

ASTROLOGY AND RACE: ASPECTS OF EQUALITY AFTER CRITICAL RACE THEORY

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Historically, Critical Race Theory (CRT) has been neglected in European legal scholarship. CRT approaches promise to be a useful avenue for European jurisprudence, however, as European nations rapidly become more multiracial. The focus of this Essay is on the theoretical value that radiates from some Critical Race Theory lines of thought, written from the perspective of an Italian legal scholar engaging in CRT. In particular, there are some aspects of CRT jurisprudence that are valuable from a general, legal-philosophical, point of view. In this vein, CRT scholars have authored scholarship that has had an impact on the traditional, liberal notion of equality. An apparently reasonable jurisprudence has been seen to revolve around a pseudo-scientific array of notions (“neutral” races, conceived as zodiac signs) that are lacking any sound epistemic ground: therefore, a form of astrology.

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INTRODUCTION

Critical Race Theory (CRT) is not well known in Europe, to put it mildly. There are several reasons for the demonstrable lack of interest that European scholars have displayed for this specific brand of so-called “post-modern jurisprudence.”¹ One of the reasons for this phenomenon is, of course, the simple fact that, in Europe, the issue of “race”² and law has always been seen from the point of view

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¹ See generally GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END (1995).

² Needless to say, “race” is a term that is often mentioned between cautionary quotes. We do not need the learned remarks by Cavalli Sforza to be aware that, as a taxonomic entity, race is at the very least an *unclear* notion. See generally LUIGI CAVALLI-SFORZA, GENES, PEOPLES, AND LANGUAGES (2000). Those who have believed in races have

of Europe's great sin: the *shoah*. Racism as anti-Semitism, therefore, has often been studied from the point of view of totalitarianism.³ In Italy, for example, the 118 issues of the journal *La difesa della razza* ("Defending the Race"), published from 1938 through 1943, provide a comprehensive representation of the type of racism active during the Mussolini era.⁴ The "Negro" race is, together with the Jewish one, the main target of the published contributions. While the former can elicit a paternalistic, patronizing attitude compatible with Italian colonialist ambitions in Africa, the latter never fails to summon a darker, more intense, and subtler repugnance.⁵

At the end of the day European racial laws are, by definition, the laws enacted before or during World War II in order to strip European Jewish people of their fundamental rights. Italian racism was later bracketed off as something exceptional and therefore worth investigating from only a historical point of view. The light shed by CRT studies on the complex relation between race and law was therefore never truly identified as a concept that should be integrated into the corpus of Italian legal liberalism. I, too, was personally influenced by this dismissive attitude.

In 1999, I was sitting in a cafe with a brilliant colleague who asked me, out of the blue, to name the most outstanding contemporary scholars or movements in jurisprudence or philosophy of law—one of those awful questions you cannot answer without getting yourself into trouble. I remember that I quickly mentioned the names of some well-known movements, including Critical Legal Studies and Legal Feminism. I did not need to think much about it, however, because I had just edited an Italian reader on the subject that described the work of contemporary legal philosophers.⁶ He asked me if I had at least *considered* Critical Race Theory as part of my list. I answered honestly that I had not given CRT much thought at all. As a result of that conversation, prodded by my caring but unmerciful friend, I realized that my knowledge of the CRT movement was, at best, superficial. After a few days, still in a brooding mood, I started to read some key texts of the movement, and I later personally translated some of them into Italian.

never been able, for example, to agree on the number of races, while "splitters" find it proper to multiply the number of races, "lumpers" rather maintain the existence of just a few racial groups. Broadly speaking, all "taxonomists fall into two camps: lumpers and splitters. (This classification is in itself an example of the simplest of taxonomies.) Lumpers take a large number of items that seem amenable to sub-grouping . . . and lump them together to form a single category Lumpers concentrate on the relevant similarities of items and aggregate them. . . . On the other hand, there are the splitters. Splitters are those who, as they begin the task of reducing a mass of data or an extremely long list of items to a small number of easily conceptualized and meaningful groupings, think it wise to give more attention to differences in the objects of their inquiry than do the lumpers." FRANK DUMONT, *A HISTORY OF PERSONALITY PSYCHOLOGY: THEORY, SCIENCE, AND RESEARCH FROM HELLENISM TO THE TWENTY-FIRST CENTURY* 151-52 (2010). As far as the notion of race is concerned, Charles Darwin noted that, in the middle of the nineteenth century, various authors believed that the number of human races numbered in a wide range from two (as suggested by authors that we would label as "lumpers" based on the above classification) to sixty-three (according to those we would call "splitters"). CHARLES DARWIN, *THE DESCENT OF MAN* 226 (1871).

³ See generally Mathias Möschel, *The Relevance of Critical Race Theory to Europe* (2001) (unpublished Ph.D. dissertation, European University Institute); see also Mathias Möschel, *Color Blindness or Total Blindness?*, 9 RUTGERS RACE & L. REV. 57 (2007).

⁴ See Federica Durante et al., *Using the Stereotype Content Model to Examine Group Depictions in Fascism: An Archival Approach*, 40 EUR. J. SOC. PSYCHOL. 465, 467 (2010). See generally Gene Bernardini, *The Origins and Development of Racial Anti-Semitism in Fascist Italy*, 49 J. MOD. HIST. 431-53 (1977) (describing in general the development of anti-Semitism during the Mussolini's regime).

⁵ Valentina Pisanty received all the original issues of *La difesa della razza* from Umberto Eco (save for one issue in photocopies). Using these materials, he edited a most useful reader. See generally LA DIFESA DELLA RAZZA. ANTOLOGIA 1938-1943 (Valentina Pisanty ed., 2006).

⁶ See generally GIANFRANCESCO ZANETTI, *FILOSOFI DEL DIRITTO CONTEMPORANEI* (1999).

The idea behind these translations was the recognition that the CRT approach is becoming increasingly useful for European jurisprudence as European nation-states become increasingly multicultural and multiracial. In a nutshell, this was why Kendall Thomas and I edited one of the first CRT readers in a language other than English.⁷ The book was well received and sparked some interest even outside of Italy,⁸ but to date it has not yet prompted consistent, structured jurisprudence research on CRT topics. While European academic traditional jurisprudence does not seem to be overly interested in the contributions offered by CRT, I propose that even if it emerges tangentially to the main goals of CRT scholars, some important aspects of CRT jurisprudence are valuable from a general, legal-philosophical point of view. This paper will therefore focus on the theoretical aspects and the general value added to legal discourse that radiate from some of the major CRT lines of thought.

Viewed through this prism, the CRT approach is neither redundant theory nor mere political activism. That is, on the one hand, it is not the case that there would be nothing in CRT that could not be found in the traditionally liberal approach on liberty and rights. Nor is it the case that even if its authors were to “fight the good fight” politically, CRT would not offer any genuinely theoretical contribution *per se*. Rather, there is more than one way to highlight the theoretical value of the CRT approach from the point of legal philosophy. One of the most traditional and academic subjects of Western philosophy of law, now definitively *passé*, is the clash between natural law theories and legal positivism. We now have the example of Martin Luther King Jr., who used the notion of natural law in his *Letter from Birmingham Jail*, quoting St. Augustine and St. Thomas Aquinas.⁹ Such a notion could well have provided a suitable ground to early equality claims, as in the original Abolitionist movement’s recourse to natural law as a basis for the antislavery argument.¹⁰

It is therefore quite interesting to see how CRT scholars, many years later, seemed to have grown increasingly suspicious of this kind of notion.¹¹ For CRT scholars, this suspicion arises from practical experience. Even if the United States Constitution was positioned as the result or manifestation of natural law and equality, the fact is that at the time of its adoption, very few doubted that this equality excluded *inter alia* blacks and women and even allowed for slavery. Having said that, it is still worth remarking that CRT has something to say on one of the most traditional subjects of jurisprudence, and it provides a contribution that can differentiate itself from the more traditional approach. What makes CRT an important asset to legal philosophy is the fact that it contributes to the discourse independent of religious background. This conceptual distance¹² is consistent with a specific jurisprudence. The CRT sensibility, at the very least, offers new reasons to take sides in an old philosophical controversy. CRT’s focus on the relationship between law and race, therefore, sheds light on key subjects for political

⁷ Gianfrancesco Zanetti, *La Nozione de la Razza*, 3 *FILOSOFIA POLITICA* 437-46 (2003); see generally KENDALL THOMAS & GIANFRANCESCO ZANETTI, *LEGGE, RAZZA, DIRITTI: LA CRITICAL RACE THEORY NEGLI STATI UNITI* (2005).

⁸ I would personally like to thank Professor Cristina Garcia-Pasqual for inviting me to give a public lecture on *Race and Law: Aspects of Equality in CRT (Critical Race Theory)*, at the School of Law in Valencia, Spain, on April 13, 2011. There has been interest in Italy specifically as well. See, e.g., *LE DISCRIMINAZIONI RAZZIALI ED ETNICHE: PROFILI GIURIDICI DI TUTELA* (Diletta Tega ed., 2011).

⁹ Martin Luther King Jr., *Letter from Birmingham Jail*, *ATLANTIC MONTHLY*, Aug. 1963, available at <http://www.theatlantic.com/ideastour/civil-rights/king-excerpt.html>.

¹⁰ See, e.g., William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 *HARV. L. REV.* 513, 525-38 (1974).

¹¹ See generally DERRICK DARBY, *RIGHTS, RACE, AND RECOGNITION* (2009).

¹² Sometimes CRT authors question the political strategy of the Civil Rights Movement itself, on the grounds that it is not open enough to the specific values of black communities. See generally Gary Peller, *Race Consciousness*, 1990 *DUKE L.J.* 758, 758-806 (1990), reprinted in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 127-58 (Kimberlé Crenshaw et al. eds., 1995).

philosophy and legal jurisprudence at large. One of these key subjects is the very structure of political society, which rests on an implied assumption of some kind of homogeneity among its members.

I. POLITICS AND RACE

Philosophies of politics and law have traditionally occupied themselves with the notion of political society. The conceptual structure of the political unit has been the main focus of many key contributions of the legal-philosophical debate. One of the reasons for this interest is that it implies some kind of assumption of homogeneity among individuals, but such an assumption is never an easy one to make. Race as a social construction also results in an assumption of homogeneity among individuals, in that those who belong to the same race are supposed to be representative of a somewhat homogenous group.¹³ Race can be, in fact, a key factor in identity claims, in sustaining assumptions of homogeneity and therefore, conversely, in defining a politics of exclusion.

Needless to say, there can be several different theories that rely upon assumptions of homogeneity, many of which may be less emotionally charged, troubling, or embarrassing for the educated, sensitive ears of liberal thinkers than the ones conjured up by the word “race.” Yet they may still be equally fallacious and arbitrary. In this respect, the notion of race is first and foremost made more concrete, more embodied, and more “dense” than other concepts. At the other extreme of the spectrum are those light assumptions of homogeneity which make a point of looking as slender and pale as possible and are often more neutral and substance-lacking. Examples include the constitutional patriotism devised by Jürgen Habermas¹⁴ and the overlapping consensus described by the late John Rawls.¹⁵

Attempts to build a concept of “European” identity are particularly interesting and religion has played an important role in this process. Controversy has erupted over the notion of so-called common “Christian” roots. For instance, the Holy See campaigned to have Europe’s “Christian heritage” explicitly mentioned in the Preamble to the European Union Constitution.¹⁶ Proponents of this idea, however, must not have had sufficient support if the Vatican proposal found such effective opposition.¹⁷ The notion of a specific European racial homogeneity, on the other hand, has been decisively debunked¹⁸ and only a few extremists openly champion this cause now.

The homogeneity assumption that supports the notion of race relies upon something related to the human body, to the power of the blood, to the *bios*. Grounds for social consistency can be quite diverse and include topics such as language, nation, Burkean manners (mores), religion, multiculturalism, a legal system grounded on shared values, a legal system based on liberal assumptions, or a legal system grounded on the acknowledgement of the value of diversity and the possibility of conflict through the politics of difference. Race can be ranked at the top of this list, as the most sanguine factor. Generally, grounds for self-identification can be ranked at the top of the list as well, and they often overlap with the

¹³ See ROBERT MILES & MALCOLM BROWN, RACISM 71 (1989).

¹⁴ See JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 632-60 (1992).

¹⁵ See generally JOHN RAWLS, POLITICAL LIBERALISM (1993).

¹⁶ Liz Blunt, *Pope Presses EU On Constitution*, BBC NEWS, June 29, 2003, news.bbc.co.uk/2/hi/europe/3029456.stm.

¹⁷ See generally Sdrjan Cvijic & Lorenzo Zucca, *Does the European Constitution Need Christian Values?*, 24 OXFORD J. LEGAL STUD., 739 (2004) (outlining the proposed compromise solution and the arguments against having such a statement of Christian identity explicitly within the Constitutional text).

¹⁸ See, e.g., Cavalli-Sforza, *supra* note 2.

reasoning behind social consistency, which is illustrated in W.E.B. DuBois's idea of race.¹⁹ Lucius Outlaw, Jr. interpreted DuBois's idea of race as "a collection of persons of common biological descent who are 'bound together' by the meaning-systems and agendas constitutive of shared cultural life-worlds."²⁰

The notion that Europeans could share a common racial identity is linked to earlier works on racial classification, even when no hierarchy of races was originally implied. The seamless shift between groups within humankind was acknowledged, as in Blumenbach's 1775 thesis.²¹ The notion of the relative primacy of the Aryan Indo-European race is notably present in the writings of Arthur de Gobineau. His friend Alexis de Tocqueville, however, did not hesitate to distance himself from such an approach, writing back to his correspondent that a whole conceptual universe existed between the two of them.²²

Predictably, some controversial and arguably racist authors write that some Europeans are more European than others. For instance, Points 8 and 10 of the *Manifesto degli Scienziati Razzisti* ("Manifesto of the Racist Scientists") published in the very first issue of *La Difesa della Razza* (August 5, 1938) state that it is necessary to distinguish the Mediterranean population of Western Europe from the Eastern European and African populations, and that the purely European biological and psychological features of Italians were not supposed to be altered.²³

Even outside an openly racist discourse, however, using the concept of race to capture the identity of a community can be quite tricky. From this point of view, CRT has famously shown how a naive notion of race may lead to extremely controversial consequences. The well-known case of *Mashpee Tribe v. Town of Mashpee*²⁴ provides an illustrative example. The Massachusetts Mashpee tribe sued under the Indian Non-Intercourse Act of 1970.²⁵ The defendant, the Town of Mashpee, denied that the Mashpee people could deem themselves a tribe at all. The Mashpee people were therefore obligated to provide evidence of their tribal status. Eventually, the court decided to base its criteria for jury instructions on those stated by a Supreme Court declaration at the beginning of the century in *Montoya v. United States*. In *Montoya*, the Court said: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. . . ."²⁶ In order to be acknowledged as a tribe, the Mashpee people had to meet these criteria and, because they were unsuccessful, they were denied recognition as a

¹⁹ W.E.B. DU BOIS, THE CONSERVATION OF RACES, THE AMERICAN NEGRO ACADEMY, OCCASIONAL PAPERS NO. 2 (1897), available at http://www.gutenberg.org/catalog/world/readfile?fk_files=1564800.

²⁰ LUCIUS T. OUTLAW, JR., ON RACE AND PHILOSOPHY 6 (1996).

²¹ See generally JOHANN FRIEDRICH BLUMENBACH, ON THE NATURAL VARIETY OF MANKIND (1775).

²² Michael D. Biddiss, *Prophecy and Pragmatism: Gobineau's Confrontation with Tocqueville*, 13 HIST. J. 611, 631 (1970).

²³ "8. È necessario fare una distinzione fra i mediterranei d'Europa occidentale da una parte, gli orientali e gli africani dall'altra; 9. Gli ebrei non appartengono alla razza italiana; 10. I caratteri fisici e psicologici puramente europei degli italiani non devono essere alterati in nessun modo." 1 LA DIFESA DELLA RAZZA 1, Aug. 5, 1938. (translation available at <http://users.dickinson.edu/~rhyne/232/Nine/RacistScientists.html>: 8. It is necessary to make a clear distinction between the European (Western) Mediterraneans on one side and the Eastern [Mediterraneans] and the Africans on the other.; 9. Jews do not belong to the Italian race.; The purely European physical and psychological characteristics ought not to be altered in any way.")

²⁴ *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1978).

²⁵ 25 U.S.C. § 177 (2006).

²⁶ *Mashpee Tribe*, 592 F.2d at 582 (quoting *Montoya v. United States*, 180 U.S. 261, 266 (1901)). See also Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 625-59 (1990).

tribe. The Mashpee people argued that “racial” blending does not dilute the tribal status. They supported this proposition by stating that the members of the tribe did not define themselves through racial types, but rather through community membership. White colonizers married Mashpee women, and many of these women were indeed widows of warriors who had fought against British soldiers. Also, fugitive slaves had found shelter among the Mashpee people, and had married members of the tribe. “In fact, the openness to outsiders who wished to become part of the tribe was part of the community values that contributed to tribal identity. The Mashpee were being penalized . . . because they did not conform to the prevailing ‘racial’ definition of community and society.”²⁷ Mashpee mores override a merely biological notion of “race.” The members of the tribe were less obsessed with the notion of blood purity than the white judges who did not understand the complexity of the issue.

This case is instructive for many reasons. On the one hand, the notion of race seems to imply that races are discovered and studied, just like any biological species.²⁸ Under this theory, tribes can be identified based on racial criteria. On the other hand, race is an ascriptive category,²⁹ and thus according to the Mashpee people for whom racial blending does not dilute the tribal status, the theory is not properly reflective of the complexity of group formation.

This is true in a general way and European scholars are, or should be, aware of the problem. Both the Nazi racial ideology and the “one drop rule” turn into institutional devices that reinforce a racial ascription. Both maintain the requisite burden for racial exclusion to a minimum—just one drop of blood from a different racial category is enough to exclude a member from a racial ascription. Therefore, both ideologies stress the purity of the Aryan and the white race respectively, and they effectively strip the target of the racial ascription of her or his full citizenship status. From the Jewish point of view, to be Jewish requires a Jewish mother, but it takes much less to be classified as Jewish from a Nazi perspective. Frau Seidenman, for example, had her ears carefully checked for some sign of Hebrew heritage, however distant it may have been.³⁰

What is crucial here is the contrast between the strong claim of objectivity—“you are what you are”—and the reality of a decision-making process that can revolve around completely arbitrary factors.³¹ People can *decide* to self-identify as a member of a specific racial group, while other people were, and still are, forced to accept the arbitrary ascription placed upon them (or denial of ascription) of another membership. The arbitrary factor embedded in a race-based notion of the political “we” is therefore exposed.³²

²⁷ Torres & Milun, *supra* note 26, at 638-39.

²⁸ There is a *prima facie* claim of objectivity in the very idea of race, which ideally forces the researcher to acknowledge the existence of an empirical reality: i.e., can we detect Mashpee “blood”? “The involuntary attribution of a racial identity is morally troubling not simply, or primarily, because it is involuntary but for other reasons. It is a fiction parading or functioning as a scientific fact.” Amy Gutmann, *Responding to Racial Injustice*, in *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 106, 168 (1996).

²⁹ It is commonplace to remark that from a certain point on that America’s citizens—were allowed to freely check their most favored box, or even multiple boxes, when they were asked about their “race” in the census forms. This sounds like a frank acknowledgment of the ascriptive meaning of the notion itself, as well as of its grounding in something far different from any biological background. See generally IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

³⁰ See generally ANDRZEJ SZCZYPIORSKI, *POCZATEK* (1986).

³¹ Any “social construction” implies both a certain degree of violent, arbitrary decision—evidently incapable of demonstration—and a specific attempt to hide, neutralize, and finally overcome it. See Elizabeth V. Spelman, “Race” and the Labor of Identity, in *RACISM AND PHILOSOPHY* 202, 202-05 (Susan E. Babbitt & Sue Campbell eds., 1999).

³² It should be borne in mind that any political “we” is but a cultural product, and that from this point of view the notion of race is not different from the notion of nationality or class, as with Etienne Balibar’s “ambiguous

II. EQUALITY AND RACE

CRT scholars, therefore, have not only shed light on the legal structure and workings of the notion of race, but also, by so doing, have written texts that are relevant for the general subject of the (ever controversial) assumption of homogeneity that is implied in any legal-political entity. Thus, there is a line of theoretical reasoning originating from CRT scholarship that impacts jurisprudence in a fundamental and compelling way.

While specific authors can be quoted as more relevant when a specific subject is at issue, as is always the case—and my own choice of quotations is, of course, itself quite arbitrary—it is also possible to argue that CRT makes a real paradigm shift possible on at least some particular key issues. The notion of political and legal equality implied in our current (democratic) notion of the political whole, in particular, has morphed into a much more complex concept under CRT's theoretical pressure.

The first part of such a new narrative about equality that is offered by CRT scholarship is relatively well-known. Equality and inequality statements can be carried out at the beginning or the end of discourse on racial notions. Equality as an “input” means equality of starting points. This concept is nevertheless not truly precise. Both chess and poker involve equality as an input. Players get the same number of pieces in a game of chess and they get the same number of cards in poker. It is understood, however, that at the beginning of the game, the value of the pieces is exactly the same for the two players sitting at the chessboard, while the value of the cards in the hand dealt to each player may be quite different. It is also possible to introduce inequality based on race as an “input” of racial discourse claiming, for instance, that a specific “racial” group is intellectually or morally inferior to another one and then acting accordingly in the legal-political arena.

Equality or inequality as an output, on the other hand, is the result of a discourse and established policy about race; it is the goal. A similar analogy to chess and poker is useful to illustrate this concept. When we play, I will first distribute poker cards. Then, I will act as if we are playing chess, in that, for that very short moment when our cards were covered in front of us on the green table, equality of “opportunities” existed between us. That the rules of the game must be poker rules has not, and cannot have ever been, the subject of any negotiation. That is, human beings are situated political beings. Now you, quite literally, have to play the cards that you have been dealt. One can introduce racist inequality as an output by claiming that the game (for instance, access to a law school) is and should be colorblind (by a denial of affirmative action) when race-related inequalities are already present, and effectively change the situation of the “players.” Now from a conceptual point of view, following CRT, inequality at the input and at the output are simply two sides of the same coin.³³

Input racism needs therefore to affirm itself. Input racism must affirm the relevance of race-related differences, because otherwise it will contradict its very logic no matter what science and reason can teach us. (Such a racist discourse is typically brutal and shameless.) On the other hand, output racism needs, from the point of view of its inner logic, to deny itself; that is, it must deny the relevance of race-related differences. Overlooking races can therefore be another way, *the* other way, to generate a racist discourse. (Such a racist discourse is typically articulate and confident.) Input racism is first and foremost about relevant human differences, and such differences are taken as an input that calls for legal consequences, like discrimination. Output racism is about denying the relevance of such differences, and the outcome of such a denial is a legal system and/or a social order where racial discrimination can flourish.

identities.” See generally ETIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES (1991).

³³ I deliberately used neutral expressions like “input equality” or “output equality” instead of talking about equality of opportunities, of starting points, institutional racism, and so on, in order to stress this point.

As a result, some may believe that input racism is for the “redneck.” Output racism seems to be more socially acceptable, especially among supporters of the “colorblind” approach, who conceptualize races as if they were zodiac signs. We should not discriminate Virgos against Pisces, but of course it would be bad to discriminate between Leos and Taureans, too. Just as we should not discriminate against African Americans in order to support white supremacy, it would be equally biased to discriminate against whites in order to grant undeserved privileges to black people.

Races, however, are far from being similar to zodiac signs. The latter are conceived as being inherently equal. They are tiles of a specific mosaic; they are a set of random possibilities of equal value. You can have a favorite color or a favorite zodiac sign, but you cannot really claim that green is more beautiful than red, or the other way around. The social construction of races, however, ensures that races are distinguished in the same fashion as one person claiming that one color is more beautiful than another.

As CRT taught to a reluctant audience, the one-drop rule, for example, implies the purity of the white race, and serves as a prelude to the notion of a blood aristocracy.³⁴ By contrast, the notion of the “black race” has been carefully built, both in terms of social norm and legal jurisprudence, to ensure the subjugation of people identified as black and this construction has therefore preserved the idea of white supremacy. Black and white are neither two “colors” nor two “zodiac signs.” Segregated schools were not merely certain schools for whites and certain schools for blacks: they were richer, nicer, more modern and efficient schools for white students; and poorer, older, less attractive schools for blacks. Separate train cars for blacks and for whites were not meant to forbid Americans of Caucasian blood to sit in a train car reserved for African Americans, but to ensure that blacks would not ride in cars reserved for whites.

If racial groups are conceived as zodiac signs, which are neutral as far as their comparative value is concerned, it also becomes possible to conceive of a category of “reverse racism,” which is really not “reverse” at all. Since racism means a deviation from a universal norm of objectivity, it can be practiced by anyone, and anyone can be its victim, regardless of his or her particular historical circumstances or power relation.³⁵ Accordingly, as Dworkin summarizes the view that he is famously fighting against, “[R]everse discrimination . . . is . . . wrong because distinctions of race are inherently unjust.”³⁶ “Particular historical circumstances” and “power relations,” however, are not erudite details or sociological trivia—they constitute races per se, so that there is nothing neutral in a racial typology. Even if races are perceived as zodiac signs, as formal characters assigned by casting astrological lots or by genetic lottery, “a judge may advocate the importance of racial equality while arriving at a decision detrimental to black Americans.”³⁷

An apparently reasonable jurisprudence seems to revolve around a pseudo-scientific array of notions (such as “neutral” races) that lack any sound epistemic ground. Colorblindness ideology seems, at best, an example of the fallacy of *metabasis eis allo genos*: a fallacious leap of a definition from one category to another. Such a fallacy is, of course, extremely instructive from a legal-philosophical point of

³⁴ Neil Gotanda stresses how racial identity ascription works in the United States quite differently than in other cultural environments; the legally acknowledged “one drop law” was a uniquely American phenomenon. His celebrated paper ends with a proposal: the United States should have the same attitude toward race that it already has toward religion—any *establishment* should be forbidden. Assimilation, like color-blindness, is not a conquest: it is a loss, a diminished diversity, a cultural genocide. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”*, 44 STAN. L. REV. 1 (1991).

³⁵ Peller, *supra* note 12 at 773.

³⁶ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 224 (1977).

³⁷ Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376 (1992).

view, even for those who are not directly interested in the relationship between law and race, because it impacts our general notion of equality.

Inequality can therefore creep into the legal system in an interesting way: without trumpeting about inequality at all, but bragging all the time about equal concern and respect. A general law that forbids both the poor and the rich from sleeping under bridges only revolves around an input notion of equality.³⁸ At the output, only poor people will suffer because rich people do not often need to sleep in any place that is not a comfortable bed. Output equality is now the focus and “[a]s in the old saw about the two horses given ‘equal’ opportunity to run a race, but one of whom has a stone in its shoe, the failure to take into account history and context can radically alter whether mere neutrality can be deemed just.”³⁹

It is possible, of course, to take colorblindness seriously—to consistently act as if we truly want to get rid of the notion of race and to thus make it truly invisible. We could, let me perhaps whimsically imagine, also enforce a legal disposition according to which procreative weddings can be celebrated only between members of different racial groups. Since there are so many suitable partners in every racial group, the compression of individual freedom is, all in all, minimal. On the other hand, the valuable outcomes of such a statute are huge: old wounds will be healed, racial hatred will slowly disappear, and so on. We need to care for the feelings of those who do not *want* to fall in love with a suitable partner, that is, a partner who does not belong to his or her same racial group. Racist feelings do not deserve any Dworkinian equal respect and consideration. Those who are so unlucky—or lacking in self-control—as to fall in love with a partner belonging to his or her same racial group will be, of course, allowed to adopt children.

Whoever thinks that colorblindness is a rational value should support such a law as it would result in huge and certain social advancement in exchange for a comparatively minimal restriction of freedom. Human beings will be colorblind because colors will quickly not be visible at all. People who will dwell in this future will *not* conceive of themselves as color blind—precisely because they will *be* colorblind. There would no longer exist any pure and detectable race.⁴⁰

If colorblindness supporters feel uncomfortable with this imagined law, they may eventually understand that individual freedom is more valuable than any concept of input equality. They therefore believe that the politics of race that radiate from the pages of most CRT authors—with the focus on output equality, through respect and emphasis on diversity as a value, recognizing the legal impact that diversity should have—are attempts of these authors to support the very same kind of freedom valued by the supporters of colorblindness.⁴¹ Therefore, the focus on output equality sheds light on some

³⁸ For example, the use of powdered cocaine is a crime which is, as a general rule, punished in a much more lenient way than crack cocaine, which correlates with racial disparities in those who are prosecuted for the use of powdered and crack cocaine. See Kendall Thomas, *Racial Justice: Moral or Political*, in LOOKING BACK AT LAW'S CENTURY 78 (Austin Sarat et al. eds., 2002).

³⁹ Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 544 (1990).

⁴⁰ See, e.g., Thomas Chatterton Williams, Op-Ed., *As Black as We Wish to Be*, N.Y. TIMES, Mar. 18, 2012, at SR5.

⁴¹ “Race” implies taxonomy. It is, first and foremost, a subdivision within a larger group of beings. Race is therefore, as it were, a plural notion. If there were just *one* race, there would be *no race* at all, because it would not be perceived as a race. The inner logic of the very notion of race must take for granted a plurality of races – so much is obvious. The inner logic of the notion of race, nevertheless, is more complex. A category can imply a constitutive pluralism without necessarily generating a hierarchy. Friendship implies pluralism: to be friends, it takes at least two people. There are terms and notions that do imply a hierarchy, like that of “one’s” baseball team. From the point of view of the baseball team supporter, in order to be a baseball team supporter you need more than a plurality of baseball teams. You must accord a special status to your team. This special status has no conceptual linkage with any “natural” factor — we do not necessarily support the team of the city where we were born, for instance, or where we live. Hard

crucial theoretical aspects of our homogeneity assumptions and their relative value. In order to better understand how CRT scholarship impacted the traditional, liberal notion of equality, it is nevertheless necessary to take a further step in the analysis.

III. FURTHER EQUALITIES⁴²

Some years ago, Jeremy Waldron distinguished basic equality, the notion according to which human beings are equal “in some fundamental and compelling sense,” from equality “as a policy *aim*.” Waldron’s idea is that we need a notion of basic equality to endorse our egalitarian aims, and he stresses that while much has been written about equality, modern literature deals far less with the background idea that humans are, fundamentally, one another’s equals.⁴³

If I believe in the basic equality of all human beings, for example, I shall likely be ready to fight for the civil rights of subjugated minorities, like Giambattista Vico’s *famuli* (the plebeians) seem ready to fight for their equal rights while realizing that patricians did not come from heaven after all. It can be preached that people of color are equal to whites in a fundamental and compelling sense. If some kind of basic equality based, for example, on a religiously inspired natural law, is assumed as a premise, blacks and whites should therefore not be discriminated against by the law, or by public policies. This is equality as an *aim*.

Now, for the sake of the argument, let us suppose that the average score of minority students on admission tests for law schools are consistently lower than that of white students.⁴⁴ Under such circumstances we have a fundamental case where there *is* a difference after all. Let us suppose further that the students who belong to a racial minority, once adopted by richer white British families, have scores as high as those of white American students. It would seem as though the right kind of toys, entertainment, play time, stimuli, the comfort of a beautiful home, the education that money can provide, security, and the warmth of a safe neighborhood, can make a difference in that plastic organ,

contrasts between team supporters of one city’s two teams are commonplace. Membership in one group of team supporters or the other may be chosen for the most volatile reasons. From that point on, your team has a special status, and you cannot really enjoy a game if you watch it in an emotionally detached way. As Italian soccer fans proverbially say, “You can change your car and your girlfriend, but you cannot change either your mother or your team.” There are therefore notions whose inner logic implies a hierarchy. The notion of race (from the point of view of its inner logic) is not only essentially plural and it is not only ascriptive, but it always entails the possibility of a specific hierarchy. This is what the astrology of liberal colorblindness jurisprudence fails to see.

⁴² Part IV reproduces a part of a paper on Giambattista Vico’s work on the relationship of marriage and equality, which was published in December of 2011. Gianfrancesco Zanetti, *Equality and Marriage in Vico*, 24 *RATIO JURIS* 461, 463-64 (2011).

⁴³ See JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE’S POLITICAL THOUGHT* 1-3 (2002). “So the distinction between basic equality and equality as an aim is fundamental to Dworkin’s work. Yet Dworkin has said next to nothing about the nature and grounding of the principle of equal respect.” *Id.*

⁴⁴ In the notorious, best-selling, and fundamentally flawed work of Herrnstein and Murray, the results of IQ testing lead to some policy recommendations, like reducing immigration (because immigration could lower the average American IQ) and halting affirmative action. Furthermore, a relationship is established between the lower score in IQ (linked by the authors to anti-social behavior tests of Americans and genetic factors). See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). The book has been debunked by severe scientific criticism. See, e.g., Noam Chomsky, *I.Q. Tests: Building Blocks for the New Class System*, *RAMPARTS MAGAZINE*, July 1972, at 24-30 (arguing against Herrnstein’s approach even prior to *The Bell Curve*’s publication); James J. Heckman, *Lessons from the Bell Curve*, 103 *J. POL. ECON.* 1091 (1995) (listing sharp criticisms of the authors’ statistical methods and notably written by a winner of the Nobel Prize in Economics); STEPHEN J. GOULD, *THE MISMEASURE OF MAN* (2d ed. 1996). *New York Times* columnist Bob Herbert famously excoriated the book as “a scabrous piece of racial pornography masquerading as serious scholarship.” Bob Herbert, *In America: Throwing a Curve*, *N.Y. TIMES*, Oct. 26, 1994, <http://www.nytimes.com/1994/10/26/opinion/in-america-throwing-a-curve.html>.

the human brain.⁴⁵ Fighting for equality, that is, equality as an *aim*, and finding ways to make it possible, for example, through affirmative action programs that result in more rich lawyers of color, rich doctors of color, and so on, becomes therefore a necessary step in order to be able to create and to state a basic equality between groups. The sons and daughters of these lawyers, doctors, and so on, will thus attain higher scores.

Therefore, first comes equality as a practice, for example, in egalitarian policies. The much-vaunted basic equality, *pace* Waldron, becomes the outcome. Equality as a practice, the fighting for equality, is the *prius*; basic equality, the *posterius*. Once black families are actually in equal social status and economic power, then they become equal “in a fundamental and compelling sense,” and that can include aspects of so-called bio-politics.

It should be noted that there is no logical contradiction between the two alternative conceptual itineraries, from basic equality to equality as an aim, from equality as an aim to basic equality. It should also be noted that there are, however, interesting differences. For example, it is much easier to defend affirmative action policies from the latter point of view (from equality as an aim to basic equality) rather than from the former one (from basic equality to equality as an aim). By contrast, the trajectory of basic equality to equality as an aim seems quite ready to imply a colorblind ideology.

IV. FINAL REMARKS

The very possibility of the counter-intuitive itinerary from equality as a goal to basic equality, besides the traditional one going in the opposite direction, dramatically alters the general argumentative meaning of the standard (liberal) notion of equality.

As far as the notion of equality is concerned, therefore, CRT is not just academic politics. CRT offers real theoretical achievements from the very moment when it exposes a sanguine primacy of the “political” (equality as an *aim*, or equality as a practice) over the “theoretical” (basic equality). CRT is also not redundant, because the more complex notion of equality that is involved in the acknowledgement of the counter-intuitive itinerary from equality as a goal to basic equality is not to be captured in a traditionally liberal system of thought. While the traditional liberal system of thought can be effective at claiming the equality of all human beings (usually with some exceptions), it does not seem particularly interested in making men equal in the first place, which is a premise of CRT.⁴⁶

⁴⁵ “If I.Q. differences are indeed largely environmental, what might help eliminate group disparities? The most dramatic results come from adoption. When poor children are adopted by upper-middle-class families, they show an I.Q. gain of 12 to 16 points. . . . The challenge is to find educational programs that are as effective as adoption in raising I.Q.” Jim Holt, *Get Smart*, N.Y. TIMES, Mar. 27, 2009, at BR9, available at <http://www.nytimes.com/2009/03/29/books/review/Holt-t.html>. See also RICHARD E. NISBETT, INTELLIGENCE AND HOW TO GET IT: WHY SCHOOL AND CULTURE COUNT (2009).

⁴⁶ This latter enterprise does not seem consistent with a religious tradition of natural law. The first advice to reach equality, indeed, came from the Serpent in Genesis 3:5, *Eritis sicut Deus, scientes bonum ac malem*, the words beloved by Goethe’s Mephistopheles. The reasonable words that always suggest not to try action and egalitarian struggle are those spoken by Abdiel to Satan in *Paradise Lost* by Milton:

Unjustly thou depriv’st it with the name
Of servitude to serve whom God ordains,
Or Nature; God and Nature bids the same,
When he who rules is worthiest, and excels
Them whom he governs. This is servitude
To serve the unwise, or him who hath rebelled
Against his worthier, as thine now serve thee,
Thyself not free, but to thyself enthralled.

A notion of equality that implies basic equality as the ever-fundamental *prius* and as a necessary first link in any possible conceptual chain of thoughts about equality, runs the risk of mistaking social (and racial) groups for zodiac signs. Under such circumstances, humans are conceived from an essentialist point of view, for example, endowed with a specific “nature.” This is not too bad, because the power of stars and planets is not strong enough to prevent liberal thinkers from deftly elaborating a notion of equality that can and will include them in some fundamental and compelling way. In this optimistic narrative, the destruction of irrational prejudices against that given zodiac sign will eventually trigger equality policies.

Races, however, are not standard groups that are used to classify human beings in a neutral way. If races had the same status as such standard groups can have, then the prejudice and discrimination that develops against one specific group would be the random outcome of a contingent moral lapse of the other groups. Prejudice and discrimination would have no necessary link with that group. Prejudice and discrimination, however, were specifically built into the social, cultural, and legal concept of “race.” They do not come as a surprising, unwelcome event, due to the moral weakness of human beings.

Unfortunately, domination and oppression can and do “make” groups of humans basically unequal.⁴⁷ CRT authors seem therefore to be, from this point of view, more pessimistic than their liberal counterparts. The reassuring astrological pattern, on the other hand, revolves around a diversity that allegedly flourishes among inherently equal groups. That pattern, however, is no longer truly an option after CRT. Such is the impact of CRT contributions on the Western notion of equality.

Equality as a practice—the practice of making men equal—is therefore also meant to separate again astrology and race, when legal reasoning is at stake. We would not trust a surgeon who let astrology impact his general view about our health condition; it is equally unwise to let this happen in the legal arena.

JOHN MILTON, PARADISE LOST, Book 6, Lines 174-81 (1667), available at http://www.dartmouth.edu/~milton/reading_room/pl/book_6/index.shtml.

⁴⁷ In the history of Western philosophy, however, this is the classic position of Giambattista Vico. See GIAMBATTISTA VICO, NEW SCIENCE (David Marsh trans., Penguin 1999) (1744). See also Zanetti, *supra* note 42, at 461-70. The “making” of inequalities can take place on the institutional and cultural level; it will not be less real. *Id.*