Introduction

Rebuilding Civil Rights

We are at a crossroads.

Our civil rights laws, and the vision that animates them – the vision of an integrated and nondiscriminatory society with equal access for blacks, women, and other disadvantaged groups, to quality education, fair housing, the enjoyment of public spaces, and employment opportunities, along with political participation, voting rights, and the equal protection of laws – have long been held by wide swaths of both popular and elite political opinion to constitute, collectively, a moral lodestar, both here and abroad. The substantial legal strides taken in the United States during the last half of the twentieth century and the first twenty years of this one, toward fulfilling the more particular promises of those laws – including the promise of integrated public schools made by the Supreme Court in 1954 in *Brown v. Board of Education*,[1] the promise of full and equal participation in political life made by the Voting Rights Acts of 1965,[2] the promise of the equal enjoyment by all races of public spaces and modes of transportation, entertainment, and commerce, commencing with the nineteenth-century's Civil Rights Acts but significantly expanded and strengthened in the twentieth century,[3] and the various promises explicitly extended in our Civil Rights Laws of the 1960s, 1970s, 1980s, and 1990s, of equal opportunity in, and access to, the private spheres of employment and housing[4] – collectively, have been likewise widely regarded as the greatest legal achievement of the last seventy-five years, spreading across

[1] 347 U.S. 483 (1954).
[2] The Voting Rights Act, 42 U.S.C. §§ 1973–1973bb-1.
[3] The Civil Rights Act (Public Accommodations) 42 U.S.C. § 2000a(a).
[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; Title IX, 20 U.S.C. §§ 1681–1688 (1972); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2013); Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 et seq.; Fair Housing Act, 42 U.S.C. § 3601.

all branches of government and impacting all sectors of social life.[5] That legal revolution – the totality of these laws and decisions – required the transformative legal advocacy of civil rights lawyers and judges during the early and mid decades of the twentieth century, the leadership, moral vision, and political skills of numerous Senate and House leaders and two presidents, the martyrdom of Medgar Evans, Malcolm X, Martin Luther King, Jr., and Robert Kennedy, the courage and perseverance of countless soldiers of the civil rights movements of the middle quarters of the twentieth century, and the generous imagination, legal acumen, and devotion of the mature civil rights legal community over the last thirty years, who won extensions of those victories on behalf of the aged, the disabled, and then sexual and gender minorities. Many of the legal figures in this monumental legal revolution have been and still are widely and rightly honored as national heroes, honors which have in turn ennobled the legal struggles they collectively pursued and largely achieved.

It is not hyperbole to suggest that the result of their cumulative legal effort is that the civil rights vision itself – the vision of an integrated society, freed of discriminatory animus and bias and of the effects of that animus – is now a central cornerstone of the American dream. It has, for example, blended seamlessly with the deeply embedded narrative of hearty individualism and robust self-determination and liberty that for many people defines America: the familiar and profoundly liberal promise that anyone can do anything to which they set their minds and hearts, so long as within their innate ability. The civil rights-based modification of that vision is now secure. Any individual, we now hold – and promise our children – regardless of their race or ethnicity or religion or sex or sexual orientation or gender identity or age or disability, can achieve up to or beyond their God-given potential. There are no *outsiders* to the American dream, the American promise, or the American commitment to that dream and promise. No one will be *held back* in their individualistically determined pursuits, or, at least, no one will be held back by racism, sexism, heterosexism, able-ism, ageism, or the discriminatory policies those inclinations and biases have too long permitted to flourish.

It is a striking feature of contemporary life in the US, then, that despite this seeming near-universal celebration of the twentieth-century civil rights movement – despite the lauding of the movement's goals, and the presence in our schools' curricula of its heroes, as well as the presence of their visages on our

[5] For a powerful endorsement and defense of this characterization of the "civil rights revolution," *see* Bruce Ackerman, The Civil Rights Revolution (2013). I briefly critique Ackerman's thesis in the final chapter and Conclusion of this book.

stamps and currency; the government holidays celebrating their births, and the monuments to their words and triumphs – *dis*satisfaction with, and dissension from, the *civil rights laws themselves* – the primary achievement of that movement, and the means by which we seek to enforce its ideals – are now sky-high in the United States. Most visibly, of course, in 2016 US voters elected a president who ran on a campaign platform of xenophobia, who is openly supported by white supremacists, who unapologetically sexually assaults women, and who has, as president, surrounded himself with like-minded advisers who share his own history and profile of racial and ethnic callousness, his loathing contempt for outsiders, and his misogynistic crudity. But – *but* – criticism of and dissension from civil rights law has by no means been limited to the narrow band of xenophobia and white nationalism that motivates much of the Trump administration. Rather, criticism of the direction of those laws, of civil rights enforcement, and perhaps mostly of the content of the civil rights *consciousness* those laws instill, has come from virtually all points on the political spectrum, by no means only the alt-right, at least over the forty years or so, and for some, much longer. Thus: right-wing-leaning libertarians have contended for decades, essentially from the passage of the 1964 Civil Rights Acts themselves up to the present, and without any trace of Trumpian-styled racial animus or white nationalist sentiment, that whatever might be true of the necessity of nondiscrimination law and principles for purposes of governmental decision-making, market forces and the profit motive would ferret out and eventually eliminate racism and sexism in private markets, including housing and employment, far more efficiently than could any particular set of legal pronouncements.[6] Social conservatives, likewise devoid of racial or ethnic animus, and again from the time of the passage of the 1964 Acts themselves, have wanted to place their bets on education and moral uplift, rather than legal compulsion, as the better road toward a racially just society.[7] On the other side of the political spectrum, some civil rights activists, black nationalists, and community organizers firmly committed to racial justice have worried that the ideal of integration toward which our civil rights laws strive is overly assimilationist, that the strategic legal commitment to nondiscrimination law as the way to get there is overly individualist, and that the entire movement has been crippled by too heavy a commitment to liberalism: because of those liberal commitments, the civil rights community

[6] *See, e.g.*, Richard Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (1995).

[7] For a full discussion of the history between the conservative movement and the rise of the civil rights movement from the 1950s through the 2000s, *see* William Voegeli, *Civil Rights and the Conservative Movement*, viii(3) Claremont Review of Books (2008).

cannot easily countenance demands for reparations, cannot take up or even fully respond to calls for black pride, cannot fashion needed community-wide rather than individual-based relief that might respond to our decades- and centuries-long histories of racial subordination, and cannot even vouch for the integrity and value of black cultures which may be threatened by the integrationist vision.[8] From yet another point on our spectrum, labor activists have long contended that the civil rights laws have nothing to offer poor whites, cannot address working-class concerns, or more generally class-based injustice, and that because of that, sometimes the movement itself, but more often the laws that are its product, represent a barrier to coalition building and thereby constitute a drag on progressive politics – a conundrum with which the political left in this country has never adequately contended. They have accordingly worried that the civil rights movement in its entirety sometimes works against the interest, broadly, of both poor and working-class peoples.[9] More recently – within the past two decades – a sizeable number of anti-identitarian and postmodern writers, labor historians, social philosophers, and political theorists, including both scholars within the academy as well as commentators and journalists outside it, have argued (roughly and broadly) that while the civil rights vision of an integrated society might rightly be regarded as a necessary condition, it is obviously not a sufficient condition of a just society.[10] Yet, the identitarian politics which that vision has unleashed, they worry, seemingly and wrongly implies just that.

Over the last quarter century, sophisticated criticisms of various fundamental pillars of our civil rights laws, echoing the themes of much of this broad-based dissatisfaction, have proliferated in the contemporary legal academy, notably including those parts of the legal academy most deeply invested in race and gender justice. The focus of *some* of that legal critique from within

[8] *See, e.g.*, Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (2008). For a general discussion of this strand of black nationalist anti-integrationist thought and advocacy, *see* Gary Peller, Critical Race Consciousness (2011). For a response to the black nationalist critique of integrationism, *see* Cheryl Cashin, Place Not Race: A New Vision of Opportunity in America (2014).

[9] *See generally* Ahmed White, *My Coworker, My Enemy: Solidarity, Workplace Control, and the Class Politics of Title VII*, 63 Buff. L. Rev. 1061 (2015); Kenneth D. Durr, Behind the Backlash, White Working Class Politics in Baltimore, 1940–1980 (2007) (history of working-class antipathy to civil rights); John Fobanjong, Understanding the Backlash Against Affirmative Action (2001). For a more particularized analysis of the troubled relation between Title VII and the employment at-will doctrine, and the backlash against civil rights that relation has engendered, *see* Ann McGinley, *Rethinking Civil Rights*, 67 Ohio St. L. J. 1443 (1996).

[10] For an introduction to the major lines of argument by these critics, *see* Left Legalism/Left Critique (Janet Halley & Wendy Brown eds., 2002).

the academy – a minority strand – like some of the non-legal critique outside it – has been the civil rights laws' overarching ideal of an integrated society. The goal of integration, according to some of our civil rights laws' legal critics, and particularly some of the leading critics from the critical race theory movement, has either diverted legal as well as political attention from, or indeed undermined, goals that are of far greater necessity to the achievement of a racially just society, including the overriding imperative to end the root causes of the cascading disadvantages that perpetuate the economic, social, and political subordination of entire black and brown communities, whether the communities themselves are integrated or not.[11] Most of the legal–academic critique of civil rights law, however, has been focused not so much on the goal of integration, but on what are often regarded as the two primary means of achieving it: first, the legalistic "antidiscrimination principle," by which is meant, briefly, the legal mandate that neither public nor private decisions can be based on impermissible characteristics which are generally irrelevant to rational ends, such as race, sex, ethnicity, religion, age, disability, or sexual or gender orientation, and, second, an embrace of an understanding of "formal equality" – meaning the like treatment of likes – and hence the like treatment of blacks and whites, and men and women – as the ideal toward which, and perhaps the form of justice toward which, those laws are directed. For the sizeable community of legal scholars within the academy who are broadly committed to the ends or goals of civil rights, but for a host of reasons skeptical of civil rights *law*, the antidiscrimination strategy deployed by our civil rights laws and the ideal of formal equality that is its professed goal is the real snake in the grass. Ferreting out discrimination, and compensating for it, they argue, or worry, has badly diverted both our civil rights movements as well as our civil rights laws themselves from more momentous and more meaningful labors. The attainment of formal equality, to whatever degree we've attained it, has likewise been a hollow victory that has cost progressivism, as well as the cause of both racial and gender justice, dearly.[12]

[11] Derrick Bell is rightly regarded as the foundational figure in this line of criticism from within the legal academy. *See* Bell, *supra* note 8; Derek Bell, The Derrick Bell Reader (2005); Derek Bell, Faces at the Bottom of the Well (1992).

[12] *See* Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., Critical Race Theory (1996) (for an introduction to this body of critical race theory). *See also* Patricia Williams, Alchemy of Race and Rights (1991); Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. Law Rev 1331 (1988); Gary Peller, Critical Race Consciousness: Reconsidering American Ideologies of Racial Justice (2011); Charles R. Lawrence III & Mari J. Matsuda, We Won't Go Back: Making the Case for Affirmative Action (1997).

The importance of this significant body of skeptical claims regarding the current direction of civil rights law – and, again, from deeply nonracist and decidedly friendly critics – to the development of our civil rights scholarship, our public law legal scholarship, and indeed to the nature and zeitgeist of the legal academy taken as a whole, can hardly be overstated: these various skeptical claims have been central to the formation of entire movements of mid-to-late twentieth-century critical legal thought. The doubts, as well as the critical scholarship in which they were eventually expressed, came of age, so to speak, with the civil rights laws themselves. Thus, in the 1970s, prominent scholars in the first wave of the critical legal studies movement, including most importantly Alan Freeman and Mark Tushnet, argued in a series of influential, near-iconic pieces that proved foundational to the formation of that movement, that the antidiscrimination principle, and particularly the rights that protect it, hold out a false and illusory promise for those committed to racial justice: by targeting at most badly motivated discriminating individuals, and redressing only particular victims of their wrongful actions, civil rights law targets the wrong evil – the intentionally racist perpetrator – and delivers damaged goods – a society rid *not* of the structural subordination that systematically lessens the quality of life for entire communities, but only the occasional and intentionally bad act and bad actor that wrongly hold back particular individuals.[13] Around the same time, seminal and near-iconic essays and books from the 1980s by Derrick Bell, in many ways the founder of the critical race theory movement, argued that "antidiscrimination law" in its entirety had dubious origins in cold war politics, and would achieve at most a marginal improvement in the life prospects of only the most privileged members of racial minorities, while semi-intentionally abandoning – in a spirit of malign neglect – the worst off and most impoverished members of underprivileged communities.[14] These Bellian claims that our civil rights movements, laws, and the liberalism that embraced them were compromised by a poison pill of both disingenuous hypocrisy and severely limited vision, were taken up, strengthened, and elaborated in a nuanced body of scholarship, authored by, among others, Charles Lawrence, Kimberlé Crenshaw, Gary Peller, Mari Matsuda, Angela

[13] Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 Tul. L. Rev. 1407 (1989–1990); Mark Tushnet, *The Critique of Rights*, 47 SMU L. Rev. 23 (1994).

[14] *See, e.g.*, Bell, And We Are Not Saved, *supra* note 8; Bell, Faces at the Bottom of the Well, *supra* note 11. For a contemporary analysis of the place of Derrick Bell in twentieth- and twenty-first-century philosophical thought, *see* Brandon Hogan, *Derrick Bell's Dilemma*, Berkeley J. Afr.-Am. L. & Pol'y (2019).

Harris, and Patricia Williams, and then eventually by scores of critical race theorists in the decades that followed.[15]

Feminists, in related but distinct developments, followed suit. Most importantly, Catharine MacKinnon, in powerful essays and books throughout the 1980s and 1990s, argued that the goal of "formal equality" underlying and guiding interpretation of the antidiscrimination principle – and particularly its ethical and Aristotelian mandate to "treat likes alike" – as well as the liberal feminism that had adopted it, would aid only those relatively well-off women already positioned to garner the privileges of liberalism, and would systematically leave behind the vast majority of women worldwide, of all colors and generally of lesser economic privilege, who were the real victims of the profound harms occasioned by global patriarchy and misogynist cruelties.[16] She embraced instead an "antisubordinationist" and substantive (nonformal) interpretation of both the ideal of equality itself and the antidiscrimination norm that presupposes it, and particularly the dominant and liberal antidiscrimination norm at the heart of Title VII.[17] An antisubordinationist understanding of the equality mandated by Title VII, she argued, would target the subordination of all women rather than the differential treatment of a relatively small group of equally (and highly) qualified women, would be truer to the civil rights and feminist movements that birthed those laws, and, most importantly, would target the endemic sexual violence suffered by women worldwide, rather than the discriminatory actions that primarily target only the relatively well-off. Scores of feminist legal theorists took up these claims, and, eventually, again, defined a field – later dubbed radical feminist legal theory – at least initially organized, in part, around feminist-inspired criticism of liberal feminism, and the liberalism and the formal understanding of both the ideal formal equality and the antidiscrimination principle, that are liberalism's most treasured and influential products.

Third, and just over the last twenty-five years: A sizeable group of postmodern, anti-identitarian, and queer legal theorists have put forward a quite different set of skeptical claims regarding not only the traditional civil rights era's goals, but also the more recent and more seemingly radical understandings of our civil rights, some of them inspired by the critical movements summarized above. Three such strands of criticism – which I'll call collectively the "postmodern critique" – are noteworthy. The first, pioneered by Janet Halley of Harvard Law

[15] For an overview, *see* Crenshaw et al., *supra* note 12.

[16] Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* Feminism Unmodified (1987).

[17] *Id.* at 40–45. *See also* Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 Notre Dame L. Rev. 1415 (2007).

School, directly targeted what is perhaps the most significant feminist political advance of the last forty years: to wit, the claim, made by Catharine MacKinnon and eventually scores of other radical feminists as well, and partially recognized in law in a series of significant US Supreme Court cases, that the subordination of women through various forms of sexual violence – including rape, sexual trafficking, sexual assault, sexual harassment, and sexual stalking, whether in the workplace, in schools, on streets, in homes, or in cyberspace – constitutes a massive violation of women's legal and civil rights, worldwide.[18] That claim, originating in radical feminism, while contested from its earliest articulations, has nevertheless proven remarkably durable, and some of its most fundamental legal constructs have come to be accepted and reflected in law: most importantly, the Supreme Court has held, and never retreated from the view, that the sexual harassment of women and girls in employment and education constitutes an actionable form of sex discrimination under Titles VII and IX of the Civil Rights Acts respectively.[19] Nevertheless, in spite of its widespread acceptance, Halley and a number of like-minded legal scholars have strongly urged us to be skeptical of the wisdom of this radical extension of traditional "discrimination-modeled" civil rights norms, and civil rights consciousness: the recognition of this entire new class of civil rights, they argue, challenges hard-won social gains in and for the acceptance of sexual minorities, as well as the gains of women and men generally that might be won via sexual liberation movements.[20] The illusory gains in equality to be achieved through this arguably tortured interpretation of our civil rights laws, and strained understanding of the antidiscrimination principle that underlies them, they argue, are simply not worth the very concrete losses to human liberty that such an expansion of our norms against sexual violence seemingly entail. In our sexual world, then – and whatever may be the case of the commercial world – the equality to be achieved by any purported "civil right" to be free of sexual violence, is just not worth the cost to our cherished rights to enjoy sexual liberty. In point of fact, it's all just one massive, global sex panic. The victims of sexual predation should and must therefore be consigned to the vagaries of criminal law. Civil rights law, and certainly the antidiscrimination principle at its heart, is simply an inhospitable forum for claims of sexual violence. This is not a claim *to equality* that deserves a hearing. Thus, twenty years after the first appearance of MacKinnon's momentous scholarship, shifting, somewhat, our understanding of civil rights away from

[18] Catharine MacKinnon, Toward a Feminist Theory of the State, ix–xiii (1989).
[19] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); 6 C.F.R. §§ 17.110, 17.115, 17.605.
[20] Janet Halley, *Sexuality Harassment*, *in* Left Legalism/Left Critique, *supra* note 10; Janet Halley, Split Decisions: How and Why to Take a Break from Feminism (2006).

the injuries of discrimination to the injuries of sexual violence instead, this body of skeptical thought, based largely on an overriding commitment to untethered sex, urged that we all "take a break from feminism."[21]

Two more contributions from the postmodern critique are worth noting, although they received far less fanfare (that's sex for you). Around the same time as Halley's interventions, a group of postmodern race theorists, perhaps most prominently Richard Ford from Stanford Law School, developed the argument that civil rights gains for those urging greater acceptance of cultural markers of identity, and again under the banner of civil rights laws, do little but essentialize racial difference – in no way, he argued, a progressive gain.[22] Civil rights cases claiming, for example, that firings for styles of clothing or hairstyles such as cornrows constitute racial discrimination under Title VII, he argued, are a Trojan horse-styled victory: while they may prevent some unjust terminations, they commit, and overcommit, African Americans and their civil rights advocates and devotees to a particular understanding of their racial identity, which is not only regressive but patronizing and homogenizing to boot. Thus, not only liberal understandings of the antidiscrimination principle, but also those broadened conceptions of it – strategically crafted by the most forward-looking of our civil rights advocates – and which target "cultural" or group oppression, he argued, carry significant costs of their own. Among much else, by arguing for the legal protection of markers of cultural and racial identity as a matter of nondiscrimination, they counsel a hegemonic uniformity of racial identity – cornrows, clothing, fashion, hairstyle, cuisine, language, rap – which has serious untoward consequences, not only to individual expression but also for racial progress. And third – and finally – Professor Mark Kelman from Stanford Law School, an early critical legal theorist, coauthoring with Gillian Lester, put forward in a series of articles an internal critique of various civil rights campaigns on behalf of learning-disabled children in public schools, all of which seek to ensure them equal educational opportunities, through the provision of resources disproportionate to their numbers.[23] Those programs, Kelman and Lester argued, while they may deliver on behalf of the learning-disabled population, don't address and in fact may badly legitimate the grotesquely deficient education delivered to

[21] Halley, Split Decisions, *supra* note 20, at 17.

[22] Richard Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 Stanford L. Rev. 1381 (2014); Richard Ford, *Beyond "Difference": A Reluctant Critique of Legal Identity Politics*, *in* Left Legalism/Left Critique, *supra* note 10.

[23] Mark Kelman and Gillian Lester, Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities (1994); Mark Kelman & Gillian Lester, *Ideology and Entitlement*, *in* Left Legalism/Left Critique, *supra* note 10.

impoverished children who cannot claim the banner of a learning disability. Thus – this particular civil right – in this case, the right of the disabled to an equal educational opportunity[24] – has the effect of legitimating the diminished life prospects of the much larger group of children disabled by nothing more than the state of impoverishment and marginalization imposed upon them by virtue of the economic circumstances of their birth. The gains to the educational attainment of the particular learning-disabled children protected by these much-loved civil rights can hardly be denied. What Kelman and Lester targeted were in effect those rights' hidden or not-so-hidden legitimation costs, although they didn't label them in that way: by insisting that these children deserve greater resources, as a matter of antidiscrimination law, the law seemingly implied the acceptability of the educational quality and attainment of children not hampered by disability, but by the general run of bad luck for which the civil rights laws provide no remedy.[25]

Let me back up. All of these doubts from the legal academy, taken collectively, regarding the antidiscrimination principle in all of its permutations and the ideal of formal equality that principle seems to presuppose, now form a sizeable, and formidable, body of skeptical legal scholarship; it includes critiques of antidiscrimination law first articulated by the critical legal studies movement in the 1980s,[26] greatly expanded and elaborated critical arguments from critical race theory and critical feminist legal theory a decade later,[27] and the more contemporary and in some ways deeper arguments put forward in the past fifteen years by postmodern and queer theorists,[28] which address not only liberal understandings of antidiscrimination laws and principles, but more radical interpretations of those laws and principles likewise. Those movements, at least as they are widely understood and often taught, have unquestionably targeted each other and are thus a clear example of the left eating both its young *and* its elderly: critical legal studies attacked the liberalism that

[24] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, 1402 (2004).
[25] Kelman & Lester, *Ideology and Entitlement*, *supra* note 22, at 163–164.
[26] Bell, *supra* note 8; Freeman, *supra* note 13.
[27] Crenshaw, *Race, Reform and Retrenchment*, *supra* note 9; Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Gary Peller, Critical Race Consciousness: Reconsidering American Ideologies of Racial Justice (2011); Catharine MacKinnon, Feminism Unmodified (1987); Feminist Theory of the State (1989); Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 Notre Dame L. Rev. 1415 (2007); Christine Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279 (1987).
[28] Halley, *Sexuality Harassment*, *supra* note 10, at 80; Kelman & Lester, *Ideology and Entitlement*, *supra* note 23, at 134; Ford, *Beyond "Difference,"* *supra* note 22, at 38.