fact that many QAnon adherents participated in the deadly January 6, 2020, attack on the Capitol).<sup>7</sup>

Pessimism is a reasonable response to the hopelessness that we see in current events. In White intellectual spaces, philosophic pessimism, as well as similar approaches like existentialism, enjoys a romanticized veneer, raising images of black-clad intellectuals smoking cigarettes in Parisian cafes. However, when expressed by Black thinkers, pessimism has been roundly criticized as counter-productive and nihilistic. From the 1990s to today, critics routinely indict Critical Race Theory for its pessimism.<sup>8</sup> Black or Afro-Pessimism, however, serves a rhetorical purpose by grounding the present in the horrors of the past, horrors we have not completely healed from, and which continue to haunt us.<sup>9</sup> Although a thorough discussion of philosophic pessimism is beyond the scope of this article, differing perceptions of pessimism, based on the racial identity of the pessimist, highlight one of the core themes—how do differences in identity and power mediate reactions to irrational or illogical thought patterns?

### B. Urban Legends & Conspiracy Theories

*“The more things change, the more things stay the same.”*

– Candyman (Universal Pictures 2021)

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7. Drew Harwell et al., *QAnon reshaped Trump’s party and radicalized believers. The Capitol Siege may just be the start*, THE WASHINGTON POST (January 13, 2021), <https://www.washingtonpost.com/technology/2021/01/13/qanon-capitol-siege-trump/> [<https://perma.cc/8WZF-9V5Z>].

8. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 4 (Oxford 1997) (taking issue with Derrick Bell’s perception of American society as “totally and irredeemably racist”); Rosen, *supra* note 4 (taking issue with “the pessimism of the critical race movement”); and Andrew Sullivan, *Don’t Ban CRT. Expose it.*, THE WEEKLY DISH (June 18, 2021), <https://andrewsullivan.substack.com/p/dont-ban-crt-expose-it-2d9> [<https://perma.cc/ZW6R-TVBP>] (taking issue with the pessimistic CRT view that White and Black folks are in a “permanent struggle between the oppressors (white) and oppressed (non-white)”).

9. See Patrice Douglass, Selamawit D. Terreffe, and Frank B. Wilderson, *Afro-Pessimism*, OXFORD BIBLIOGRAPHIES (August 28, 2018), <https://www.oxfordbibliographies.com/view/document/obo-9780190280024/obo-9780190280024-0056.xml> [<https://perma.cc/R7YH-NLRG>].

William (“Billy”) Burke, a character in from the 2021 horror film *Candyman*, makes this pronouncement as he explains the long history of the *Candyman* urban legend. Released to critical acclaim and set in Chicago’s Cabrini-Green neighborhood, 2021’s *Candyman* updates an earlier *Candyman* movie from the 1990s and cinematically continues the *Candyman* urban legend, which holds that uttering the words “*Candyman*” five times summons a demonic entity with fatal consequences. The 2021 movie is a sterling example of artful horror and suspense, and it also speaks to the themes in this article. First, it is a sequel to a movie about the same urban legend, filmed and released in the 1990s, aligning with this paper’s 1990s/2020s theme. Second, and more importantly, 2021’s *Candyman* speaks to the way that stories, even supernatural and paranormal stories, are born out of fear and can explain real things in a sublime and illogical way. Even in an urban legend’s impossible logic, there lies a grain of truth. In both the 1990s movie and the 2021 movie, *Candyman* is the ghost of a 19th Century Black male artist who was lynched for falling in love with a White woman.<sup>10</sup> People believe in urban legends for the some of the same reasons that they believe in conspiracy theories; these narratives help explain what is difficult to comprehend. In the next part of the article, we will begin in the 1990s and look at two law-related sources that speak about conspiracy theories and their nature.

## I. THE 1990S CRT DEBATES

### A. *Regina Austin’s Article*

In 1995, Professor Regina Austin delivered a distinguished lecture on anti-Black conspiracy theories at Florida State Law School, a lecture that was later published in law review format.<sup>11</sup> At the time, Professor Austin was a Professor at the University of Pennsylvania Law School; now, she is a Professor Emeritus there.<sup>12</sup> Professor Austin is a scholar of conflicts relating to race, gender, and class inequality, seen through the lenses of video, film, and photography.<sup>13</sup> In her 1995 article on anti-black

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10. See Candice Frederick, *Nia DaCosta on ‘Candyman’ and the Power of Terrifying Legends*, THE N.Y. TIMES (August 30, 2021), <https://www.nytimes.com/2021/08/30/movies/nia-dacosta-candyman.html> [https://perma.cc/Y6HX-RBHJ]

11. Austin, *supra* note 3.

12. *Id.* at 1021; Regina Austin, William A. Schnader Professor of Law, Emeritus, PENN LAW, <https://www.law.upenn.edu/faculty/raustin> [https://perma.cc/G232-9Y73].

13. Regina Austin faculty profile, *supra* note 12.



conspiracy theories, Professor Austin noted that conspiracy theories were prevalent among Black people in the U.S.<sup>14</sup> She categorized the theories as “anti-Black,” meaning that most of the beliefs centered around a plot, by White people and/or the government, to harm Black people.<sup>15</sup> She catalogued a number of these theories, including beliefs of a white conspiracy to import drugs and guns into urban areas to harm Black people; a U.S. government conspiracy to develop AIDS in an effort to ravage African people; a plot to persuade Black women to use the Norplant birth control patch as a means toward Black genocide.<sup>16</sup> Among these widely-held conspiracy theories was the belief, common in the 1990s, that Jewish Whites in particular, were hatching plots to harm Black people.<sup>17</sup>

Austin sharply criticized the anti-Semitic strains of anti-Black conspiracy theories, writing that “Group hatred per se is inconsistent with the universal moral ethic on which the Black liberation struggle has proceeded thus far and there is really no place for group hatred in the formulation of a praxis for everyday struggle.”<sup>18</sup> She also criticized the irrational and unreasoned aspects of these conspiracy theories, writing that “[w]hen Blacks theorize, they should have reason to believe that, through hard investigative work, their indictments will stick.”<sup>19</sup> On the other hand, she notes that conspiracy theorizing should not become “yet another excuse for demonizing and denigrating Blacks” as “Black folks are not the only people in this country using the rhetoric of conspiracy theories.”<sup>20</sup>

In her analysis of anti-Black conspiracy theories, Austin noted that many of the theories were analogous or aligned with actual conspiracies against Black people. Theories founded on a distrust of medicine and medication aligned with historical experiences such as the Tuskegee Experiment, where Black men were cruelly denied medicine for syphilis to study the disease.<sup>21</sup> Theories founded on the belief that powerful Whites were out to get Black men connected to the FBI’s COINTELPRO surveillance and terrorization of Dr. Martin Luther King, Jr. and Fred Hampton and the phenomenon, at the time, of White people such as Charles Stuart and Susan Smith accusing Blacks of heinous crimes that

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14. Austin, *supra* note 3, at 1021.

15. *Id.*

16. *Id.* at 1024-1028.

17. *Id.* at 1027.

18. *Id.* at 1031.

19. *Id.* at 1032.

20. *Id.*

21. *Id.* at 1030.

they themselves committed.<sup>22</sup> Austin noted that many anti-Black conspiracy theories contain “symbolic truths.”<sup>23</sup> While the theories are not literally true in a factual sense, they operate on a logic and rationality based on past historic persecution and oppression.

Ultimately, Professor Austin concluded that it is worthwhile to study anti-Black conspiracy theories and that the theories served an important purpose. She notes that the theories are “an obviously imaginative and creative oral folk art form which attempts to grapple critically with the complexities of a postmodern, post-industrial political economy.”<sup>24</sup> Even though the form of reasoning is “far from an ideal form of discourse,”<sup>25</sup> the theories explain “much about the concerns of contemporary Blacks regarding law, medicine, economics, politics and the media, and warrant serious consideration on that account.”<sup>26</sup> Conspiracy theorizing also has value because it allows “space in which Blacks can speculate about the macroeconomic forces oppressing them” “in a way that is unmediated by the strictures of conventional reporting.”<sup>27</sup>

### B. Jeffrey Rosen’s Article

In 1996, law professor Jeffrey Rosen wrote a searing critique of Critical Race Theory (CRT) for THE NEW REPUBLIC, and Professor Austin was one of his targets.<sup>28</sup> Mr. Rosen was the commentator on legal affairs for THE NEW REPUBLIC from 1992 to 2014, and he is currently a Professor of Law at George Washington Law School.<sup>29</sup> Professor Rosen took issue

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22. *Id.* at 1024. In 1989, Charles Stuart murdered his wife but told authorities that an unknown Black assailant was responsible. *Charles Stuart (murderer)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Charles\\_Stuart\\_\(murderer\)](https://en.wikipedia.org/wiki/Charles_Stuart_(murderer)) [https://perma.cc/Y8XB-P27N]. Susan Smith was convicted of drowning her two sons in a South Carolina lake but initially told authorities that a Black man had kidnapped her sons. *Susan Smith*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Susan\\_Smith](https://en.wikipedia.org/wiki/Susan_Smith) [https://perma.cc/G8KL-A3GX].

23. Austin, *supra* note 3, at 1033.

24. *Id.* at 1033.

25. *Id.* at 1022.

26. *Id.* at 1022.

27. *Id.* at 1032.

28. Rosen, *supra* note 4.

29. *Jeffrey Rosen (legal academic)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jeffrey\\_Rosen\\_\(legal\\_academic\)](https://en.wikipedia.org/wiki/Jeffrey_Rosen_(legal_academic)) [https://perma.cc/C4WR-CCK5]; *Jeffrey Rosen*, GWU LAW, <https://www.law.gwu.edu/jeffrey-rosen#:~:text=Jeffrey%20Rosen%20is%20a%20Professor,Contributing%20Editor%20of%20The%20Atlantic.&text=Professor%20Rosen%20is%20coeditor%2C%20with,3.0%3A%20Freedom%20and%20Technological%20Change> [https://perma.cc/9U37-CRJC].

with a tenet, emerging from CRT and other left-leaning legal theories, that “[o]ur perception of facts . . . is contingent on our racially defined experiences; and, since the white majority can never transcend its racist perspectives, formally neutral laws will continue to fuel white domination.”<sup>30</sup> Professor Rosen questioned the value of narrative (or any other kind of epistemology departing from rational discourse).<sup>31</sup> In this article, Professor Rosen devoted a lengthy amount of text to excoriating O.J. Simpson’s lawyers for impeaching a major player in the case, the Los Angeles Police Department, with evidence of its individual and institutional racism.

With respect to Professor Austin’s paper on anti-Black conspiracies, Professor Rosen was not charitable: “The reductio ad absurdum of the storytelling movement, with its celebration of subjectivity over objectivity, of emotion over truth, is the scholarly romanticizing of Black conspiracy theories by Regina Austin.”<sup>32</sup> Professor Rosen chided Austin for locating symbolic truth in the conspiracy theories held by Black people. He chastised her for not “lamenting the prevalence of conspiracy theories today” and for instead “condescend[ing] to those who embrace them.” Professor Rosen then summarily dismissed Professor Austin’s point—that conspiracy theories allow marginalized people to make sense of the world by voicing narratives outside the strictures of confined White spaces. Professor Rosen could not seem to fathom any value for a legal study of narratives, collective consciousnesses, or alternative ways of knowing that depart from linear Western rationality.<sup>33</sup> The suggestion, from Austin and others, that other ways of knowing might be relevant to legal problem-solving was met with outright hostility, resentment, perhaps propelled by fear that traditional forms of legal discourse might be losing currency.

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30. *Id.*

31. *Id.* (“In its most radical form, [CRT’s] storytelling movement is a direct assault on the possibility of transracial agreement, on the possibility of objectivity.”).

32. *Id.*

33. For a brilliant exposition of epistemological differences that radiate from identity, see Teri A. McMurtry Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham’s Sycamore Row*, 48 UNIV. OF MEM. L. REV. 889, 897 (2018) quoting EDWARD T. HALL, BEYOND CULTURE 7 (1976) (“Western man uses only a fraction of his mental capabilities, there are many different and legitimate ways of thinking; we in the West value one of these ways above all others—the one we call ‘logic,’ a linear system that has long been with us since Socrates. Western man sees his system of logic as synonymous with truth. For his it is the only road to reality.”).

### C. Radical Assaults on Contested Terrain

The perspectives of Professors Austin and Rosen on conspiracy theories should be understood in the context of what was going on in the 1990s.<sup>34</sup> Today, CRT is a bogeyman for conservative Whites, afraid to confront this country's troubled racial history.<sup>35</sup> In the 1990s, however, the CRT debate took place primarily between law professors within the legal academy.<sup>36</sup> CRT emerged from the work of scholars like Derrick Bell, Richard Delgado, Patricia Williams, and Kimberlé Crenshaw, who, through the use of stories, revisionist histories, and contextualized legal accounts, highlighted the deep-seated patterns that perpetuated racial inequality, within arguably "neutral" legal institutions.<sup>37</sup> Richard Delgado explains a central thesis of CRT as the idea that "[l]egal and cultural decisions are made against a background of assumptions, interpretations, and implied exceptions, things everyone in our [marginalized] culture understands but that seldom, if ever, get expressed explicitly."<sup>38</sup> A large part of the CRT project was devoted to unpacking and unmasking concepts previously thought to be "objective" and "neutral" (such as academic

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34. I studied these texts, the Austin article and the Rosen article, while I was in law school in the 1990s. Suffice to say, these texts, as well as other CRT texts, had a lasting impact on my journey as both a lawyer and a scholar.

35. See, e.g., Spencer Bokor-Lindell, *Why Is the Country Panicking About Critical Race Theory?*, THE N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2021/07/13/opinion/critical-race-theory.html?partner=slack&smid=sl-share> [https://perma.cc/368T-HPV9]; Marokey Sawo & Asha Banerjee, *The Racist Campaign Against 'Critical Race Theory' Threatens Democracy and Economic Transformation*, ECONOMIC POLICY INSTITUTE (August 9, 2021), <https://www.epi.org/blog/the-racist-campaign-against-critical-race-theory-threatens-democracy-and-economic-transformation/> [https://perma.cc/X3UE-36XZ]; Sean Illing, *Is There An Uncontroversial Way To Teach America's Racist History?*, VOX (June 11, 2011), <https://www.vox.com/policy-and-politics/22464746/critical-race-theory-anti-racism-jarvis-givens> [https://perma.cc/35HA-VZPX].

36. See, e.g., Farber & Sherry, *supra* note 8; Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARVARD L. REV. 1745 (1989); RICHARD DELGADO, THE RODRIGO CHRONICLES (NYU 1995) [hereinafter DELGADO, THE RODRIGO CHRONICLES]; RICHARD DELGADO, THE COMING RACE WAR? (NYU 1996); Richard A. Posner, *The Skin Trade*, *Review of Beyond All Reason: The Radical Assault on Truth in American Law by Daniel A. Farber and Suzanna Sherry*, THE NEW REPUBLIC 40 (October 13, 1997) [hereinafter Posner, *The Skin Trade*].

37. See, e.g., Lucy Jewel, *Silencing Discipline in Legal Education*, 49 TOL. L. REV. 657, 667 (2018).

38. DELGADO, THE RODRIGO CHRONICLES, *supra* note 36, at 62-63.

merit) and showing how these concepts operate to produce and reproduce inequality.<sup>39</sup>

In the 1990s, the CRT conflict related to the substance of the argument (is legal reasoning truly neutral, and truly “colorblind”), but also to epistemological method. For instance, Professor Rosen decried Professor Austin’s inquiries into anti-Black conspiracy theories because those theories “celebrat[ed] subjectivity over objectivity [and] emotion over truth.”<sup>40</sup> The CRT critics’ central target was the CRT scholars’ method of using narrative or storytelling to generate knowledge within legal scholarship.<sup>41</sup> The CRT critics furiously disputed the value of using metaphor, emotion, or intuition to make a rhetorical point.<sup>42</sup> The connections laid bare by CRT’s methods were not difficult to comprehend, and yet the CRT critics deplored “the paucity of explicit reasoning connecting [the stories] to a clear conclusion” and “the absence of a clear analytic framework.”<sup>43</sup>

The CRT scholar’s critique of formal legal reasoning and use of alternative methods was a real thorn in the side of the academics who fought the movement. Professors Daniel Farber and Suzanna Sherry’s book, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford 1997) is emblematic of the response. Armed with a pugilistic metaphor (“radical assault”), Farber and Sherry described CRT scholars as “extreme” people who have “abandon[ed]. . . moderation and common sense.”<sup>44</sup> CRT, within colleges and law schools, was ruining what were once “bastions of objective, reasoned argument” and “province[s]. . . of reason rather than emotion, of principle rather than raw power.”<sup>45</sup> Brimming with outrage, the authors decried CRT’s attack on the “crown jewels of our Enlightenment heritage.”<sup>46</sup>

Other CRT critics charged that the intellectual abilities of CRT scholars were lesser than scholars engaging in traditional legal scholarship. Professor Randall Kennedy wondered if CRT was an example of Blacks “exempting themselves from the risk of failure by refusing to

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39. See, e.g., LANI GUINER & GERALD TORRES, *THE MINDER’S CANARY* (2002) (discussing how academic “merit” tends to reproduce existing forms of inequality).

40. Rosen, *supra* note 4.

41. Representative authors included Richard Delgado, Derrick Bell, and Patricia Williams.

42. Farber & Sherry, *supra* note 8, at 39.

43. *Id.* at 85.

44. *Id.* at 3.

45. *Id.* at 5-6.

46. *Id.* at 27.

compete (write scholarship using traditional, formal reasoning) on the same terms as Whites.”<sup>47</sup> Judge Richard Posner similarly wrote:

Rather than marshal logical arguments and empirical data, critical race theorists tell stories – fictional, science-fictional, quasi-fictional, autobiographical, anecdotal – designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.<sup>48</sup>

There were also related ad hominem charges that CRT scholars did not write well. Professor Rosen wrote of “the unfortunate fact that few of the storytellers are gifted at telling stories.”<sup>49</sup> Judge Posner concluded that all the CRT scholars were bad storytellers except for Professor Patricia Williams, whom he seemed to have a grudging respect for.<sup>50</sup>

#### *D. Was Beethoven Black? Challenging the Canon in the 1990s.*

An anecdote from Professor Patricia Williams’s book will wrap up this contextualized discussion of the 1990s CRT debates and move the discussion into the next section, which analyzes what has changed in the intellectual landscape since the 1990s. In *The Alchemy of Race & Rights: Diary of a Law Professor*, Professor Williams recounted an incident of racial hate that took place at Ujamaa house, a Stanford University dorm dedicated to African American culture.<sup>51</sup> In the dorm, two students got into an argument over whether Beethoven was Black. After the argument, the white student got drunk with his friends and together they defaced a poster of Beethoven so that Beethoven represented a Black stereotype.<sup>52</sup> A few weeks later, in the same dorm, a Black fraternity’s poster was defaced with a toxic racial epithet.

For several pages Professor Williams considered the story, using it as an example of the unspoken calculus that equates White European culture with goodness and Black culture with bad.<sup>53</sup> She noted that the quarrelsome White student stated that he found the theory that Beethoven

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47. Kennedy, *supra* note 36, at 1770.

48. Posner, *The Skin Trade*, *supra* note 36, at 42.

49. Rosen, *supra* note 4. Professor Rosen seems to take issue with Professor Delgado’s choice to reference espresso coffee in his Rodrigo dialogues.

50. Posner, *The Skin Trade*, *supra* note 36, at 42.

51. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 110-15 (Harvard Univ. Press 1991).

52. *Id.* (internal citation omitted).

53. *Id.* at 115.

was Black to be “preposterous.”<sup>54</sup> Finally, Professor Williams explained that the focus of the investigation (on one student only) reflected that the insular and bordered approach to race-relations with no consideration of collective or “extrinsic” harms. For Professor Williams, the core point of the Beethoven story was “the appropriation of knowledge, the authority of creating a canon, revising memory, declaring a boundary beyond which lies the ‘extrinsic’ and beyond which ignorance is reasonably suffered.”<sup>55</sup> Noting the metaphoric elements of the Beethoven story, Williams explained that “[B]lack have been teaching white people that Beethoven was [biracial] for over a hundred years or so.”<sup>56</sup>

In their book, Professors Farber and Sherry claim that Williams’s Beethoven story represents CRT’s “negligent” treatment of history.<sup>57</sup> Farber and Sherry mount their attack by pointing out that Beethoven being Black is “almost certainly false.”<sup>58</sup> But, as described above, a careful reading of Williams’s musings reveals that the “Beethoven Was Black” story was not about the truth, but about canons, knowledge, and racial assumptions about western civilization. She was not using the story to argue that Beethoven was in fact Black.

Professors Farber and Sherry then challenged Williams’s use of the story to illustrate the White is good and Black is bad paradigm.<sup>59</sup> To support their point here, Farber and Sherry quoted CRT’s other frequent critic, Judge Richard Posner. Judge Posner explained that the student (who felt the idea that Beethoven was Black to be “preposterous”) “may simply have been incredulous that Beethoven had a Black ancestor, just as I would be incredulous to discover that my cat was Siamese, though I know that some cats are.”<sup>60</sup> With all the cavils that CRT scholars were poor writers and untalented storytellers, Posner should not get a pass for making such an ill-fitting analogy to his beloved cat’s pedigree.

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54. *Id.* at 112.

55. *Id.* at 113.

56. Williams, *supra* note 51, at 113.

57. Farber & Sherry, *supra* note 8, at 101 (charging in CRT, “[h]istory is treated with . . . negligence.”).

58. *Id.*

59. *Id.* Professors Farber and Sherry misinterpreted Williams as talking about the “racism” in the Beethoven story, but that is not what she was really talking about. She was talking about how the paradigm, though not written into the code books, remains as “an unconsciously filtered vision.” *Id.* at 110.

60. RICHARD POSNER, *OVERCOMING LAW* 375 (Harvard 1995).

## II. WHAT HAS CHANGED SINCE THE 1990S?

Patricia Williams's "Beethoven Was Black" anecdote, relayed in 1995, is a good example of how some things have changed since that time. The CRT critics charged that the anecdote failed because it operated on false information. Beethoven did not have Black or Moorish ancestors, or so Farber and Sherry say.<sup>61</sup> And yet, the belief that "Beethoven Was Black" meme is still with us today.<sup>62</sup> As Williams intimates, Beethoven Was Black was actually a mantra for Black consciousness and black power in the 1960s, popularized by both Malcolm X and Stokely Carmichael.<sup>63</sup> So, was Beethoven Black? A recent article on the topic from The Guardian explains that

The evidence is scant and inconclusive. The case rests on two possibilities: that Beethoven's Flemish ancestors married Spanish "blackamoors" of African descent, or that Beethoven's mother had an affair. But the truth Carmichael and Malcolm X sought was not scientific. "Beethoven was black" was a grand metaphor designed to unsettle and shake certainty.

Unlike the CRT critics' position, the truth of whether Beethoven was Black or not is not as important as the message within the metaphor. And metaphor is a type of rhetoric that runs deeply through Black art and music. The Guardian article points out that "Edward Ellington and William Basie were ennobled to the status of a Duke and a Count."<sup>64</sup> And Birmingham, Alabama bandleader Herman Blount boldly proclaimed himself to be Sun Ra, "an alien from Saturn, who descended to Earth to preach peace and togetherness."<sup>65</sup> Sun Ra and his Arkestra went on to make some of the most cosmic, mind-bending avant-garde jazz that the world has ever known.<sup>66</sup> While the myopic focus on material truth is one

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61. Farber & Sherry, *supra* note 8, at 101 ("A Black scholar concluded in 1990 after a thorough examination that the claim had no factual basis").

62. Phillip Clark, *'Beethoven was black': why the radical idea still has power today*, THE GUARDIAN (Sept. 7, 2020), <https://www.theguardian.com/music/2020/sep/07/beethoven-was-black-why-the-radical-idea-still-has-power-today> [<https://perma.cc/3DD3-29GV>].

63. *Id.*

64. *Id.*

65. *Id.*

66. Thank you here to my friend James Lien, who long ago shared the brilliance of Sun Ra and his Arkestra with me.



angle, let's note that the law, like Black artistic forms, also creates fictional personas, such as the reasonable person and the constructive trust.<sup>67</sup>

The CRT critics of the 1990s contested the meanings that come from language, meanings operating through metaphor, emotion, and intuition. But now, metaphor, emotion, and narrative techniques are accepted as valid methods for expressing meaning in the law and in legal scholarship.<sup>68</sup> Research has been done indicating that legal arguments that contain a combination of logos (rational, rule-based argument) and pathos (emotional resonance) are ranked as more effective than arguments that rely on logos alone.<sup>69</sup> There must also be pathos (emotional resonance) and ethos (credibility of the speaker).<sup>70</sup> Yes, the truth matters, but there are other ways to make and find meaning in the law, methods that operate in tandem with the traditional, formal process of finding "the truth."

The idea that facts or perceptions are socially constructed or least socially mediated has also become more mainstream. Cognitive science has roundly challenged the old Enlightenment idea that the rational mind can be separated from the emotional body.<sup>71</sup> Since the 1990s, research on

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67. Nick J. Sciallo, *Conversations with the Law, Irony, Hyperbole, and Identity Politics or Sake Pase? Wyclef Jean, Shottas, and Haitian Jack: A Hip-Hop Creole Fusion or Rhetorical Resistance to Law*, 34 OKLA. CITY L. REV. 455, 501 (2009).

68. See generally Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127 (2008); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); Susan M. Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S.C.L. REV. 247 (2019); Carole M. Parker, *The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions*, 43 MCGEORGE L. REV. 323 (2012); Linda Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISCIP. L.J. 259 (2008); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007).

69. Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 LEGAL COMM. J. ALWD 1 (2010) (finding that most legal readers, including judges, found appellate briefs that used "story" techniques to be more effective than briefs that relied purely on logocentric reasoning).

70. See *Id.*

71. See generally Harold Lloyd, *Cognitive Emotion and the Law*, 41 LAW & PSYCHOL. REV. 53 (2016); GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* (1999); Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663 (2017) [hereinafter Jewel, *Neurorhetoric*].

the embodied mind,<sup>72</sup> cognitive bias and heuristic thinking,<sup>73</sup> behavioral economics,<sup>74</sup> implicit bias,<sup>75</sup> racialized biases in witness identification,<sup>76</sup> the fallibility of human memory,<sup>77</sup> and psychological and neuroscientific approaches to persuasion<sup>78</sup> all point to the reality that the mind cannot be fully separated from the body. Most social scientists would agree that it is

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72. See Lakoff & Johnson, *supra* note 71.

73. See generally, ROBERT KAHNEMAN, THINKING FAST AND SLOW (2013); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic, and Amos Tversky eds. 1974).

74. See *The Behavioral Economics Guide 2017* (Alain Samson ed. 2017), <http://eprints.lse.ac.uk/84059/1/The%20behavioral%20economics%20guide%202017.pdf> [<https://perma.cc/67VD-9FAC>]; Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1988); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

75. Information on Harvard's Implicit Association Test (the IAT) can be found at Project Implicit, <https://implicit.harvard.edu/implicit/> [<https://perma.cc/X3VR-6ZGF>]. For thorough explanations of implicit bias as it relates to law, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). But note that research on implicit bias has come under fire from other scholars, who dispute the theory. See Tom Bartlett, *Can We Really Measure Implicit Bias? Maybe Not*, THE CHRONICLE OF HIGHER EDUCATION (January 5, 2017), <https://www.chronicle.com/article/can-we-really-measure-implicit-bias-maybe-not/> [<https://perma.cc/3CRF-PCBK>].

76. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1983-1084) (collecting research on this phenomenon).

77. See generally, Elizabeth Loftus & Jacqueline Pickrell, *The Formation of False Memories*, 25 PSYCHIATRIC ANNALS 720 (1995). Dr. Loftus has become the preeminent expert on the fallibility of human memory, testifying as an expert witness in numerous trials where a witness's memory is at issue. Her work has come under criticism for supporting the defense of countless sex offenders and because newer research methods intimate that her original studies overstated her theses. See Kate Heaney, *The Memory War*, THE CUT (January 6, 2021), <https://www.thecut.com/article/false-memory-syndrome-controversy.html> [<https://perma.cc/4UVK-S3ZC>]; Lynn Crook & Linda McEwen, *Deconstructing the lost in the mall study*, 16 JOURNAL OF CHILD CUSTODY: RESEARCH, ISSUES, AND PRACTICES 7 (2019); Ruth Blizard & Morgan Shaw, *Lost-in-the mall: False memory or false defense?*, 16 JOURNAL OF CHILD CUSTODY: RESEARCH, ISSUES, AND PRACTICES 20 (2019).

78. Jewel, *Neurorhetoric*, *supra* note 71, at 674 (citing DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION 14 (2007)).

not possible to exercise rational thought patterns entirely free from cognitive, racial, or emotional influence. And, other theories have posited that “objective” or “reasonable” modes of thought are also riddled with emotional undercurrents, like fear.<sup>79</sup>

Finally, with respect to the enduring effects of racism in U.S. Society, it is now a majoritarian concept that the past matters. In the wake of a continuous stream of killings—of Michael Brown, Tamir Rice, Trayvon Martin, Sandra Bland, Philando Castile, Elijah McClain, George Floyd, Breonna Taylor, Ahmaud Arbery, and countless others—a majoritarian consensus emerged, holding that past de jure and de facto racism bears on the present. The consensus is prominent in popular journalism, media, and art such as the 1619 project,<sup>80</sup> the best-selling writings of public-intellectual Ta-Nehisi Coates;<sup>81</sup> popular movies and television shows such as *Get Out*,<sup>82</sup> HBO’s *Watchmen*,<sup>83</sup> and *Lovecraft Country*;<sup>84</sup> and compelling art from Kara Walker,<sup>85</sup> Bisa Butler,<sup>86</sup> and Kehinde Wiley.<sup>87</sup>

Tellingly, the consensus is even visible in the Supreme Court’s majority opinion in *Ramos v. Louisiana*, authored by Trump appointee Justice Neil Gorsuch.<sup>88</sup> Rather than accept a “functional” cost-benefit analysis for allowing non-unanimous jury verdicts for felony crimes (to reduce the number of hung-juries), Justice Gorsuch emphasized the need to look at the racial history of these laws. The legislative history indicated that Louisiana and Oregon allowed non-unanimous jury verdicts, during

79. Lucy Jewel, *Does The Reasonable Man Have Obsessive Compulsive Disorder?* 54 WAKE FOREST L. REV. 1049 (2019) (Theorizing that rigid adherence to legal formalism could derive from an individual and/or collective fear of uncertainty) [hereinafter Jewel, *Does the Reasonable Man Have OCD?*].

80. Nicole Hannah-Jones, *The 1619 Project*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/374P-9D6K>].

81. TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015); TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER* (2018).

82. *Get Out* (Universal Pictures 2017).

83. *Watchmen* (HBO 2019).

84. *Lovecraft Country* (HBO 2020).

85. Kara Walker biography, ART21, [https://art21.org/artist/kara-walker/?gclid=Cj0KCQiAraSPBhDuARIsAM3Js4p16iY6qNBKWhw0c9uWH\\_83NDsZwgaUH\\_sc0UX9raVXU8\\_Rl3ZDhAMaAspTEALw\\_wcB](https://art21.org/artist/kara-walker/?gclid=Cj0KCQiAraSPBhDuARIsAM3Js4p16iY6qNBKWhw0c9uWH_83NDsZwgaUH_sc0UX9raVXU8_Rl3ZDhAMaAspTEALw_wcB) [<https://perma.cc/LF76-NEQP>].

86. Bisa Butler Art, <https://www.bisabutler.com/> [<https://perma.cc/XK67-G45X>].

87. Kehinde Wiley Studio, <https://kehindewiley.com/> [<https://perma.cc/JT2H-CHZL>].

88. *Ramos v. Louisiana*, 590 U.S. \_\_\_, at 1-3 (2020) (Slip Op).

the Jim Crow era, so that juries could be superficially integrated yet White majorities could still convict defendants of color.<sup>89</sup> Gorsuch writes, “[l]ost in the [functionalist, cost-benefit] accounting are the racially discriminatory reasons that Louisiana and Oregon adopted their peculiar rules in the first place.”<sup>90</sup> Justice Gorsuch reiterated that not even a “shared respect for rational and civil discourse [should] . . . supply an excuse for Leaving an uncomfortable past unexamined.”<sup>91</sup> Trump appointee Justice Bret Kavanaugh, in concurrence, states, “on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon *should matter and should count heavily in favor of overruling*.”<sup>92</sup>

As we compare the 1990s to the present, another issue to consider is how we understand race and racism as it is portrayed in the media. Specifically, can injurious racial stereotypes and metaphors be traced well back into our history?<sup>93</sup> In the late 1980s and early 1990s, the U.S. was roiled by a persistent media demonization of Black men, evidenced in heinous crime stories of Charles Stuart and Susan Smith as well as George H.W. Bush’s Willie Horton campaign advertisement. In 1988, Charles Stuart, a middle-class Boston man staged the murder of his pregnant wife, shooting her and himself, and then blaming crime on a Black gunman from the Mission Hill housing projects.<sup>94</sup> The mainstream media lionized Stuart as a heroic widower and demonized the scourge of violent criminals inhabiting the Mission Hill neighborhood and its environs.<sup>95</sup> The police

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89. *Id.* at 1-3 (2020) (Slip Op) (citing Thomas W. Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018)).

90. *Id.* at 13-14.

91. *Id.* at 14, n. 44.

92. *Id.* at 14 (Kavanaugh, J., concurring) (emphasis added).

93. For wonderful expositions on this topic see Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J. LAW & SOC. JUSTICE 233 (2014); Teri A. McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 MERCER L. REV. 651 (2016); Teri A. McMurtry-Chubb, *“Burn This Bitch Down!": Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*, 17 NEV. L. J. 619 (2017). All three of these articles discuss how racial tropes negatively and tragically influence our law and our culture.

94. Roberto Scalese & Hilary Sargent, *The Charles Stuart Murders and the Racist Branding Boston Just Can’t Seem to Shake*, BOSTON.COM, (October 22, 2014), <https://www.boston.com/news/local-news/2014/10/22/the-charles-stuart-murders-and-the-racist-branding-boston-just-cant-seem-to-shake/> [<https://perma.cc/6V9N-7C44>].

95. *Id.*

identified a Black man, Willie Bennett, as a suspect after Stuart had a “strong physical reaction” upon seeing Bennett in a police line-up.<sup>96</sup> When Charles Stuart’s brother Matt Stuart came forward and suggested that Charles had something to do with his wife’s murder, the Boston Police focused its investigation on Charles. When Charles learned he was a suspect in the murder, he leapt to his death from Boston’s Tobin Bridge.<sup>97</sup> In the wake of the Charles Stuart case, Boston continued to suffer from racial distrust and animosity for years to come.<sup>98</sup>

In 1994, Susan Smith rolled her car into a South Carolina lake with her two young sons strapped inside.<sup>99</sup> She told the police and the media that her car had been carjacked by a Black man, who was the person who had kidnapped her children.<sup>100</sup> She helped the police draw up a sketch of the perpetrator, a “Black male in his late 20s to 30s, wearing a plaid shirt, jeans, and a toboggan-type hat.”<sup>101</sup> Smith’s church pastor told the media that “[t]here are some people who would like to see this man’s brains bashed in.” For nine days she stayed committed to her lie until she finally confessed to the murder.<sup>102</sup> Susan Smith’s lie was founded on a troubling pattern—a White Southern woman accusing a Black man of a heinous crime—accusations that had propelled countless lynchings of Black men.<sup>103</sup>

In 1988, an independent political action committee ran a television advertisement supporting George H.W. Bush. The advertisement highlighted the face of Willie Horton, a Black man who was convicted of being an accessory to a felony murder, who then, while released on a prison furlough program (supported by Dukakis), held a couple hostage, stabbing the male victim and raping the female.<sup>104</sup> On the surface, the

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96. *Id.*

97. *Id.*

98. *Id.*; see also, Kirk Johnson, *In Boston, A Storm of Recriminations*, THE N.Y. TIMES (Jan. 6, 1990), <https://www.nytimes.com/1990/01/06/us/in-boston-a-storm-of-recriminations.html> [<https://perma.cc/3CEB-YR36>].

99. WLTX, *Susan Smith: 25 years since the South Carolina mom murdered her sons*, NEWS19 (October 24, 2019), <https://www.wltx.com/article/news/crime/susan-smith-killings-25-years-later/101-27ffb1f3-4742-49e7-9764-c54c197f840f> [<https://perma.cc/W237-GGAE>].

100. *Id.*

101. David Pilgrim, *The Brute Caricature*, FERRIS STATE UNIV. (November 2000), <https://www.ferris.edu/news/jimcrow/brute/> [<https://perma.cc/BM3S-88GM>].

102. *Id.*

103. *Id.*

104. KATHLEEN HALL JAMISON, *THE PRESS EFFECT, POLITICIANS, JOURNALISTS, AND THE STORIES THAT SHAPE THE POLITICAL WORLD* 2-3 (2004).

advertisement was about Dukakis being soft on crime, but the implicit message was that Dukakis would allow menacing Black men to threaten the safety of White voters.<sup>105</sup>

In 2004, cognitive scientist Drew Westen wrote the following about the Willie Horton advertisement: “[t]he mug shot of Horton was obviously the most emotionally powerful image in the ad, playing on every white person’s fears of the dangerous, lawless, violent, dark black male.”<sup>106</sup> Westen further connected the visual photograph of Horton to how racism trafficked in the reptilian netherworlds of the human brain:

The Willie Horton ad was well attuned to the primate brain, and particularly to the amygdala, which is highly responsive to both facial expressions and to fear-evoking stimuli. The ad was packed with both.<sup>107</sup>

The above examples show that racism is often enacted in the thick soup of culture and media, animated by biased tropes and stereotypes. In response to these examples, after the 1990s, a consensus was emerging that race and racism does the devil’s work overtime deep in the infrastructures of our individual minds, our collective mind, and our institutions. For instance, countless scholars from a variety of fields have studied and assessed the unconscious ways that racism operates in the brain and in the body. Work on implicit bias<sup>108</sup> and racialized effects on witness identification (White people have trouble distinguishing the faces of Black people)<sup>109</sup> show how implicit or unconscious racism operates at all levels of U.S. society, including in the legal system and courtrooms. Studies have found correlations between racialized social experiences and disparate health outcomes in Black people.<sup>110</sup> In psychology, scholars have

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105. E.J. DIONE, WHY AMERICANS HATE POLITICS 62-63 (2004).

106. Westen, *supra* note 78.

107. *Id.* at 63.

108. *See supra* note 75.

109. *See supra* note 76.

110. *See* Lucy Jewel, *The Biology of Inequality* 95 DEN. L. REV. 609, 610, n.1 (2018) (citing David H. Chae et al., *Discrimination, Racial Bias, and Telomere Length in African-American Men*, 46 AM. J. PREVENTATIVE MED. 103, 103 (2014) (“Black American men experience aging-related diseases earlier in life and suffer greater severity and worse consequences of disease compared to other groups.”); Christopher W. Kuzawa & Elizabeth Sweet, *Epigenetics and the Embodiment of Race: Developmental Origins of US Racial Disparities in Cardiovascular Health*, 21 AM. J. HUM. BIOLOGY 2, 2 (2008) (explaining that Black Americans, in general, suffer from cardiovascular disease at a much higher rate than the rest of the population).

documented the psychological harm that Black people experience from everyday racialized encounters, or microaggressions.<sup>111</sup> Finally, other researchers are looking at how terroristic racialized trauma, experienced by marginalized peoples, gets under the skin and actually interacts with an individual's genome in epigenetic ways.<sup>112</sup> In terms of Black/White relations, the research and theories described above support the theory that multi-generational trauma is a powerful agent that continues to perpetuate inequality and oppression.<sup>113</sup>

There's also growing acceptance for the argument that our legal history, codified in statutes and case-law and experienced collectively, influences our culture, and vice versa. The law-culture-law cycle explains how toxic stereotypes and metaphors get reinforced or canalized in the law, in our legal institutions, and in our thinking.<sup>114</sup> For instance, plantation laws requiring armed White men to band together and hunt down runaway or unruly enslaved persons aligns factually with the murder of Ahmaud Arbery as he jogged on land that was once part of the plantation system.<sup>115</sup>

Although there is now more of a consensus, the idea that past racial trauma has a bearing on present society was highly controversial in the 1990s. The Charles Stuart, Susan Smith, and Willie Horton examples led Professor Austin to opine that sparks of truth stoked anti-Black conspiracy theories holding that powerful groups of White people were targeting

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111. See Jioni Lewis, *Gendered Racial Microaggressions and Depressive Symptoms among Black Women: A Moderated Mediation Model*, 43 PSYCHOLOGY OF WOMEN QUARTERLY 368 (2019) (with Dr. Marlene Williams).

112. *Id.* at 622-623 (discussing epigenetic variations in stress hormones in holocaust survivors). In *Biology of Inequality*, I argued that if Jewish victims of the holocaust can be shown to have epigenetic markers from their trauma, it follows that Black people also have similar markers from the transatlantic slave trade, Jim Crow, extra and intra judicial violence, etc. See *id.* at 640.

113. JOY DEGRUY, POST TRAUMATIC SLAVE SYNDROME 105 (2005).

114. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 839 (1987) (Translated by Richard Terdiman); Jewel, *Neurorhetoric*, *supra* note 71, at 686-689 (citing Elizabeth B. Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL. ADVOC. 255, 257 (2013)).

115. See Elizabeth Berenguer, Lucille Jewel, Teri McMurtry-Chubb, *Antebellum Law is the Precedent for Today's White-on-Black Violence*, RACE L. BLOG (June 13, 2020), <https://lawprofessors.typepad.com/racelawprof/2020/06/antebellum-law-is-the-precedent-for-todays-white-on-black-violence-by-professors-elizabeth-berenguer.html> [<https://perma.cc/4967-R9EG>].

Black men.<sup>116</sup> In his long-ranging New Republic article, discussed in part above, Professor Rosen also commented on the Charles Stuart and Susan Smith cases. In this portion of the article, Professor Rosen critiqued the work of Third Circuit Judge A. Leon Higginbotham, Jr.<sup>117</sup> In the crosshairs are Higginbotham's *In the Matter of Color* (1978),<sup>118</sup> an exhaustive study of slavery law in colonial times and Judge Higginbotham's more recent book *Shades of Freedom* (1996),<sup>119</sup> which traced racial politics and the presumption of Black inferiority throughout the law from the Civil War until the present. In *Shades of Freedom*, Judge Higginbotham started his legal study by looking at six recent cases where a "white person made false accusations that an African-American man had committed a terrible crime."<sup>120</sup> Higginbotham included the Susan Smith and Charles Stuart cases in his list of six cases.<sup>121</sup> Segueing from these contemporary cases to the law, Judge Higginbotham stated:

[T]he centuries-old precept of inferiority in American slavery jurisprudence and the contemporary events I have cited are part of a continuum that still has an unfair impact on African Americans, even at the present time. . . . The perception of inferiority that motivated these false accusations against blacks in the 1990s is not unrelated to the perception of inferiority that legitimized slavery.<sup>122</sup>

In response to Judge Higginbotham's contextualizing, Professor Rosen responded:

[W]hat on earth does Susan Smith have to do with the Black Codes of the antebellum South? . . . . In all the cases that Higginbotham mentions, the legal system exposed the false accusations against African Americans as a racist hoax and brought the real murderers to justice. And, once they were exposed, each of these racist lies quickly became a national outrage, and each of the perpetrators was, appropriately, shunned

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116. Austin, *supra* note 3, at 1024.

117. Rosen, *supra* note 4.

118. A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR, RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (Oxford Univ. Press 1978).

119. A. LEON HIGGINBOTHAM, *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (Oxford Univ. Press 1996) [Hereinafter Higginbotham, *Shades of Freedom*].

120. *Id.* at xxv-xxvi.

121. *Id.* at xxvi-xxvii.

122. *Id.*



and vilified in the starkest terms. Far from being misled by racial presumptions of inferiority, prosecutors and judges scrupulously resisted the temptations of racialism, and color-blind justice prevailed.<sup>123</sup>

Both Higginbotham and Austin, however, pointed to these high-profile stories, not for the ultimate resolution of the case, but for the enduring presence of a toxic trope that still found airtime in the media and press. The public vilification of Willie Horton, the Boston police department's targeting of Willie Bennett, and the community animus directed against the unnamed Black male that Susan Smith conjured up all descended from a long history of White people internalizing the "brutal caricature"<sup>124</sup> of the menacing Black man. And many agreed that this history is ingrained in our culture and our law.

In this debate between CRT and traditional reason, the two positions are (1) a contextualized and historic approach to racial justice, or (2) a color-blind justice that disregards the presence of implicit, unconscious, or structural racism. This was the issue in the 1990s and it is still the issue now. In the *Ramos* jury unanimity case, Justice Alito, writing in dissent, referred to the process of looking at a statute's racist origins as unwarranted "ad hominem" rhetoric that fails to prove the law is unsound but rather "attack[s] the character or motives of the argument's proponents."<sup>125</sup> Justice Alito then deployed a single sentence paragraph ("now to what matters") to pivot away from the racial context and toward a colorblind legal process focused on whether the statute promoted judicial efficiency.<sup>126</sup> But Justice Alito was in the minority on this issue.

A renewed effort to promote color-blind epistemology is also discernible in the current legislative attacks on critical race theory (CRT). The anti-CRT movement stems from Christopher Rufo, a right-wing activist who came up with the anti-CRT idea after encountering a 2018 anti-bias training session sponsored by the City of Seattle.<sup>127</sup> A savvy

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123. Rosen, *supra* note 4.

124. See *supra* note 101.

125. *Ramos v. Louisiana*, 590 U.S. \_\_\_, at 2 (2020) (Slip Op) (Alito, J. dissenting).

126. *Id.*

127. Benjamin Wallace-Wells, *Conservative Activist Invented the Conflict over Critical Race Theory*, THE NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/3YLP-4RKE>]; Laura Meckler & Josh Dawsey, *Republicans, spurred by an unlikely figure, see political promise in targeting critical race theory*, THE WASHINGTON POST (June 21,

intellectual etymologist, Rufo traced some of the anti-bias ideas to authors such as Ibrahim X. Kendi, Robin DiAngelo, Derrick Bell, and Angela Davis.<sup>128</sup> To construct his piercing dog whistle, Rufo harped on these writers' Marxist (or anti-capitalist) views.<sup>129</sup> When Rufo delivered an impassioned monologue against CRT on Fox's Tucker Carlson show, President Trump invited him to draft an executive order aimed to limit CRT in federal training programs.<sup>130</sup> Then, the language within Trump's executive order provided the foundational text for the various state laws aimed to limit CRT.<sup>131</sup>

Rufo's purpose, in mounting his anti-CRT campaign was to fight the "progressive racial ideology [that became popular] late in the Obama years."<sup>132</sup> Or, one might say that Rufo's purpose was to stop the broadening consensus that racial harm, terror, and trauma has occurred in the past and continues to influence the present. The anti-CRT movement seemed intent on quashing the momentum that grew in the summer of 2020, when thousands marched to protest the death of George Floyd and to celebrate Black Lives. The anti-CRT movement has successfully morphed into a legislative trend. In the K12 public education setting, 13

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2021), <https://www.washingtonpost.com/education/2021/06/19/critical-race-theory-rufo-republicans/> [<https://perma.cc/PL3X-NJ6W>].

128. *Id.* Of all of these writers, only Derrick Bell would qualify as a canonical critical race theorist.

129. *Id.* Linking CRT with Marxism echoes the segregationist charge that the federal Civil Rights Act was communist in its origins. See KEVIN KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* 221 (2005). It also aligns with the popular charge that Black Lives Matter activists are radical Marxists. See Cheryl Corley, *Black Lives Matter Fights Disinformation to Keep the Movement Strong*, *NPR*, <https://www.npr.org/2021/05/25/999841030/black-lives-matter-fights-disinformation-to-keep-the-movement-strong> [<https://perma.cc/SG5B-RRPD>]. It is accurate to say that many Black Lives Matter adherents follow the teachings of Karl Marx with respect to the power dynamics that capital creates. *Id.* As Patrisse Cullors, one of the co-founders of Black Lives Matter explained, "I do believe in Marxism [as a method for criticizing capitalism]" and "I'm working on making sure that people don't suffer. . . We can't allow for fear to dictate an understanding of what's possible." Patrisse Cullors, *Am I A Marxist?*, *YOUTUBE* (December 14, 2020), <https://www.youtube.com/watch?v=rEp1kxg58kE> [<https://perma.cc/R86N-8DDR>].

130. Wallace-Wells, *supra* note 127.

131. *Id.*

132. *Id.*

states have imposed bans or restrictions on teaching concepts believed to derive from CRT.<sup>133</sup> Another 20 states have introduced similar bills.<sup>134</sup>

Like many of the other anti-CRT statutes, which track Trump's executive order, Tennessee's legislative ban takes aim at critical race theory's purported pessimism, prohibiting teaching that Tennessee or the U.S. is "fundamentally or irredeemably racist or sexist" or that "[a]n individual, by virtue of the individual's race or sex, is inherently privileged, racist, sexist, or oppressive, whether consciously or subconsciously."<sup>135</sup> Many of these bills allow citizens to make complaints about specific instructional materials that their children have been exposed to. In the summer of 2021, Moms for Liberty, a conservative parents' group in suburban Nashville, used Tennessee's new procedure to complain that their children were being taught from books that depicted the perspective of children like Ruby Bridges (integration in New Orleans) and Sylvia Mendez (integration of Latino/a students in California).<sup>136</sup> The complaining parents also wanted their children shielded from an iconic Norman Rockwell painting depicting Ruby Bridges walking to her elementary school, an image of segregated water fountains, and an image of the police using high-pressure fire-hoses on civil rights protesters.<sup>137</sup> The Moms for Liberty complaint took particular issue with the *visual* illustration of truthful historic events. We know that visual imagery is incredibly moving and powerful, with great capacity to persuade.<sup>138</sup> It seems that Moms for Liberty did not want their children to experience the South's truthful history with their own eyes. It might make them feel pain and empathy for those who suffered through that history.

The anti-CRT movement has also targeted how American history is taught, with a particular animus against Nicole Hannah Jones's Pulitzer

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133. Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUCATION WEEK (June 11, 2011, updated Sept. 28, 2022), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/4JPA-4FE9>].

134. *Id.*

135. Tenn. Code Ann. § 49-6-1019 (West 2022).

136. Letter from Moms for Liberty Williamson County Chapter (June 30, 2021), available at <https://drive.google.com/file/d/16W9grkwSFsIPRQOSpQfnAHNJzvDH5Bkk/view> [<https://perma.cc/UF95-GZAY>].

137. *Id.*

138. See generally, Lucy Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237 (2010).

Prize winning 1619 Project.<sup>139</sup> Texas has banned public schools from including any content from the New York Times' 1619 project.<sup>140</sup> Florida's Board of Education has also banned the 1619 Project.<sup>141</sup> And at least three other states (Arkansas, Iowa, and Mississippi) have tried to introduce bills that would ban Hannah-Jones's materials from K12 public classrooms.<sup>142</sup>

Finally, some of these statutes attempt to define, corral, and limit history in a way that can only be described as thought control. Georgia's anti-CRT bill limits the teaching of the so-called divisive concepts, but this bill goes further in declaring how race must be viewed in the context of American history:

Slavery, racial discrimination under the law, and racism in general are so inconsistent with the founding principles of the United States that Americans fought a civil war to eliminate the first, waged long-standing political campaigns to eradicate the second, and rendered the third unacceptable in the court of public opinion, all of which dispels the idea that the United States and its institutions are systemically racist and confutes the notion that slavery, racial discrimination under the law, and racism should be at the center of public elementary, secondary, and postsecondary educational institutions.<sup>143</sup>

It is not true that racism is "so inconsistent with the founding principles." So many of the U.S.'s founders were enslavers who believed and practiced chattel slavery, racial inequality, and segregation. Thomas Jefferson did not actually believe that "all men were created equal," instead, he "regarded [Black persons] as inferior, childlike, untrustworthy,

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139. Nicole Hannah-Jones, *The 1619 Project*, THE NEW YORK TIMES, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [https://perma.cc/3ZBY-TK49].

140. Tex. H.B. 3879, available at <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB03979F.pdf#navpanes=0> [https://perma.cc/2XMV-5QHA].

141. Florida Board of Education Rule 6A-1.094124, available at [https://www.flrules.org/Gateway/View\\_notice.asp?id=24754999](https://www.flrules.org/Gateway/View_notice.asp?id=24754999) [https://perma.cc/6NU6-SDHG].

142. Sarah Schwartz, *Lawmakers Push to Ban '1619 Project' from Schools*, EDUC. WEEK (February 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02> [https://perma.cc/4LMG-UZKV].

143. Ga. H.B. 888, available at <https://www.legis.ga.gov/legislation/61099> [https://perma.cc/EY7M-BSWR].

and, of course, as property.”<sup>144</sup> That racism is “unacceptable in the public opinion” is an especially egregious denial of the truth in Georgia, which continues to commemorate and celebrate its racist and segregationist past with its historically protected monolith celebrating confederate war heroes,<sup>145</sup> a federal courthouse named for avowed segregationist Russell B. Russell (signatory to the Southern Manifesto);<sup>146</sup> an interstate highway bridge named after governor and segregationist Lester Maddox and his wife Virginia, who closed their restaurant down rather than integrate it;<sup>147</sup> a bridge over the Savannah river named after avowed White supremacist and segregationist Eugene Talmadge,<sup>148</sup> and countless other memorials and monuments to the White supremacist “Old South.” It is difficult to say that racism should not be at the center when students are learning about Georgia’s history; especially when so many publicly erected monuments (which cannot legally be taken down)<sup>149</sup> remain front and center.

In conclusion for this section, the differences between Professor Austin’s and Professor Rosen’s thoughts about conspiracy theories reflect deep divides about the role that race plays in U.S. law and society. These ideas were contested in the 1990s are still contested today. Now, there is (1) a broader consensus for the contextualized and historic approach than

144. Stephen Ambrose, *Founding Fathers and Slaveholders*, SMITHSONIAN MAGAZINE (2002), <https://www.smithsonianmag.com/history/founding-fathers-and-slaveholders-72262393/> [https://perma.cc/KYF8-S8Q2].

145. Debra McKinney, *Stone Mountain: A Monumental Dilemma*, SOUTHERN POVERTY LAW CENTER (February 10, 2018), [https://www.splcenter.org/fighting-hate/intelligence-report/2018/stone-mountain-monumental-dilemma?gclid=CjwKCAiA24SPBhB0EiwAjBgkhnCzIceFDK79Z7LeL-5RDmrakS7qPve8b4s9YIgliE85ZyUn4JfFRoCLuIQAvD\\_BwE](https://www.splcenter.org/fighting-hate/intelligence-report/2018/stone-mountain-monumental-dilemma?gclid=CjwKCAiA24SPBhB0EiwAjBgkhnCzIceFDK79Z7LeL-5RDmrakS7qPve8b4s9YIgliE85ZyUn4JfFRoCLuIQAvD_BwE) [https://perma.cc/WP5U-F3KH].

146. KRUSE, *supra* note 129 at 219-220 (Russell particularly opposed the Civil Rights Act’s prohibition of discrimination in public accommodations because it violated Americans’ rights “to choose or select their associates.”) (source omitted).

147. *Id.* at 194-196, 220-221, 225. Before he was elected as governor of Georgia, Lester Maddox closed his Pick Rick restaurant rather than comply with a federal court order to integrate. He closed the kitchen but used the building as a memorial to “free enterprise and conservative politics” with speakers blaring fife-and-drum marches and shelves offering right-wing pamphlets. *Id.* at 225.

148. *Eugene Talmadge*, WIKIPEDIA (last edited October 23, 2022), [https://en.wikipedia.org/wiki/Eugene\\_Talmadge#:~:text=Only%20Talmadge%20and%20Joe%20Brown,the%20University%20System%20of%20Georgia](https://en.wikipedia.org/wiki/Eugene_Talmadge#:~:text=Only%20Talmadge%20and%20Joe%20Brown,the%20University%20System%20of%20Georgia) [https://perma.cc/5Z33-B7SU].

149. Ga. Code Ann. § 50-3-1 (Effective May 10, 2010) (prohibiting relocation of confederate monuments and imposing treble damages for violations).

what existed in the 1990s, but also (2) a stronger opposition on the part of conservatives who are willing to legislate to control and limit critical knowledge about race. Even though the debate was highly contentious in the 1990s, things have become even more polarized now. One thing that has changed is how messages are communicated and received. With post-modern and neoliberal culture refracted through social media, messaging has become fleeting, performative, and superficial, much less reliant on older so-called rational forms of debate like writing, serious news reporting, books, etc. Truth seems to matter less and less, even to conservatives. It is to this phenomenon that we now turn.

### III. POST-MODERN THOUGHT

Whether humans can agree on truthful facts is vital for a study of conspiracy theories. Post-modern thought has a lot to tell us about this question. In his 1996 article, Professor Rosen criticized CRT for “drawing upon strains of literary theory,” which hold that a single objective meaning is difficult to pinpoint and that a contingent approach finding meaning in text, or a set of facts, is the best way to approach knowledge.<sup>150</sup> Professor Rosen chafed at such a contingent approach to knowledge—especially as it might apply to law.<sup>151</sup> Professor Rosen was referring to post-modern literary theory and post-modern philosophy. As for literary theory, Rosen seems to be pointing to the work of Edward Said and Gayatri Spivak, both of whom argued that Western literature should be analyzed with an understanding of power dynamics. In other words, a Western European’s depiction of Egypt as an exotic, “Oriental” space should be read from the vantage point of the author’s power and place as a colonist.<sup>152</sup> A reader should understand how Western colonial writers inflicted epistemological pain on the inhabitants of other cultures, by writing narratives that negatively stereotyped other cultures and at the same time held up the clarity and nobility of European culture.<sup>153</sup>

In the field of philosophy, other post-modern writers such as Jacques Derrida and Michel Foucault articulated a theory skeptical of

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150. Rosen, *supra* note 4.

151. *Id.* (“For the law, however, the cult of contingency holds the seeds of nihilism.”)

152. See generally, EDWARD SAID, *ORIENTALISM* (Random House 1978); Gayatri Spivak, *Can the Sub-Altern Speak*, *MARXISM AND INTERPRETATION OF CULTURE* 271-313 (Cary Nelson and Lawrence Grossberg eds. U. Ill. Urbana 1988).

153. SAID, *supra* note 152, at 38-39, 145, 148.

enlightenment reason, objectivity, and “grand narratives.”<sup>154</sup> Often grouped under the umbrella of deconstructionism, these thinkers developed the general principle that there can never be complete “linguistic certainty,” and “[k]nowledge takes the form of discourses or ‘ways of speaking’ about the world which are [often] distinct and incompatible.”<sup>155</sup> Influenced by post-modern thought, Professor Roberto Unger, an early pioneer of the critical legal studies movement,<sup>156</sup> wrote that morality of reason is a construct because reason itself is based on who you are and what community you are from.<sup>157</sup> In his *New Republic* article, Professor Rosen linked post-modern thought, with its emphasis on pluralistic knowledge dethroning White European male standards, to the emergence of identity politics (although identity was not yet a buzzword in the 1990s).<sup>158</sup>

In the 1990s, there was so much consternation about the idea that cold hard facts may not be objective facts or may be perceived differently based on one’s identity.<sup>159</sup> That Black jurors might have a different view of the O.J. Simpson trial than Whites was a very freighted concept, one that brought about “incredulity and scorn.”<sup>160</sup> (Now it seems like everyday knowledge). The idea of truth and differing perceptions created tremendous cultural itchiness, as people grappled with the spectacle of President Bill Clinton’s and Monica Lewinsky’s stories as well as the differing narratives from Anita Hill and Clarence Thomas.<sup>161</sup> During the he-said/she-said conflicts of the 1990s, commentators voiced the idea that perhaps no one was intentionally lying but that the two witnesses experienced very different interpretations of the same events, similar to the characters in the classic movie *Rashomon* by Akira Kurosawa.<sup>162</sup> Other thinkers, such as Professor Ann Althouse, argued that we should not shrug

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154. MATTHEW MCMANUS, *THE RISE OF POST-MODERN CONSERVATISM: NEOLIBERALISM, POST-MODERN CULTURE, AND REACTIONARY POLITICS* 26-33 (Palgrave MacMillan 2020).

155. *Id.* at 31.

156. Critical Legal Studies, which emerged in the 1970s, was foundational to Critical Race Theory, which borrowed some of the thinking but reoriented it specifically around racial dynamics. See Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 744-745 (1993).

157. ROBERTO UNGER, *KNOWLEDGE AND POLITICS* 53-54 (Free Press 1984).

158. MCMANUS, *supra* note 154, at 28 (explaining the connection between post-modern theory and identity politics).

159. Ann Althouse, *Invoking Rashomon*, 2000 WISC. L. REV. 503 (2000).

160. Rosen, *supra* note 4.

161. For a thoughtful exposition on these two incidents in our political history, see Althouse, *supra* note 159.

162. *Id.* at 503, 506-507 (citing *Rashomon* (Janus Films 1950)).

our shoulders and move on from these conflicts but that we should “express despair at the untrustworthiness and selfishness of human beings” and decry the “egoistic lying [that] has made life hell.”<sup>163</sup>

#### IV. CONSERVATIVE POST-MODERNISM

In the 1990s, a belief in epistemological indeterminacy and the promotion of pluralistic knowledge flowed from the Left. So did critiques of reason, objectivity, and truth with a capital T. Things are different now. Now, conservative, right-wing thinkers are embracing indeterminacy, rejecting science and reason, and entertaining outlandish conspiracy theories.<sup>164</sup> We need to look at this trend to fully understand what is happening now with conspiracy theories.

Last year, political science Professor Matthew McManus artfully captured this trend.<sup>165</sup> As an example of conservative post-modernism, McManus points to lawyer, politician, and Trump advisor Rudy Giuliani, who quipped in 2018 that “truth isn’t truth.”<sup>166</sup> Other examples include Trump’s embrace of “truthful hyperbole”<sup>167</sup> and Hungarian Prime Minister Viktor Orbán’s messaging strategy, heavily based on crude signs and symbols.<sup>168</sup>

In his book, McManus traces the origins of conservative post-modernism from cultural trends (post-modern culture and neoliberal culture) and strains of pre-existing conservative philosophy. With respect to post-modernism, McManus discusses the relevant literary and philosophy theories but also surfaces the role that post-modern culture has played. Post-modern culture has been described as media-saturated, a world of signs rather than physical or material things.<sup>169</sup> Germinal post-modern cultural theorist Jean Baudrillard presciently theorized that the simulated world (such as Disneyworld) is the actual world that we live

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163. *Id.* at 518.

164. See Dylan De Jong, *Foreword in MCMANUS*, *supra* note 154, at x-xi (“Now, there is a disregard for “even the structural appearance of truth,” such as the Trump claim that his inauguration sported “the largest audience ever to witness an inauguration””).

165. MCMANUS, *supra* note 154.

166. *Id.* AT 3 (citing NBC News, *Rudy Giuliani: Truth Isn’t Truth*, MEET THE PRESS (August 19, 2018), <https://www.youtube.com/watch?v=CljsZ7lgbtw> [<https://perma.cc/QJ36-BEV2>]).

167. *Id.* Trump refers to his rhetorical strategy of using truthful hyperbole in his book *THE ART OF THE DEAL* (Ballantine 2015).

168. MCMANUS, *supra* note 154, at 4-5.

169. *Id.* at 36.



in.<sup>170</sup> In terms of rhetorical devices, post-modern culture makes great use of pastiche—signs, symbols, and snippets of text to “draw some connection to the past in the increasingly disconnected present.”<sup>171</sup> Irony and ironic distance are also frequent features of post-modern culture; its substrate of superficiality makes substantive and deep criticism difficult to achieve.<sup>172</sup> With a hat tip to Marshall McLuhan,<sup>173</sup> the ephemeral nature of post-modern culture has been greatly enabled by changes in how information is presented. Meanings have become much more superficial as lengthy print sources (newspapers and magazines and “serious” television news journalism) have given way to soundbites and video “shorts.”<sup>174</sup>

Post-modern culture concomitantly rose with neoliberal culture. Neoliberalism is a catchall phrase for post-WWII policies that insulate markets and the free flow of capital from democratic and redistributive efforts.<sup>175</sup> Neoliberalism has also been described as a kind of rigid logic where “all spheres of existence are framed and measured by economic terms and metrics, even when those spheres are not directly monetized.”<sup>176</sup> In a nutshell, neoliberalism converted the political into the economic.<sup>177</sup>

Designed to help global capitalists reduce the costs of production, neoliberalism saw production move to areas of lower-cost labor and mass migration of immigrants willing to take lower wages (resulting in lost “good jobs”).<sup>178</sup> These policies really hurt the middle class as labor markets morphed into a norm of job precarity, weakened benefits, and tenuous retirement/pension benefits.<sup>179</sup>

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170. *Id.* at 36 (Citing JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION* (Sheila Fraser trans. Mich. Univ. Press 1994)).

171. McMANUS, *supra* note 154, at 39.

172. *Id.* at 74, 77; see also David Foster Wallace, *E Unibus Pluran: Television and U.S. Fiction*, 13 *REVIEW OF CONTEMPORARY FICTION* 151, 165 (1993). As an example of post-modern irony, David Foster Wallace describes the television show *Alf*, where the puppet encourages the audience to “Eat a whole lot of food and stare at the TV!” *Id.* at 165. Wallace describes the irony (we shouldn’t *really* do these things) as a “self-nourishing” cycle. *Id.*

173. MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 1964).

174. *Id.* at 37. Shorts refers to the medium employed by TikTok and YouTube, videos between 15 and 60 seconds.

175. *Id.* at 53.

176. WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 10 (Zone Books 2015).

177. *Id.* at 17.

178. McManus, *supra* note 154, at 53, 55, 60-61.

179. *Id.* at 60-61.

At the same time, neoliberalism enacted a cultural shift. As the market became the predominant organizing principle, society shifted away from the traditional and sacred forms of identity (like traditional family roles, the Church, and other institutions).<sup>180</sup> McManus points to neoliberalism's profaning effect—what was once holy and sacred has become profaned through commodification.<sup>181</sup> While neoliberalism gave more cultural power to members of marginalized groups such as racial minorities, women, and LGBTQ+ identifying individuals, it did so in a way that promoted the growth of meritocratic hierarchies and further the flow of global capital and profit.<sup>182</sup> Neoliberalism's multiculturalism helped urbanite members of the creative class, but it wreaked havoc in rural areas, where rapidly disappearing jobs led to depression and marginalization.<sup>183</sup> Culturally, neoliberalism's embrace of cosmopolitan values trampled upon the traditional values and identities that “more rural and conservative people related to.”<sup>184</sup>

Neoliberalism emphasizes consumer choice as a strategically important way to participate in society, much more important than older, more traditional forms of civic participation.<sup>185</sup> Here, neoliberal capitalism borrowed from postmodernism, particularly its emphasis on pastiche, irony, and individual choice.<sup>186</sup> The 1990s Taco Bell advertisements, featuring a beret-wearing chihuahua modelled to look like revolutionary Che Guevara, aptly illustrate this point.<sup>187</sup> The Marxist chihuahua sells us tacos but as we watch we become “disengaged spectators who keep an ‘ironic distance’ from problems of [real] social transformation and identity.”

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180. *Id.* at 75.

181. *Id.* at 75. As an example, McManus provides the animated show South Park's ironic but sacrilegious treatment of Jesus Christ. *Id.* at 11.

182. *Id.* at 56, 58.

183. *Id.* at 15, 84.

184. *Id.* at 15.

185. *Id.* at 69.

186. *Id.* at 39.

187. *Taco Bell Chihuahua*, WIKIPEDIA (last edited November 1, 2022), [https://en.wikipedia.org/wiki/Taco\\_Bell\\_chihuahua](https://en.wikipedia.org/wiki/Taco_Bell_chihuahua) [<https://perma.cc/FVU7-WVF8>].



Figure 1 - source, <http://www.nattopping.com/2009/07/taco-souls-are-we-in-heaven.html> [<https://perma.cc/H8B2-GSH5>]

Many of neoliberalism's critics hail from the left,<sup>188</sup> but there is increasing criticism from the right.<sup>189</sup> This is important. Professor McManus compellingly argues that post-modern conservatism can be understood as both a reaction against neoliberalism and a resurfacing of pre-existing conservative thought forms.<sup>190</sup>

One of the things that the conservative post-modernist has in common with the leftist post-modernist is a distrust of reason. Conservatives tend to revere sacred, traditional, and hierarchical concepts, which conflict with objective rationality and egalitarianism. Thus, conservatives have chafed at neoliberalism's desacralization of traditional values in its quest to construct identity in pure market terms, as what one consumes and produces.<sup>191</sup> For conservatives, the desacralization process created a tremendous feeling of loss from not having the sacred and traditional to order one's life.<sup>192</sup>

Since the 1990s, a growing emphasis on multiculturalism created resentful feelings as individuals who formerly held power based on their identity (White, male, father, husband) felt a loss of power as formerly

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188. See, e.g., Zephyr Teachout, David Singh Grewal & Jedediah Purdy, *Neoliberal Law*, 77 L. CONTEMP. PROB. 215 (2014); Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. CONTEMP. PROB. 71, 88 (2014).

189. For instance, right-wing personality Tucker Carlson has criticized global capitalism for its dehumanizing characteristics. See Eric Levitz, *Why Tucker Carlson Plays a Critic of Capitalism on TV*, NEW YORK MAGAZINE, INTELLIGENCER BLOG (January 8, 2019), <https://nymag.com/intelligencer/2019/01/tucker-carlson-romney-monologue-capitalism-social-conservatives-fox-news.html> [<https://perma.cc/BE4G-YQ22>].

190. MCMANUS, *supra* note 154, at 114.

191. *Id.* at 103.

192. *Id.* at 98, 102.

marginalized groups gained more power.<sup>193</sup> The growing influence of multiculturalism did not stem solely from neoliberal forces, however. Rather, multiculturalism reflects a growing consensus that Western societies need to be more pluralistic and inclusive of all identities. Nonetheless, the drive toward inclusion and diversity has unsettled some individuals (White, male) who believe that their identity has lost currency or that their identities are under attack.

Currently, it has become hip to reject secular neoliberalism and engage with traditional and sacred ideas. Young cognoscenti, previously involved in left-leaning culture, are moving toward the right and embracing traditional, sacred, and esoteric concepts.<sup>194</sup> This trend has become known as the “vibe shift.”<sup>195</sup> The vibe shift has involved young people moving further to the right and has been sometimes underwritten by wealthy right-wing impresario Peter Thiel.<sup>196</sup>

In addition to neoliberalism’s desecralization effects, conservatives have reacted against neoliberalism’s construction of meritocratic and technocratic hierarchies.<sup>197</sup> This sentiment gets expressed as animus against out-of-touch cosmopolitan elites, ultra-wealthy or credentialed individuals who possess too much power and who don’t understand the common person.<sup>198</sup> As will be discussed more fully below, the anti-elitist animus is important for understanding today’s conspiracy theories, but it also provides a possible common ground for both left-leaning and right-leaning people, who are skeptical of high-placed people with a lot of power.<sup>199</sup>

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193. *Id.* at 152-155 (explaining that Trump’s pastiche MAGA symbol captures the belief that white males would be assuming their status at the top of the social hierarchy again).

194. See James Pogue, *Inside the New Right, Where Peter Thiel is Placing His Biggest Bets*, VANITY FAIR (May 2022), <https://www.vanityfair.com/news/2022/04/inside-the-new-right-where-peter-thiel-is-placing-his-biggest-bets> [https://perma.cc/M5K7-3KMF]; Will Harrison, *Escape from Dimes Square*, THE BAFFLER (May 24, 2022), <https://tennessee.zoom.us/j/95999494691> [https://perma.cc/872R-HVKA]; Joseph Bernstein, “Look at What We’re Doing With Your Money, You Dick”: How Peter Thiel Backed an Anti-Woke Film Festival, BUZZFEED NEWS (March 3, 2022), <https://www.buzzfeednews.com/article/josephbernstein/peter-thiel-anti-woke-film-festival-trevor-bazile> [https://perma.cc/68N5-MERN].

195. Harrison, *supra* note 194.

196. Pogue, *supra* note 194; Bernstein, *supra* note 194.

197. *Id.*

198. *Id.* at 62.

199. For a classic leftist take on anti-elite sentiment, see C. WRIGHT MILLS, *THE POWER ELITE* (1956).

Finally, McManus's intellectual history points out some interesting precursors to the contemporary post-modern conservative. As for anti-elitism, McManus points out that the father of the conservative movement, Edmund Burke, excoriated the cosmopolitan Enlightenment elitists of his day for being out of touch with the common people and for not respecting traditional identities and values, which ought to be treated with respect.<sup>200</sup> Burke also emphasized the sacred as an ordering principle, arguing that authority and tradition stemming from God should be respected over a devotion to pure reason.<sup>201</sup> Although he was skeptical of Enlightenment reason, he ultimately believed in the Enlightenment project of allowing free and liberal individuals the ability to deploy their independent reason to further their self-interest.<sup>202</sup> McManus points to Joseph de Maistre as another ancestor of post-modern conservatism. De Maistre loathed the Enlightenment figures (more so than Burke) and utterly disregarded reason because it "can only ever undermine respect for stabilizing authority."<sup>203</sup> Finally, McManus points to Judge Robert Bork as a final precursor to today's post-modern conservative. Judge Bork is important because he fleshed out the anti-elitist argument that has become central to the post-modern conservative, that there exists a "new class," a cadre of progressive actors determined to overturn the will of the common people.<sup>204</sup> Bork frames the "new class" as federal judges, government officials, and bureaucrats who together operate as the elitist enemy of the people.<sup>205</sup> Several decades later, Bork's new class has become the ultra-dangerous "deep-state" that supposedly plagues all levels of U.S. society.

There are important distinctions between the post-modernism that emerged in Europe in the 1960s, 1970s, and 1980s and post-modern conservatism. For the old-school post-modernist, there is epistemological and linguistic skepticism for reason and objectivity which is accomplished through the process of deconstruction.<sup>206</sup> For the right-leaning post-modernist, respect for the sacred and distrust of elites form the basis of the skepticism. Post-modernism from the likes of Derrida and Foucault does not contain any strains of anti-elitism. In fact, it has been faulted for being

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200. MCMANUS, *supra* note 154, at 118, 122.

201. *Id.* at 122.

202. *Id.* at 122.

203. *Id.* at 129-131.

204. *Id.* at 138.

205. *Id.* at 140 (citing Robert Bork, *Coercing Virtue: The Worldwide Rule of Judges* 5 (2002)).

206. *See supra* notes 154-157 and surrounding text.

elitist, overly academic, and out-of-touch with American sentiments.<sup>207</sup> Old school post-modernism is also not at all concerned with the religious or the sacred. On the other hand, the conservative post-modern rejects formal reason in favor of the sacred, energized by a desire to return to pre-modern modes of social organization and reject neoliberal forms of social organization.<sup>208</sup> Moreover, distrust of elites is an animating principle for contemporary post-modern conservatism and figures prominently in current right-wing conspiracy theories like QAnon and Pizzagate.

How does the post-modern conservative signal their identity? First, there are instances where conservative figures deny or question the concept of “truth.”<sup>209</sup> This aligns with a post-modernist skepticism for pure reason, particularly if this knowledge or reason can be framed as fake news from elite media outlets. Denying facts (such as how many people attended President Trump’s 2016 inauguration ceremony) as the province of “fake news” or misinformation from media elites descends from both Burke and De Maistre, who disdained the Enlightenment’s orientation toward pure reason, but it also shares similarities with Derrida, Foucault, and other continental philosophers who would deny majoritarian knowledge or at least tear it down in the deconstruction process.

Second, the influence of post-modern culture as conservative identity is heralded through pastiche and symbols.<sup>210</sup> Trump’s bright red MAGA logo (Make America Great Again) exemplifies how this works. It is a simple, short, superficial message that, in a way that Baudrillard would appreciate, “looks to the stereotypical past as presented in the simulacrum of the present.”<sup>211</sup> Conservatives have also adopted the strategies previously deployed by leftist identity politics. Conservative identities are emphasized over reason, or even the truth.<sup>212</sup>

For post-modern conservatives, “the performative enactment of traditional symbols, rituals and identities became a new form of ideological spectacle and entertainment.”<sup>213</sup> In Tennessee, where the

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207. See, e.g., Camile Paglia, *The North American Intellectual Tradition*, PROVOCATIONS 418 (2018).

208. MCMANUS, *supra* note 154, at 147.

209. See notes 5 and 166 and surrounding text (Rudy Giuliani’s remarks that “truth isn’t truth”); Mahita Gajanan, “*What You’re Seeing. . . Is Not What’s Happening.*” *People are Comparing this Trump Quote to George Orwell*, TIME (July 18, 2018), <https://time.com/5347737/trump-quote-george-orwell-vfw-speech/> [<https://perma.cc/5YYJ-W7WF>].

210. *Id.* at 151.

211. *Id.* at 152-155.

212. McManus, *supra* note 154, at 16.

213. *Id.* at 11.

author lives, conservative identity is on full display through flags and bumper stickers—Trump flags, the Gadsen “Don’t Tread On Me” flag, the Confederate Flag, and the Thin Blue Line pro-police flag.<sup>214</sup> In true pastiche fashion, the Gadsen flag is sometimes super-imposed onto the Confederate flag.<sup>215</sup> There is also a mash-up of the Thin Blue Line image with the Gadsen flag’s hyper-libertarian message.<sup>216</sup> The values in these flags do not quite line up; support for government law enforcement agents is not 100% in alignment with the anti-government sentiments conveyed in the original Gadsen flag.<sup>217</sup>

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214. *Oversized Thin Blue Line American Flag*, THIN BLUE LINE USA, [https://www.thinbluelineusa.com/products/oversized-durasleek-thin-blue-line-american-flag-sewn-embroidered?variant=40987422036&currency=USD&utm\\_medium=product\\_sync&utm\\_source=google&utm\\_content=sag\\_organic&utm\\_campaign=sag\\_organic&keyword=&gclid=Cj0KCQiAoY-PBhCNARIsABcz771sEnPLBhW5O0WgPNRYQeHfKzzL64IDav9-tWoEMld\\_uVwx\\_qUfAvQaA lH-EALw\\_wcB](https://www.thinbluelineusa.com/products/oversized-durasleek-thin-blue-line-american-flag-sewn-embroidered?variant=40987422036&currency=USD&utm_medium=product_sync&utm_source=google&utm_content=sag_organic&utm_campaign=sag_organic&keyword=&gclid=Cj0KCQiAoY-PBhCNARIsABcz771sEnPLBhW5O0WgPNRYQeHfKzzL64IDav9-tWoEMld_uVwx_qUfAvQaA lH-EALw_wcB) [https://perma.cc/GGE5-EW85].

215. *File: Gadsen Flag (Confederate Spin-off).jpg*, [https://commons.wikimedia.org/wiki/File:Gadsden\\_Flag\\_\(Confederate\\_Spin-off\).png](https://commons.wikimedia.org/wiki/File:Gadsden_Flag_(Confederate_Spin-off).png) [https://perma.cc/UVY7-6S9W].

216. *Thin Blue Line Don’t Tread on Me Sticker*, STICKER SHOPPE.COM, [https://www.stickershoppe.com/PROD/827-6054.html?gclid=Cj0KCQiAoY-PBhCNARIsABcz772tbqAkq113UTOCGYpVfhU4V46b9ffhK9vyrmBfgBlgez vWN5n1Er4aAgLcEALw\\_wcB](https://www.stickershoppe.com/PROD/827-6054.html?gclid=Cj0KCQiAoY-PBhCNARIsABcz772tbqAkq113UTOCGYpVfhU4V46b9ffhK9vyrmBfgBlgez vWN5n1Er4aAgLcEALw_wcB) [https://perma.cc/MTU5-7EQE].

217. See Rob Walker, *The Shifting Symbolism of the Gadsen Flag*, THE NEW YORKER (October 2, 2016), <https://www.newyorker.com/news/news-desk/the-shifting-symbolism-of-the-gadsden-flag> [https://perma.cc/8UN6-N2QZ] (“[T]he Gadsden flag has become a favorite among Tea Party enthusiasts, Second Amendment zealots—really anyone who gets riled up by the idea of government overreach.”)



Figure 2 - source, [https://commons.wikimedia.org/wiki/Category:Gadsden\\_flags](https://commons.wikimedia.org/wiki/Category:Gadsden_flags) [<https://perma.cc/8JEQ-J3XK>]



Figure 3 - source, <https://www.a1flagsnpoles.com/shop/dont-tread-on-me-rebel-flag/> [<https://perma.cc/M458-KLAV>]



Figure 4 - source, [https://www.stickershoppe.com/PROD/827-6054.html?gclid=CjwKCAiAxJSPBhAoEiwAeO\\_fP9k6DhJ7flw20xwycOjnl9BFvGdxg-c3eBPkF36IhtqzMI3pzHG\\_MhoC-IwQAvD\\_BwE](https://www.stickershoppe.com/PROD/827-6054.html?gclid=CjwKCAiAxJSPBhAoEiwAeO_fP9k6DhJ7flw20xwycOjnl9BFvGdxg-c3eBPkF36IhtqzMI3pzHG_MhoC-IwQAvD_BwE) [<https://perma.cc/5P4A-9879>]



The post-modern conservative's respect for the sacred is visible in another popular flag that proclaims, "Jesus Is My Savior" and "Trump is my President."<sup>218</sup> Finally, post-modern irony is on full display with the popular slogan "Let's Go Brandon," which definitely is not a cheer for NASCAR driver Brandon Brown, but a crude insult hurled at President Biden.<sup>219</sup> And of course, now one can buy a Let's Go Brandon flag.<sup>220</sup>

#### V. POST-MODERN THEORY, CRITICAL THOUGHT, AND CONSPIRACY THEORIES

At this point, a formal working definition of a conspiracy theory is necessary. Researchers Jan-Willem van Prooijen & Karen Douglas provide a helpful definition—a conspiracy theory is a set of "explanatory beliefs about a group of actors that collude in secret to reach malevolent goals."<sup>221</sup>

Now, let's think about how post-modern and critical forms of thought connect conspiracy theories. There is a theme in both critical thought, like CRT, and post-modernism, that powerful actors benefit from either majoritarian knowledge structures (i.e., The Western European approach to reasoned description) or from the set-up of an institution's infrastructure (i.e., how merit is assessed and deputized in the educational credentials game). Critical and post-modern theories can be viewed as conspiratorial for their searching belief that powerful institutions benefit from status quo forms of thought.

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218. *Jesus is My Savior Trump is My President 3x5 Flag double sided*, WALMART.COM, <https://www.walmart.com/ip/Jesus-Is-My-Savior-Trump-Is-My-President-3-X5-Flag-Double-Sided-Rough-TeX-100D/213607960?wmlspartner=wlp&selectedSellerId=101009544&&adid=2222222227350885528&wl0> [https://perma.cc/C3RY-CY3R].

219. Colleen Long, *How 'Let's Go Brandon' Became Code for Insulting Joe Biden*, A.P. (Oct. 20, 2021), <https://apnews.com/article/lets-go-brandon-what-does-it-mean-republicans-joe-biden-ab13db212067928455a3dba07756a160> [https://perma.cc/ZX46-5RVK].

220. *Let's Go Brandon Grommet Flag*, FLAGWIX, [https://flagwix.com/products/lets-go-brandon-grommet-flag-thh3672gf/?attribute\\_size=3x5+ft.&attribute\\_type=No+Flag+Pole+Rings&gclid=CjwKCAiA\\_omPBhBBEiwAcg7smYChAVNkzIx0Y9zjgZOKYLeq0Z-GXiIyVQQmmMY7SB39tVKVWHqj7hoCwNAQA\\_vD\\_BwEj](https://flagwix.com/products/lets-go-brandon-grommet-flag-thh3672gf/?attribute_size=3x5+ft.&attribute_type=No+Flag+Pole+Rings&gclid=CjwKCAiA_omPBhBBEiwAcg7smYChAVNkzIx0Y9zjgZOKYLeq0Z-GXiIyVQQmmMY7SB39tVKVWHqj7hoCwNAQA_vD_BwEj) [https://perma.cc/ASY3-MFGE].

221. Jan-Willem van Prooijen & Karen M. Douglas, *Belief in Conspiracy Theories: Basic Principles of an Emerging Research Domain*, 48 EUROPEAN JOURNAL OF SOCIAL PSYCHOLOGY 897, 897 (2018).

Some have referred to post-modern thought as a conspiracy theory in and of itself. In his immensely readable typology of conspiracy theories, Robert Anton Wilson pointed out that:

Even [a]cademia has its own brands of conspiracy theory, or something much like it. The two leading schools of art/culture criticism, known as [d]econstructionism and [p]ost-[m]odernism amount to seeking, and usually finding, ulterior motives in an body's model or narrative about the human situation, whether that 'narrative' appears as a play by a genius such as Shakespeare or just a TV sitcom; or as a novel, a film, a documentary film, a sculpture, a grand opera, a painting; or as an alleged finding social science, or even an ordained law in the hard sciences; or as a political or religious faith. . . .the [d]econstructionists leave one feeling that no communication can be trusted to say what it means or to mean what it says.

Critical thought, particularly the idea that racism inhabits the infrastructure of U.S. institutions and structures, has also been called out as a conspiracy theory.<sup>222</sup> In *Grutter v. Bollinger*, Justice Clarence Thomas referred to the theory that high-stakes standardized tests (like the LSAT) stack the odds against marginalized test-takers in a biased way as a "conspiracy theorist's belief that 'institutional racism' is at fault for every racial disparity in our society."<sup>223</sup>

Second, conspiracy theories overlap with post-modern thought in that they do not embrace pure reason. The reasoning is distorted and faulty, what Professors Cass Sunstein and Adrian Vermeule refer to as a "crippled epistemology."<sup>224</sup> Conspiracy theorists tend to use intuitive and emotional thinking rather than logical analysis to forge their beliefs.<sup>225</sup> They rely on an overly narrow limited set of data to form their conclusions.<sup>226</sup> Conspiracy theorists also attribute causation and intent upon a set of facts when the outcome is really the result of complex forces, not intentional

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222. See Kathryn Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 BOSTON COLLEGE L. REV. 1252, 1299 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 377 (Thomas, J., concurring in part)).

223. *Grutter*, 539 U.S. at 377 (Thomas, J., concurring in part).

224. Adrian Vermeule & Cass Sunstein, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 204 (2009).

225. Prooijen & Douglas, *supra* note 221, at 901; Sunstein & Vermeule, *supra* note 224, at 216.

226. Sunstein & Vermeule, *supra* note 224, at 204.

machinations.<sup>227</sup> On the other hand, conspiracy theorists sometimes mimic the intense logical style of rational argument while missing important analytic connections.<sup>228</sup> Senator Eugene McCarthy's 96-page pamphlet on alleged communist conspiracies contained 313 footnotes.<sup>229</sup> John Birch Society founder Jack Welch's assault on Eisenhower contained over 100 pages of bibliography and notes. Notably, both McCarthy and Welch were trained at U.S. law schools, McCarthy at Marquette Law School, Welch at Yale Law School (though he never graduated). There may be some connection between legal education and conspiracy thinking, but this inquiry is beyond the scope of this article.<sup>230</sup>

#### VI. WHY DO PEOPLE BELIEVE IN CONSPIRACY THEORIES?

The overlap between conspiracy theories and post-modern/critical thought ties some of the threads in this paper together, but we must also inquire into the *why* of conspiracy theories. Why do people believe in these theories and what can these theories teach us about social relations wrought large in U.S. society?

Relevantly, there are four other concepts that shed light on conspiracy theories. The first is atavistic. "Human brains need to recognize dangerous situations, and we are hardwired to seek patterns, to find order in chaos, and to exert control where none can be found."<sup>231</sup> Looking for patterns is something that helped us survive in more primitive times. This helpful practice of pattern perception continues today, but it has gone off the rails. Now, some people see nefarious plots within the vast information landscape we all have access to. The tendency to see a pattern in everything partially explains the QAnon phenomenon, where the conspiracy theory is crowdsourced by thousands who claim to see the presence of "an elite [cadre] of Satan-worshipping pedophiles purportedly

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227. Prooijen & Douglas, *supra* note 221, at 901; Sunstein & Vermeule, *supra* note 224, at 208.

228. See, e.g., Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAGAZINE (November 1964) (electronic version).

229. *Id.*

230. For an exposition on the connections between legal education, legal thinking, and psychological disorders, see Jewel, *Does the Reasonable Man Have OCD?*, *supra* note 79.

231. Mike Rothschild, *Why Does the QAnon Conspiracy Thrive Despite All its Unfulfilled Prophecies?*, TIME (June 30, 2021), <https://time.com/6076590/qanon-conspiracy-why-people-believe/> [<https://perma.cc/S3H2-6BBM>].

practic[ing] cannibalism, with the intent of ingesting a life-sustaining chemical (“adrenochrome”) from their victims.”<sup>232</sup>

Second, conspiracy theories align with our deep-seated need to feel in control and believe in a straightforward story. “The negative emotions that constitute the psychological origins in belief in conspiracy theories include anxiety, uncertainty, or the feeling that one lacks control.”<sup>233</sup> “[C]onspiracy theories are more appealing than the truth because they offer the possibility of control.”<sup>234</sup> Conspiracy theories so often arise from terrible events (Sandy Hook, 9-11, etc.) because they deeply satisfy the primeval itch to understand a cause and to place blame.<sup>235</sup> Conspiracy theories rationalize and relieve at the same time.<sup>236</sup> Conspiracy theories offer the same sense of control that playing online video games offer.<sup>237</sup> “To partake of a conspiracy theory like the crowd-sourced QAnon theory, is “to be part of a grand army, with flags and badges, secret codes, forbidden weapons, and daring comrades, all directed to saving the world from the worst forms of villainy.”<sup>238</sup>

The third explanation for conspiratorial thinking involves group dynamics. Theorizing within one’s community creates an incredibly strong bond that brings people together and keeps them there.<sup>239</sup> However, when thinking occurs in groups, a polarizing effect occurs which can cause some members of the group to shift their thinking away from the center and further toward the fringe.<sup>240</sup> Social media greatly amplifies this effect, it “makes people less informed but more partisan.”<sup>241</sup>

Fourth, a scapegoating effect is inherent in many conspiracy theories. Polymath René Girard connected scapegoating with the ancient practice of human sacrifice, one of humankind’s earliest methods for creating social cohesion. When a community faced an “overwhelming catastrophe,

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232. Gary Drevitch, *Why People Embrace Conspiracy Theories*, PSYCHOLOGY TODAY (April 3, 2021), <https://www.psychologytoday.com/us/blog/the-pathways-experience/202104/why-people-embrace-conspiracy-theories> [https://perma.cc/Z2HH-YHCK].

233. Prooijen & Douglas, *supra* note 221, at 901.

234. Jennifer Latson, *The Mind of a Conspiracy Theorist*, PSYCHOLOGY TODAY (November 3, 2020), <https://www.psychologytoday.com/us/articles/202011/the-mind-conspiracy-theorist> [https://perma.cc/AU6V-Y7MC].

235. Sunstein & Vermeule, *supra* note 224, at 213.

236. *Id.*

237. Drevitch, *supra* note 232.

238. *Id.*

239. Rothschild, *supra* note 231.

240. Sunstein & Vermeule, *supra* note 224, at 216-218.

241. GLENN HARLAN REYNOLDS, *THE SOCIAL MEDIA UPHEAVAL* 13-14 (Encounter Books 2019).

[it] hurl[ed] itself blindly into the search for a scapegoat.”<sup>242</sup> The violence within the community is deflected onto a single sacrificial victim; the sacrifice or expulsion of the scapegoat ritually and sacredly purged the community of its ills.<sup>243</sup> Writing in 1972, Girard noted that in modern times, scapegoated individuals were often subjected to shame, ostracism, and ridicule, social acts that carried out the expulsion process.<sup>244</sup>

With respect to scapegoating, the first observation is that conspiracy theories often target a group or a powerful individual as a scapegoat, a known entity or identifiable group upon which blame can be laid.<sup>245</sup> Scapegoating happens in both right-leaning<sup>246</sup> or left-leaning<sup>247</sup> theories. For instance, in the 9-11 conspiracy theory, George W. Bush and his pro-War allies were the scapegoats responsible for planning and carrying out the 9-11 attacks on the American people.<sup>248</sup> In the Pizzagate conspiracy theory, Hillary Clinton and her campaign manager John Podesta are the named scapegoats responsible for running a child trafficking ring.<sup>249</sup>

The second observation is that individuals who engage in conspiracy thinking feel that they themselves have been scapegoated through the process of social or racial marginalization and ostracization. Research indicates that marginalized groups that feel stigmatized and powerless are more likely to believe in conspiracy theories.<sup>250</sup> Members of marginalized groups retain a stronger in-group identity, and a strong in-group identity produces a “circle the wagons” belief that more powerful groups are out to get them.<sup>251</sup> In other words, in this process, the scapegoats make their

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242. RENÉ GIRARD, *VIOLENCE AND THE SACRED* 90 (Bloomsbury 2017). As an example of such a catastrophe, Girard provides patricide and incest detailed in Sophocles’ *Oedipus*. *Id.*

243. *Id.* at 87-88, 90.

244. *Id.* at 289.

245. Austin, *supra* note 3, at 1045 (explaining that conspiracy theorizing can indulge in the “worst sort of stereotyping and scapegoating”).

246. *See generally*, Hofstadter, *supra* note 228 (discussing right-wing conspiracy theories from the 1950s and 1960s).

247. Ryan Neville-Shepard, *Paranoid Style and Subtextual Form in Modern Conspiracy Rhetoric*, 83 S. COMM’N J. 119, 123 (2018) (discussing 9/11 conspiracy theories, a left-leaning theory); Austin, *supra* note 3, at 1045 (I am categorizing Austin’s anti-Black conspiracy theories as left-leaning).

248. Neville-Shepard, *supra* note 247, at 119, 123.

249. Michael Sebastian & Gabrielle Bruney, *Years After Being Debunked, Interest in Pizzagate is Rising—Again*, *ESQUIRE* (July 24, 2020), <https://www.esquire.com/news-politics/news/a51268/what-is-pizzagate/> [https://perma.cc/MKV3-8E6D].

250. Prooijen & Douglas, *supra* note 221, at 898, 903.

251. *Id.* at 902.

own scapegoats.<sup>252</sup> With respect to conspiracy theories, sometimes groups are shamed and stigmatized, not for believing in conspiracy theories, but for choosing not to believe in an official narrative that is promulgated by elites. For instance, Charles Eisenstein has compellingly applied René Girard's sacrificial victim/scapegoat theory to societal treatment of those who have chosen not to get vaccinated.<sup>253</sup>

Finally, scapegoating is much more than a neat explanation for how members of communities and societies hold themselves together in the face of tragedy and violence. The shame that is levied against scapegoats has lasting, tragic consequences on the individual. Social media compounds the shaming effect ten-fold.<sup>254</sup> Shame is "the primary and ultimate cause of all violence, whether toward others or toward the self."<sup>255</sup> Causing a cascade of negative psychological effects, shame compounds the original wrong.<sup>256</sup> Basic human decency demands that shaming should not be part of our rhetorical toolkit no matter what point we are trying to make.

#### CONCLUSION—ARE THERE LESSONS IN THESE THREADS?

I think that there are lessons in these threads and in this last section, I'll try to point out what they are. First, I think that epistemology is not a black and white proposition. The view that reason is wholly indeterminate, unreliable, and the product of Western European malefactors is not productive. On the other hand, pure Enlightenment reason is not the answer either. Reasoning can and should be more pluralistic and inclusive. We can now accept that experiences and origins produce different ways of knowing. Collective, rather than individual, circular, rather than linear, and dualism rather than onanism are all valid thought forms that we can exercise in a collective pursuit of knowledge.<sup>257</sup> Professor Charles Mills, who wrote a searing analysis of the racism inherent in much of enlightenment philosophy, remained hopeful that a form of liberalism

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252. Neville-Shepard, *supra* note 247, at 1042.

253. Charles Eisenstein, *Mob Morality and the Unvaxxed*, SUBSTACK (August 1, 2021), <https://charleseisenstein.substack.com/p/mob-morality-and-the-unvaxxed> [https://perma.cc/BKJ2-Y2SG].

254. JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015).

255. JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 110-11 (1992).

256. James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. R.* 563, 574 (2015).

257. *See generally*, Lucy Jewel, *Comparative Legal Rhetoric*, 110 *KY. L.J.* \_\_ (forthcoming 2022).

could be constructed that incorporated feminism, Black radicalism, and even Marxism.<sup>258</sup> I too remain hopeful for projects such as these.

In the context of the so-called stolen 2020 election, we've seen Trump-aligned lawyers (Sidney Powell and Lin Wood were the most public facing) face professional discipline for propagating, in court, theories that have no factual basis.<sup>259</sup> Judge Linda Parker of the Eastern District of Michigan sanctioned the lawyers for "proffering claims not backed by law [and] proffering claims not backed by evidence (but instead, speculation, conjecture, and unwarranted suspicion)."<sup>260</sup> In the context of the law, these lawyers violated Rule 11 of the Federal Rules of Civil Procedure and Rule 3.1 of Professional Conduct. In other words, these lawyers filed pleadings based on false and baseless conspiracy theories. In order for the law to do its job and in order for the public to keep faith in our legal system, reason and truth must be re-enshrined. In our polarized world, in left-leaning spaces, there is an immense amount of anger and resentment for Trump and his allies for not telling the truth. There is no patience for a therapeutic approach that might explain away the lying as differences in perception. On this point, left-leaning folks can cite the right and libertarian-leaning theorists in the 1990s, who proclaimed disgust for lying, but hope for the truth.<sup>261</sup>

It is a bad idea to label conspiracy theorists as "paranoid"<sup>262</sup> or suffering from a "crippled epistemology."<sup>263</sup> In mulling all this over, it is

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258. Jamelle Bouie, *The World Lost a Great Philosopher This Week*, THE N.Y. TIMES (Sept. 25, 2021), <https://www.nytimes.com/2021/09/25/opinion/charles-w-mills-dead.html> [<https://perma.cc/P3EQ-KLPD>] (discussing the legacy of Charles Mills).

259. Alison Durkee, *Here Are All The Places Sidney Powell, Lin Wood, and Pro-Trump Attorneys Could Also be Punished for 'Kraken' Lawsuit after Michigan Sanctions Ruling*, FORBES (August 26, 2021), <https://www.forbes.com/sites/alisondurkee/2021/08/26/here-are-all-the-places-sidney-powell-lin-wood-and-pro-trump-attorneys-could-also-be-punished-for-kraken-lawsuits-after-michigan-sanctions-ruling/?sh=5e9a3e43e1aa> [<https://perma.cc/R59R-4Q8N>]; David Wickert, *Judge Refers Former Atlanta Attorney for Disbarment in Election Lawsuit*, THE ATLANTA JOURNAL CONSTITUTION (August 25, 2001), <https://www.ajc.com/politics/election/judge-refers-former-atlanta-attorney-for-disbarment-in-trump-lawsuit/K2ENUUPTMJDPXAKT6DVE4YKEQA/> [<https://perma.cc/C5X6-8XG6>].

260. *King v. Whitmer*, Opinion and Order, Case No. 20-13134 (E.D. Mich. 2020) available at [https://www.michigan.gov/documents/ag/172\\_opinion\\_\\_order\\_King\\_733786\\_7.pdf](https://www.michigan.gov/documents/ag/172_opinion__order_King_733786_7.pdf) [<https://perma.cc/3FWE-N7N6>].

261. See, e.g., Althouse, *supra* note 159.

262. Hofstadter, *supra* note 228.

263. Sunstein & Vermeule, *supra* note 224, at 204.

important to note that sometimes conspiracy theories end up being true. After all, Watergate technically met the definition of a conspiracy theory.<sup>264</sup> The FBI's domestic spying on and, in the case of Fred Hampton, killing of, Black civil rights activists were also a conspiracy theory that turned out to be true.<sup>265</sup> It is possible that right-leaning conspiracy theories might turn out to be true.

Further, because of the unproductive effects that come from shaming and scapegoating, it would be better to look for the underlying social and political subtexts behind the beliefs.<sup>266</sup> As a thinker with leftist leanings, I can see that members of stigmatized racial minorities lack political, culture, and social power and, accordingly, might turn to conspiracy theories as a way to establish a voice.<sup>267</sup> But what about the adherents of these current right-wing conspiracy theories? In the typical leftist narrative, they hold power and privilege. Is there a grain of truth in the idea that individuals with conservative, religious beliefs are stigmatized or at least concretely feel stigmatized by liberal, secular, neoliberal society?<sup>268</sup> There could be. Reading writers that straddle both left and right on this issue could help find the contours of connecting bridges.

In keeping with this essay's 1990s theme, historian Christopher Lasch (who died in 1994) exemplifies the kind of iconoclastic neither right nor left thinking that might create a consensus.<sup>269</sup> Writing in Harper's

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264. *Id.* at 206.

265. Devlin Barrett, *FBI Pressured to Answer for Domestic-Spying Program Tied to Black Panther Fred Hampton's Killing in 1969*, THE WASHINGTON POST (May 4, 2021), [https://www.washingtonpost.com/national-security/fred-hampton-black-panthers-fbi-surveillance/2021/05/04/2b12f826-acd7-11eb-b476-c3b287e52a01\\_story.html](https://www.washingtonpost.com/national-security/fred-hampton-black-panthers-fbi-surveillance/2021/05/04/2b12f826-acd7-11eb-b476-c3b287e52a01_story.html) [<https://perma.cc/4C4C-65FU>].

266. See Neville-Shepard, *supra* note 247, at 122 (discussing the subtext of conspiracy theories); Austin, *supra* note 3, at 1033 (discussing symbolic truths inherent in conspiracy theories).

267. See Austin, *supra* note 3, at 1032.

268. Professor Lisa Pruitt has engaged with this question, at least in the context of a rural, white, and working-class identity. See Lisa J. Pruitt, *Acting White: Or Acting Affluent: A Book Review of Carbado & Gulati's Acting White: Rethinking Race in Post Racial America*, 18 J. GENDER RACE & JUST. 159 (2015-2016); Lisa R. Pruitt, *Who's Afraid of White Class Migrants*, 31 COLUMBIA J. OF GENDER & LAW 196 (2015); Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. 289 (2016); Lisa R. Pruitt, *The Women Feminism Forgot: Rural and Working-Class White Women in the Era of Trump*, 49 U. TOL. L. REV. 537 (2018).

269. See, e.g., CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES* (W.W. Norton 1995); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (W.W. Norton 2018).



Magazine in 1992, just as Bill Clinton was just about to secure the presidency, Lasch criticized Hillary Clinton's big government attitudes toward the family.<sup>270</sup> At this time, Hillary Clinton dedicated a great amount of her work to the ideal of children's rights. Lasch reviewed a number of her law review articles and writings and criticized her idea that there should be more federal government institutions dedicated to caring for children—preschool, aftercare, parenting skills training, etc.<sup>271</sup> Lasch's essay is also relevant because the subject is Hillary Clinton, who, thirty years later, became a focal point in the Pizzagate and QAnon conspiracy theories, both of which hold that Hillary Clinton is at the center of a child-trafficking ring.<sup>272</sup> Was there something in Hillary Clinton's ideas that generated the distorted logic that would put her into the QAnon and Pizzagate conspiracy theories?<sup>273</sup>

In the Harper's essay, Lasch took aim at Clinton's view that families are not capable of raising children so the state must intervene and take over.<sup>274</sup> In particular, Lasch pointed to Clinton's arguments that families, particularly low-income and less educated families, needed help from experts on how to talk to their children and raise their children.<sup>275</sup> To counter Clinton's positions, Lasch cited influential urban theorist Jane Jacobs, who persuasively argued that professional governmental supervision would always be inferior to informal systems like densely populated neighborhoods peppered with community institutions like churches and corner stores.<sup>276</sup>

The best defense against the state [intervening into the family home] is the informal authority exercised by the family, the neighborhood, the church, the labor union, and all those other intermediary institutions that make it possible for communities to educate, discipline, and take care of themselves without falling on

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270. Christopher Lasch, *Hilary Clinton, Child Saver*, HARPER'S MAGAZINE 74 (October 1992) [hereinafter Lasch, *Hilary Clinton, Child Saver*].

271. *Id.* at 76-78.

272. The hosts of The Red Scare podcast expressly linked Lasch's ideas about Hillary Clinton, especially her ideas about children, with the actual beliefs of the QAnon conspiracy. *Vaccination Victim*, RED SCARE PODCAST (May 1, 2021), <https://redscarepodcast.libsyn.com/vaccination-victim> [https://perma.cc/5T8H-ARPF].

273. Lasch, *Hilary Clinton, Child Saver*, *supra* note 270, at 76-78.

274. *Id.* at 77.

275. *Id.* at 78-80.

276. *Id.* at 78 (citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (Vintage Books 1992)).

the state.<sup>277</sup>

The Lasch essay is refreshing, not just because he takes up the conservative concern for a boundless state, but also because he concurrently identifies untrammelled free market capitalism as obstructing what families really need.<sup>278</sup> An equal opportunity skeptic, Lasch indicts free-market ideology, with its celebration of the individual, capitalist entrepreneur, for failing to give children “a protected space to grow up in” free from the “intrusive commercialism that corrupts the young and undermines parental authority.”<sup>279</sup> Recently, right-wing impresario and Trump advisor Steve Bannon touted Lasch as an influential thinker who rightly condemned East and West coast elites, on both the right and the left.<sup>280</sup> However, as the thoughtful podcast *Know Your Enemy* recently pointed out, hard-right conservatives like Bannon have emphasized Lasch’s anti-elitism but disregarded his concern for the erosion of democratic ideals and institutions.<sup>281</sup>

Lasch’s prescient essay (as well as his other writings) aimed at two targets, anti-neoliberalism and anti-elitism, both of which are receiving airplay in today’s distorted political landscape. Although the word neoliberal was not in vogue in the 1990s, Lasch’s point about the harms of ubiquitous consumer culture and commercialism can be read as anti-neoliberal. Thirty years later, there is overlap on both the right and the left, in a rigorous skepticism for the idea that global capital and finance should provide the organizing principles for all of society. A growing consensus that the power of global capital should be tamed offers hope for solutions that move beyond tired left/right positions.

And, although he did not use the word “elitist,” Lasch’s Harper’s essay is most certainly anti-elitist, in its argument that regular people and regular families are better suited to raising their children than a vast array of federal actors deputized to do the job. With respect to contemporary right-leaning conspiracy theories, anti-elitism (the nefarious cabal of deep state elites in cahoots with Hillary Clinton) is a strong undercurrent. We should

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277. *Id.* at 77-78.

278. *Id.* at 81-82.

279. *Id.* at 82.

280. See Jonathan Swan, *The One Book to Understand Steve Bannon*, AXIOS (March 7, 2017), <https://www.axios.com/2017/12/15/the-one-book-to-understand-steve-bannon-1513300787> [<https://perma.cc/YUL5-MXU5>].

281. *Christopher Lasch’s Critique of Progress (with Chris Lehman)*, KNOW YOUR ENEMY PODCAST, (August 11, 2022), <https://know-your-enemy-1682b684.simplecast.com/episodes/back-to-lasch-w-chris-lehmann> [<https://perma.cc/ZWA4-EYAX>].

pay attention to the subtext within these narratives, as distorted as the surface logic is.

Notably, conspiracy theories attract because of the absence of social stratification based on merit. There is no hierarchy in conspiracy theory land—experts, participants, enthusiasts, lay people—are all treated as having equal merit.<sup>282</sup> Second, both left-leaning and right-leaning conspiracy theories utilize the trope of bad elites. This is visible in QAnon’s contention that a vast, “deep-state” of elite government actors threaten conservative values.<sup>283</sup> Anti-elitism is found in the Black conspiracy theories that Professor Austin studied, particularly in the belief that U.S. corporate actors created the Norplant birth control device as a form of Black genocide or that elites in the U.S. government created the AIDS virus and crack cocaine.<sup>284</sup>

Anti-elitism, however, can be weaponized and used against marginalized and minoritized people who make it to the top and acquire elite credentials. This was visible during the nomination and confirmation of Justice Ketanji Brown Jackson, when South Carolina Senator Lindsay Graham criticized her for graduating from Harvard University (B.A.) and Harvard Law School (J.D.).<sup>285</sup> In this situation, though, Graham pitted Justice Jackson against another Black, liberal candidate, J. Michelle Childs, who hailed from a more working-class background and received her degrees from the University of South Florida (B.A.) and the University of South Carolina (J.D.). In this performance, Graham signaled his right-leaning anti-elitism, but did so in a highly politicized way that attacked the democratic consensus building around Justice Jackson. We must be careful when we talk about anti-elitism and understand that some commentators deploy the elitist label to denigrate successful minoritized people through a divide and conquer technique. That said, elite credentials are such a necessary stamp for Supreme Court membership that it is highly unlikely that we would ever confirm a justice like Thurgood Marshall today, who graduated from Howard Law School, a historically Black institution.<sup>286</sup>

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282. See Neville-Shepard, *supra* note 247, at 123.

283. Drevitch, *supra* note 232.

284. Austin, *supra* note 3, at 1025-26, 1033.

285. See, e.g., Guy Nave, *Judge Ketanji Brown Jackson criticized for having a Harvard Education*, *Momentum Blog*, MEDIUM.COM. (Feb. 25, 2022) <https://momentum.medium.com/judge-ketanji-brown-jackson-criticized-for-having-a-harvard-education-dbc6a0a522a5> [<https://perma.cc/KZA7-K7E6>].

286. See generally, BENJAMIN J. BARTON, *INSIDE THE CREDENTIALLED COURT: INSIDE THE CLOISTERED, ELITE SUPREME COURT* (Encounter Books 2022).

Plain and simple, these anti-elitist theories operate on a logic that people with power, experts whose authority is based on “merit,” are controlling the lives of ordinary people in depraved ways. While debunking these harmful conspiracy theories is one valid goal.<sup>287</sup> But the problem of conspiracy theories also poses the question of how government actors, officials, academics, and other “elites” can communicate in a way that builds trust rather than distrust and resentment. If we want to encourage a deliberative democracy that eschews troubling false narratives, we must consider both the role of reason, the need for belongingness, and the ways that elitism might breed these theories.

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287. Professors Sunstein and Vermeule offer an interesting strategy involving covert counter-information agents as well as official government speech. *See* Sunstein & Vermeule, *supra* note 224, at 204.