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Changing the Rules:
Some Preliminary Thoughts on Doctrinal Reform, Indeterminacy, and Whiteness

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In each of the past three years I have published a law review article proposing a fundamental change in some aspect of race discrimination doctrine.[1] These articles are congruent with some aspects of Critical Race Theory, in that they describe existing doctrine as deeply (though perhaps unconsciously) racist, they adopt radical racial redistribution as the benchmark for adequate doctrine, and they advocate race-conscious means of achieving racial justice. At the same time, my work has been classified as part of an emerging literature labeled Critical White Studies, because I locate these projects of doctrinal reform within the larger context of a search for an antiracist white self-identity. Each of these taxonomic characterizations carries with it an implicit theoretical challenge, to which this essay attempts to respond.

Proposals for doctrinal reform are a prominent feature of the Critical Race literature.[2] Indeed, this aspect of Critical Race scholarship might seem unremarkable from a mainstream perspective, given that arguments for change in legal doctrine are the bread and butter of law review publications generally. The inherently conservative nature of legal scholarship,

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1 Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) [hereinafter *Was Blind*]; Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935 (1994) [hereinafter *Enduring Principle*]; Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995) [hereinafter *Title VII Remedy*].

2 *See, e.g.*, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

combined with the relative youth of the Critical Race Theory movement, might lead one to expect to see only modest departures from familiar formats even, or perhaps especially, in the context of radical proposals for substantive change.[3]

However, viewed from the perspective of Critical Theory in general, the propensity of Critical Race scholars to engage in doctrinal reconstruction is *quite* remarkable. The contrast with Critical Legal Studies ("CLS"), often regarded as having provided a point of departure for Critical Race Theory ("CRT"),[4] is most vivid. CLS is characterized, if not defined, by its emphasis on deconstructing legal doctrines and accompanying distrust of any reconstructive or reform effort.[5] In this respect, the agenda of CRT seems diametrically opposed to that of Critical Legal Studies.[6]

Many commentators describe CLS as seeking to demonstrate that law is not distinct from politics.[7] One key step in this analysis is the indeterminacy thesis: the contention that legal language does not determine legal outcomes. If legal rules do not constrain decisionmakers, Critical Legal scholars argue, legal outcomes must be attributed to causes other than formal doctrines. CLS scholars ultimately identify maintenance of the status quo as the driving force behind law's operation. Accordng to one CLS conference statement, the objective of CLS is "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work to buttress and support a pervasive system of oppressive, inegalitarian relations."[8] The indeterminacy Critical Legal scholars find in legal doctrine provides the means by which even ostensibly justice-producing doctrines can be deployed in practice to support the existing social matrix.

Clearly, a concern with "oppressive, inegalitarian relations" is equally a hallmark of Critical Race Theory. However, CRT's willingness to engage in doctrinal reform suggests that this school of Critical thought may have greater confidence in the efficacy of legal rules than would be dictated by

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[3] The pattern is not perfect. Consider Derrick Bell's 1985 Foreword to the Harvard Law Review. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

[4] Critical Race Theory gained considerable impetus as a movement as scholars responded to the tenth National CLS Conference. *See* Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

[5] *See, e.g.*, Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). The emphasis here is on *doctrinal* reform; many Critical Legal scholars do address the normative implications of existing rules and implicitly or explicitly advocate change.

[6] Angela Harris sheds new light on this difference between CLS and CRT while describing both in terms of "modernist" and "postmodernist" narratives. *See* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

[7] A helpful overview of the evolution of the indeterminacy thesis, and its relationship to the CLS claim that law and politics are indistinguishable, can be found in John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86-98 (1995).

[8] CLS Conference statement, quoted in Peter Fitzpatrick & Alan Hunt, *Introduction* to CRITICAL LEGAL STUDIES 1, 1-2 (Peter Fitzpatrick & Alan Hunt eds., 1987). Of course, Critical Legal Studies is not a monolithic movement; Critical Legal scholars differ from one another in numerous ways. *See, e.g.*, James Boyle, *Introduction* to CRITICAL LEGAL STUDIES xiii (James Boyle ed., 1992).

the indeterminacy thesis of CLS. One explanation for the difference can be found in the social experience of people of color, as described in the minority criticisms of the CLS critique of rights.[9] However, as Professor Angela Harris describes, there is more to this phenomenon than simple faith in legal remedies.[10] On this question I can speak only for myself, and I must acknowledge that I find a resonant "truth" in CLS's concern with the manipulability of legal doctrine, and do not think that I can or should avoid confronting the indeterminacy thesis.[11]

I believe that there is another way to think about doctrinal reform proposals, one that does not require wholesale rejection of the indeterminacy thesis. In Part I of this essay I suggest that legal doctrine can be understood as a sort of promise made by the privileged to the disadvantaged members of society.[12] Doctrines constrain decisionmakers in much the same way that gratuitous promises constrain: by the weight of moral force and expectation. Thus, though the indeterminacy thesis is correct to the extent that it claims legal outcomes are ultimately the product of forces other than doctrinal language per se, it does not follow that doctrinal reform proposals are empty, as many Critical Legal scholars would contend. Doctrine expresses the substance of the promises the privileged are willing to make, and ostensibly to keep.

The notion of legal doctrine as a sort of promise is relevant to the problem of whites' racial identity as well. I have described the core of whites' race consciousness as selective unconsciousness: white people tend to view ourselves as raceless, and to associate the concept of "race" exclusively with people of color.[13] This "transparent" aspect of whiteness has the consequence, among others, of fostering the mistaken perception that norms formulated and applied by whites may be accepted as race-neutral without further examination and analysis. The doctrinal reforms I have proposed are designed to confront the transparency phenomenon on at least two fronts. First, they make explicit the race-dependency of transparently white norms and seek to substitute new normative structures that can more effectively accommodate racial diversity. Second, considering alternative visions of racial equality provides an opportunity for white people to examine our consciousness of self as racial being, and to begin to find ways to construct an image of whiteness that does not rely explicitly or implicitly on assumptions of white supremacy, superiority, or privilege. Part II of this

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[9] *See* Symposium, *supra* note 4.

[10] Harris, *supra* note 6, at 759-66 (describing the tension between modernism and the recognition of oppression).

[11] This is most emphatically not to say that minority scholars do avoid addressing the indeterminacy problem.

[12] This description is most apt with regard to ostensibly redistributive rules. Though all doctrines are formulated and applied by the privileged, not all of them promise a benefit to the disadvantaged. Much of property law, for example, promises to preserve the privilege of those who possess property.

[13] *See Was Blind, supra* note 1, at 969-79.

essay addresses the role promising might play in the project of formulating an antiracist white race consciousness.

I. Indeterminacy and Doctrinal Reform

The indeterminacy thesis contends that legal doctrines are not dispositive of legal outcomes. I don't intend to enter the debate over the ultimate "truth" of the indeterminacy thesis; for the purpose of this essay, I accept it as a point of departure. Let me note, however, that this is more than an assumption made for the sake of argument. My own view is that because language is inherently indeterminate, some degree of legal indeterminacy is inevitable. Moreover, I find overwhelming the evidence that the social/political vision of law's interpreters influences their understanding and application of legal rules. It is in spite of (and perhaps in part because of) my acceptance of the indeterminacy thesis that I have published several proposed "solutions" to inadequacies in existing race discrimination law.

I respond to the indeterminacy difficulty by conceiving legal doctrine as a sort of promise. Webster's dictionary defines a "promise" as "a declaration that one will do or refrain from doing something specified," and indicates as well that a promise is "a declaration that gives the person to whom it is made a right to expect or to claim the performance or forbearance of a specified act."[14] Thus when I promise to mow the lawn this Saturday, I am assuring the promisee that I intend to mow, and creating the expectation that I will indeed do so.[15]

Here, I rely upon the model of the gratuitous promise, rather than contract. The difference, of course, is that the former, unlike the latter, is not legally enforceable. Indeed, I have in mind the sort of gratuitous promise whose breach carries no adverse consequences at all to the promisor, other than the weight of moral failure and/or the disappointed expectations of the promisee.[16] Even in this case, promising *is* possible, and it is this circumstance that poses most clearly the question whether, and in what sense, promising constrains the promisor.

Consider again the lawn mowing example. If I make no declaration at all, I create no expectation regarding whether or when I will mow. The nature of promising is such that saying "I promise . . ." alters the situation at least to the extent that an expectation has been created. Moreover, different promises create different expectations. I might have promised to do some yard work on Saturday, without specifying precisely what tasks I would

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[14] Webster's Third New International Dictionary of the English Language, Unabridged 1815 (1986).

[15] Of course, if unforeseen circumstances prevent performance, it usually is not said that I have failed to keep my promise. Gordon D. Schaber & Claude D. Rohwer, Contracts 365-66 (3d ed. 1990).

[16] This discussion assumes that there has been no detrimental reliance on the part of the promisee. *See id.* at 113-14.

perform, or I might have promised to mow "sometime," or "next weekend," without being more exact about the date. From the perspective of the promisee, it matters *that* I have promised, and it matters *what* I have promised.

Of course, gratuitous promises that do not induce detrimental reliance make a difference to the promisor only to the extent he or she feels bound to keep his or her promises.[17] But language analysts often have noted that the practice of promising would not exist were it common for promisors not to keep their word.[18] Thus it is intrinsic to the notion of promise that promising constrains the future action of the promisor. Because promising constrains, different promises constrain differently.

Legal doctrine can be conceived as a sort of promise.[19] Government is the promisor; individuals are the promisees. In general, both criminal and civil laws can be thought of in this way, though they do not necessarily conform to the "promising" model in every respect. In a sense, government promises freedom from prosecution to persons who do not violate its criminal statutes; similarly, government promises intervention or not in individuals' affairs in accordance with the civil laws. When people form expectations because of, and conform their conduct to, legal rules, they are in much the same position as any ordinary promisee.

But, one might object, government's promises are enforceable, and thus are unlike the gratuitous promises described above. However, even if one accepts the idea that the relation between the government and the individual is more like contract than gratuitous promise,[20] the fact of legal indeterminacy casts doubt on the thesis that individuals genuinely have remedies when government fails to keep its promises. Legal indeterminacy means that laws are similar to vague promises. A legal claimant always faces a risk that the law's interpreter will construe government's promise differently than does the claimant; in effect, the interpreter declares, "What you ask is not what was promised." Thus, by virtue of inherent linguistic indeterminacy, government indeed is in a position much like that of the gratuitous promisor: the consequences of breach are limited to the promisor's own sense of responsibility and the promisee's disappointed expectations.[21]

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[17] Generally, breaking a promise does not have legal consequences unless consideration or detrimental reliance is present. *Id.* at 75.

[18] *See, e.g.*, R.M. Hare, *The Promising Game, in* THEORIES OF ETHICS 115, 124-25 (Philippa Foot ed., 1967).

[19] The analysis that follows is in many respects consistent with Duncan Kennedy's account of the ways law constrains judicial decisionmakers. Transposed into his framework, the notion of doctrine as promise adds an additional dimension to the "normative power of the field." *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 548-51 (1986). In addition, conceiving of doctrine as a sort of promise emphasizes the cultural continuity between those who formulate and those who apply legal doctrine. *See infra* note 31.

[20] I take no position on this question.

[21] There may be collateral consequences, as when disappointed promisees take retaliatory steps in the absence of legal enforceability.

Do vague promises constrain? Certainly there is a point at which an assurance of future conduct is so vague as to provide no "right to expect . . . performance." I label such a declaration an empty promise. For example, "I'll mow the lawn sometime" may be an empty promise in the absence of implicit qualifications such as "before it's a foot high." But there is a continuum of indefiniteness, and other promises may be subject to varying interpretation and yet constrain. For instance, people use "next weekend" differently: on Wednesday, "next weekend" may refer to the first succeeding weekend, or to the second.[22] Thus "I'll mow next weekend" may not be clear on its face, but it is specific with respect to any given interpretation of "next," and so a promise *has* been made. Indeterminate content does not necessarily defeat the claim that promises constrain.

One need not resolve the question whether any particular doctrine is in fact empty or merely indeterminate to find value in the enterprise of doctrinal reform. The notion of doctrine as promise envisages legal rules as relational; assessing the content of doctrine requires considering both the respective points of view of the promisor and the promisee. If a given rule is susceptible to multiple interpretations, comparing these points of view may provide a means of selecting the interpretation that ought to control.[23] Even if one accepts the contention of some Critical Legal scholars that some—or all—doctrines are tantamount to empty promises,[24] the notion of promising provides a framework in which to argue that it's possible to do better. In daily life, promisors are capable of making promises they can keep, and of articulating those promises in relatively clear, comprehensible terms that provide a reasonable basis for expectation. I don't believe it has been demonstrated that law's creators and interpreters are inherently unable to do as well.

The notion of doctrine as promise situates the enterprise of doctrinal reform as an exercise in sorting out what was (or should be) promised by whom to whom, and thus what it means to keep a particular promise as embodied in legal language. Such promises may be seen as gratuitous and often vague, but they nevertheless constrain the responsible promisor in much the same way that everyday promises constrain. Doctrinal reform matters because the content of even unenforceable promises matters.

II. White Identity and Race Discrimination Law

Under current law, facially race-neutral statutes or other government rules that have a racially disparate effect violate the Equal Protection Clause only if the constitutional challenger can demonstrate that the rule in ques-

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22 In the latter case, the speaker would refer to the first weekend as "this weekend."

23 A good example is Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978) (comparing the "perpetrator" and "victim" perspectives on race discrimination).

24 *See* Tushnet, *supra* note 5.

tion was adopted with a racially discriminatory intent.[25] One explanation for the discriminatory intent requirement is the principle of judicial restraint: in a racially stratified society, many facially neutral rules carry racially disproportionate effects, and so a rule that mandated judicial intervention upon proof of such effects alone arguably would involve the judiciary too deeply in the formation of social policy.[26] However, from the perspective of judicial restraint the legislature is the appropriate body to make social policy judgments, and the Supreme Court has concluded that in Title VII's proscription of employment decisions made "because of" race, Congress meant to fashion a remedy for disparate impact discrimination.[27]

Each of these legal propositions can be criticized as failing to promote distributive racial justice. Both the constitutional requirement of discriminatory intent and Title VII disparate impact analysis, as elaborated by the courts, fail to provide a remedy for what I have labeled "transparently white decisionmaking." Because whites tend to equate whiteness with racelessness, whites similarly tend to perceive as race-neutral norms that are in fact associated with whites.[28] These norms operate to systematically disadvantage nonwhites, and so to maintain the existing maldistribution of material and social goods.[29] The principle of judicial restraint too has failed the cause of distributive justice in that it has provided support for constitutional doctrines that are adverse to the interests of nonwhites.

Viewing doctrine as promise, these distributive criticisms are grounded in the perspective of the promisee. Race discrimination doctrine constitutes promises of equality made by whites to nonwhites;[30] the distributive criticisms may be seen as charging that the promises made have not been adequate, or that the performance has not measured up to the promise. Either way, arguments that existing doctrine produces inadequate results for people of color focus on the expectation aspect of promising.

What about the value of doctrinal analysis for the promisor? If doctrine is a sort of promise, doctrinal evaluation asks the promisor what promises he wants to make (and keep).[31] I have argued that each of the above doctrines reflects a distinctively white way of thinking about race.[32]

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25 Washington v. Davis, 426 U.S. 229, 239 (1976). This rule is the subject of *Was Blind, supra* note 1.

26 I discuss the principle of judicial restraint and the more general topic of the process perspective in constitutional law in *Enduring Principle, supra* note 1.

27 Title VII's disparate impact rule is the target of my critique in *Title VII Remedy, supra* note 1.

28 *Was Blind, supra* note 1, at 957, 973-77.

29 *Was Blind, supra* note 1, at 954-55.

30 Consider the history of the adoption of the Equal Protection Clause. *See* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 437-42.

31 Though the doctrinal promisor and the promise-keeper are almost always in reality distinct individuals, I treat them as a unitary entity in order to emphasize the cultural continuity of interests and perspectives among whites that makes racial hegemony possible.

32 *Was Blind, supra* note 1, at 968-69; *Enduring Principle, supra* note 1, at 968-76; *Title VII Remedy, supra* note 1, at 2029-30.

Because these doctrines also function to maintain white privilege, retaining them has the existential effect of constructing the self as a white supremacist, though perhaps one who maintains that position unconsciously. Thus rethinking the basis and effects of race discrimination law allows the white person to reevaluate whiteness itself.

Previously, I have described this process as the task of creating a "positive white racial identity."[33] I meant by this first, an explicit racial identity, in contrast to the experiential racelessness that is the transparency phenomenon, and second, an identity not formed around the oppression of others. However, Professor Ian Haney López has pointed out another connotation of "positive," one that is the opposite of "negative."[34] In this sense, a "positive" identity would be constructed of positive attributes which, by implication, different others would not share. Thus, using the term "positive white identity" tends to support the stereotype of whites as "good" and nonwhites as "bad."[35] Haney López's point is well taken; a much more appropriate term would be an "antiracist white identity."

I believe the first step in the process of developing such an identity is to overcome the habit of transparency; that is, to develop the habit of seeing oneself as explicitly white, and of identifying seemingly neutral norms as white. However, because these norms carry positive connotations, this move to become conscious of whiteness is perilous: it risks reinforcing "negative" stereotypes of nonwhites.[36] Accordingly, Professor Haney López recommends that white people *abandon* whiteness.[37]

As I see it, this proposal raises questions regarding the mechanics of struggling against privilege. Because privilege is a social phenomenon, it is not always subject to individual action. My own experience is that it's often quite difficult, and sometimes impossible, for a privileged individual to abandon privilege unilaterally. When that is the case, it seems to me that one alternative is to consciously employ privilege to the advantage of those who are not in a position of privilege—in this instance, nonwhites.[38] For example, whites in a position to do so might appoint as judges only people of color.[39] Analogously, whites who have input into the process of doctrinal formation can advocate legal rules that might effect greater racial justice.

This approach—*using* privilege in an antiracist manner—must be adopted with extreme caution. Retaining privilege is too attractive, too

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[33] *Was Blind, supra* note 1, at 957.

[34] IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 172 (1996).

[35] I recognize this phenomenon in another context, when I point out that only desirable attributes can be *transparently* white. *See Enduring Principle, supra* note 1, at 970-71.

[36] This demonstrates that Haney López's concern with my use of "positive" is more than a concern with terminology.

[37] HANEY LÓPEZ, *supra* note 34, at 183-90.

[38] Without seeking gratitude or return, of course; that course of action would not foster racial redistribution.

[39] It should go without saying that such appointees ought to be qualified for positions on the bench.

comfortable, to provide assurance that the privileged are in a good position to evaluate when and whether abandoning privilege is a realistic option. Thus, it might be argued that the conception of the white person as the promisor, the author of race discrimination law, is not a well-considered strategy, because it sustains the image of whites as those who wield power in society. By way of comparison, doctrinal proposals that make nonwhites the final arbiters of legal outcomes offer a more complete transfer of power and privilege.[40]

However, the reality is that white people do control the formation and application of legal doctrines at this time. Is abandonment of that status possible? The most direct method would be simply to hand to nonwhites authority over doctrinal formulation and interpretation, but I am not optimistic that this is a realistic possibility. The notion of doctrine as promise, with whites in the position of promisor, can function as an alternative strategy of abandonment if it is pursued in the manner I have suggested. The key is to make and keep promises that genuinely provide greater distributive justice.

If promises constrain, then promisees benefit when promises are made and kept. Criticizing race discrimination law from the perspective of white privilege affords an occasion for whites to renounce privilege by promising a greater measure of racial justice to nonwhites. Of course, this renunciation is inherently incomplete; because the nature of doctrinal promises is such that there is no external means of enforcing them, the promisee remains ultimately at the mercy of the promisor for performance. Nevertheless, the promisor is in a different position than one who has not promised at all, and one who has promised more is in a different position than one who has promised less. Though making more racially just doctrinal promises is perhaps only a partial abandonment of white privilege, I believe it is a step in the right direction.

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[40] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). Note that there's a slight disanalogy here: the notion of promising is intended to provide a standard against which to measure specific doctrines; it's not a doctrinal proposal per se.