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# WHO'S AFRAID OF CRITICAL RACE THEORY?†

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*In this essay, originally delivered as a David C. Baum Memorial Lecture on Civil Liberties and Civil Rights at the University of Illinois College of Law, Professor Bell begins by discussing the recent debate surrounding The Bell Curve, and utilizing the tools of critical race theory, he offers an alternative explanation as to why the book's authors decided to publish rejected theories of black inferiority. Professor Bell then discusses the origins of critical race theory, what the theory is, what the theory ought to be, and the critics' attack of the theory. He concludes with stories about black struggle in America, stories which Professor Bell believes accurately depict the ongoing racist efforts to prevent black success.*

As I see it, critical race theory recognizes that revolutionizing a culture begins with the radical assessment of it.<sup>1</sup>

## I. INTRODUCTION

Radical assessment can encompass illustration, anecdote, allegory, and imagination, as well as analysis of applicable doctrine and authorities. At the outset, I want to utilize all of these techniques to comment on a contemporary phenomenon: *The Bell Curve*.<sup>2</sup>

For the past three or four months, a great deal of attention and energy has been devoted to commending and condemning Mr. Charles Murray and the late Dr. Richard Herrnstein, authors of the best-selling book on racial intelligence, *The Bell Curve*. This book suggests great social policy significance in the fact that black people score, on average, fifteen points below whites on I.Q. tests.<sup>3</sup>

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1. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2145 (1992).

2. RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

3. See *id.* at 317-40.

This thesis has been criticized as the rehashing of views long-ago rejected by virtually all experts in the field.<sup>4</sup> There is, critics maintain, no basis for a finding that intelligence is inherited and, indeed, no accepted definition of the vague term "intelligence." There is, on the other hand, a depressingly strong and invariant correlation between resources and race in this country, and resources and success—including success in taking I.Q. tests. These are settled facts.

Even so, the book has enjoyed an enormous success that its critics find difficult to explain. Stephen Jay Gould, for example, writes:

*The Bell Curve*, with its claims and supposed documentation that race and class differences are largely caused by genetic factors and are therefore essentially immutable, contains no new arguments and presents no compelling data to support its anachronistic social Darwinism, so I can only conclude its success in winning attention must reflect the depressing temper of our time—a historical moment of unprecedented ungenerosity, when a mood for slashing social programs can be powerfully abetted by an argument that beneficiaries cannot be helped, owing to inborn cognitive limits expressed as low I.Q. scores.<sup>5</sup>

Criticism of *The Bell Curve* has been so universal among biologists that one must wonder: Why did these two well-known men produce a book filled with rejected theories? Surely they must have known that the book would provide pseudoscientific support for racial hostilities that always worsen during times of economic stress and anxiety.

The all too easy answer is that *The Bell Curve*'s authors saw a market opportunity and they took it. The book has sold over 300,000 copies and has become a major source of discussion in the media. But utilizing the conceptual and experiential tools of critical race theory, I want to suggest another possibility.

It is not difficult to imagine that the authors were aware of the generally accepted findings regarding the lack of any connection between race and intelligence. Suppose, as well, that recognizing the debilitating effects of discrimination and exclusion on African Americans, they devised an "oppression factor" and, adding it to existing data, discovered that there was indeed a discernible racial difference in intelligence measured by I.Q. tests. However, when the I.Q. data playing field was leveled via the "oppression factors," contrary to their own expectations, they discovered that blacks performed fifteen points higher than whites. Quite likely, they disbelieved and thus reviewed painstakingly their data several times. Each time they did so, the con-

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4. See generally *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* (Steven Fraser ed., 1995).

5. Stephen J. Gould, *Curveball*, *NEW YORKER*, Nov. 28, 1994, at 139.

clusion that they (perhaps) did not want became ever more certain. It was beyond denial. There was an answer beyond simple faith that explained why blacks survived two centuries of the world's most destructive slavery and a century of utter subordination under segregation: Black people are simply smarter than whites.<sup>6</sup>

What would they do with this information? Its release would almost certainly throw the country into turmoil. Let me explain. As history indicates all too well, blacks have suffered greatly as a result of discrimination undergirded and often justified by the general belief in black inferiority. But history shows with equal clarity, though it is less frequently acknowledged, that indications of black success and thus possible black superiority result in racist outrage. Most of the many race riots in this nation's history were sparked by white outrage over black success.<sup>7</sup>

In the nineteenth and early twentieth centuries, blacks who were successful at business or farming were targeted by the Ku Klux Klan and other hate groups for death and destruction.<sup>8</sup> While protection of white womanhood is deemed the major motivation for the thousands of blacks lynched during the latter part of the nineteenth century and the early decades of the twentieth, in fact, retaliation against blacks who dared compete successfully with white men was the real source of many, and perhaps most, of these atrocities.

A debate raged in Florida over a bill intended to compensate black victims for losses suffered more than seventy years ago, when the Klan absolutely destroyed a thriving black town called Rosewood—murdering, raping, pillaging, and finally burning all the property in sight. Denial is the usual response to even such well-documented racist rampages.<sup>9</sup> State officials who opposed the measure noted that the statute of limitations had expired, and that "compensation would be 'bad for the county and bad for our state' because it would encourage similar claims."<sup>10</sup>

In more recent times, discrimination aimed at skilled or talented blacks is a well-understood fact of life in the black community. Doz-

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6. *The Bell Curve* devotes several chapters to the discussion of the traditional oppression factors, including poverty and schooling. See HERRNSTEIN & MURRAY, *supra* note 2, at 127-55.

7. See generally ANTHONY M. PLATT, *THE POLITICS OF RIOT COMMISSIONS, 1917-1970* (1971).

8. See, e.g., ERIC FONER, *RECONSTRUCTION* 425-44 (1988). "But the most 'offensive' Blacks of all seemed to be those who achieved a modicum of economic success for, as a White Mississippi farmer commented, the Klan 'do not like to see the negro go ahead.'" *Id.* at 429.

9. See Lori Rozsa, *Massacre in a Small Town in 1928*, *ATLANTA J. & CONST.*, Jan. 17, 1993, at M1.

10. Larry Rohter, *Paying for Racial Attack Divides Florida Leaders*, *N.Y. TIMES*, Mar. 14, 1994, at A12. The Florida legislature finally passed, and the governor signed, a claims bill providing \$60,000 in scholarships to compensate the Rosewood families and their survivors. See C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 *FLA. ST. U. L. REV.* 503, 520 (1995).

ens of able and ambitious blacks were interviewed by journalist Ellis Cose in his book, *The Rage of a Privileged Class*.<sup>11</sup> They complained bitterly:

I have done everything I was supposed to do. I have stayed out of trouble with the law, gone to the right schools, and worked myself nearly to death. *What more do they want?* Why in God's name won't they accept me as a full human being? Why am I pigeonholed in a 'Black job'? Why am I constantly treated as if I were a drug addict, a thief, or a thug? Why am I still not allowed to aspire to the same things every white person in America takes as a birthright? Why, when I most want to be seen, am I suddenly rendered invisible?<sup>12</sup>

In the context of law school faculties, my character Geneva Crenshaw describes an experience with which many professors of color can relate:

When I arrived, [the first Black hired], the white faculty members were friendly and supportive. They smiled at me a lot and offered help and advice. When they saw how much time I spent helping minority students and how I struggled with my first writing, they seemed pleased. It was patronizing, but the general opinion seemed to be that they had done well to hire me. They felt good about having lifted up one of the downtrodden. And they congratulated themselves for their affirmative-action policies.

Then after I became acclimated to academic life, I began receiving invitations to publish in the top law reviews, to serve on important commissions, and to lecture at other schools. At this point, I noticed that some of my once-smiling colleagues now greeted me with frowns. For them, nothing I did was right: my articles were flashy but not deep, rhetorical rather than scholarly. Even when I published an article in a major review, my colleagues gave me little credit; after all, students had selected the piece, and what did they know anyway? My popularity with students was attributed to the likelihood that I was an easy grader. The more successful I appeared, the harsher became the collective judgement of my former friends.<sup>13</sup>

Professor Richard Delgado, a well-known critical race theorist, believes the shift may be caused by "cognitive dissonance":

At first, the white professor feels good about hiring the minority. It shows how liberal the white is, and the minority is assumed to

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11. ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993).

12. *Id.* at 1.

13. DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 157-58 (1987).

want nothing more than to scrape by in the rarefied world they both inhabit. But the minority does not just scrape by, is not eternally grateful, and indeed starts to surpass the white professor. This is disturbing; things weren't meant to go that way. The strain between former belief and current reality is reduced by reinterpreting the current reality. The minority has a fatal flaw. Pass it on.<sup>14</sup>

Recognizing this strong, though often unconscious, white preference for black mediocrity in even the most elite professional schools, *The Bell Curve's* authors faced a dilemma that they chose to resolve by intentionally falsifying their data, to spare blacks the reprisals and even bloody retaliation they would have suffered had the real truth regarding superior test performance by blacks come out. Dr. Herrnstein and Mr. Murray may well have foreseen the serious criticism of their work, if published without their new findings, criticism that, in fact, has been heaped on them by social scientists and experts in biology. They may have feared, though, that if they published the new data revealing the superiority of black intelligence, black people would be deemed a threat to many whites and thus placed in far greater danger than if the book served simply as a comfort to whites by repeating the oft-told tale of black inferiority.

*The Bell Curve's* authors must have known what every professional and skilled black has learned the hard way: that policies of affirmative action are endangered far more by the presence of blacks who are clearly competent than they are by those blacks who are only marginally so. Because it has been difficult for many whites to acknowledge that black people are competent—even superior—at some sports, it would be impossible to gain the same acknowledgement for blacks across the board, particularly if the reluctant recognition required the admission that inferior status is the result of discrimination rather than the old racial rationales of inferior skills, lack of drive, or the unwillingness to compete. The Dodger's official, Al Camparis, lost his job for saying so, but he was far from the only white person who believed that blacks lack "some of the necessities" to become managers in baseball.<sup>15</sup>

Finally, Dr. Herrnstein and Mr. Murray may have feared that, even if they were to convince a reluctant America of blacks' superior intelligence and ability—much of which has been smothered by racial discrimination—that reality may have opened the question for many whites as to whether they had not been similarly disadvantaged on the

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14. *Id.*

15. David Aldridge, *Companis Admits Error but Maintains Innocence*, WASH. POST, July 3, 1987, at F1.

basis of class. Such a long-overdue revelation could well spark serious political unrest and perhaps a rebellion.

Given the potential for societal mischief at this level, the authors would almost certainly opt for conclusions that conform closely with what most people already believe. Better one more libel of blacks as an inferior people than a truth posing a greater threat that could lead to racial atrocities and class warfare. Thus, while *The Bell Curve*, as published, is condemned as a perversion of truth and a provocation for racial stereotyping, we should view it less harshly for what it is, and more sympathetically for what it might have been.

The moral: To understand the motivation for and the likely intent of racial policies in America, one need only be willing to reverse the racial composition of the major components of those policies. To see things as they really are, you must imagine them for what they might be. In this instance, the effort is intended to delegitimize the illegitimate. *The Bell Curve* captured the nation's fascination precisely because it laid out in scientific jargon what many whites believe, need desperately to believe, but dare not reveal in public or even to their private selves. The critical race theory perspective offers blacks and their white allies insight, spiked with humor, as a balm for this latest insult, and enables them to gird themselves for those certain to follow.

## II. THE ONGOING DEBATE OVER THE LEGITIMACY OF CRITICAL RACE THEORY

At the outset, I asked, "Who's Afraid of Critical Race Theory?" The interrogatory poses indirectly two additional questions that may remain after my *Bell Curve* illustration. First, what *is* critical race theory? And second, what *ought* critical race theory to be? The distinction is useful even though the dividing line between the descriptive (what is) and the prescriptive (what it ought to be) can be quite fine.

The answers to what *is* critical race theory are fairly uniform and quite extensive. As to what critical race theory *ought* to be, the answers are far from uniform and, not coincidentally, tend to be leveled in the form of outsider criticism rather than insider inquiry. As to the *what is*, critical race theory is a body of legal scholarship, now about a decade old, a majority of whose members<sup>16</sup> are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by law. Those critical race theorists who are white are usually cognizant of and committed to the overthrow of their own racial privilege.

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16. Critical race theory's founding members are usually identified as Derrick Bell, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams.

Critical race theory writing and lecturing is characterized by frequent use of the first person, storytelling, narrative, allegory, interdisciplinary treatment of law, and the unapologetic use of creativity.<sup>17</sup> The work is often disruptive because its commitment to anti-racism goes well beyond civil rights, integration, affirmative action, and other liberal measures. This is not to say that critical race theory adherents automatically or uniformly “trash” liberal ideology and method (as many adherents of critical legal studies do). Rather, they are highly suspicious of the liberal agenda, distrust its method, and want to retain what they see as a valuable strain of egalitarianism which may exist despite, and not because of, liberalism.

There is, as this description suggests, a good deal of tension in critical race theory scholarship, a tension that Angela Harris characterizes as between its commitment to radical critique of the law (which is normatively deconstructionist) and its commitment to radical emancipation by the law (which is normatively reconstructionist). Harris views this tension—between “modernist” and “postmodernist” narrative—as a source of strength because of critical race theorists’ ability to use it in ways that are creative rather than paralyzing.<sup>18</sup> Harris explains:

CRT is the heir to both CLS [Critical Legal Studies] and traditional civil rights scholarship. CRT inherits from CLS a commitment to being “critical,” which in this sense means also to be “radical” [while] . . . [a]t the same time, CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. Despite the difficulty of separating legal reasoning and institutions from their racist roots, CRT’s ultimate vision is redemptive, not deconstructive.<sup>19</sup>

Consider how the two groups view the law. Duke English Professor Stanley Fish explains the critical legal studies view of legal precedent as not

17. For the definitive example of incisive legal analysis utilizing these methods, see PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

18. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994).

19. *Id.* Richard Delgado, one of critical race theory’s original writers, lists as among the attributes of critical race scholars the following:

(1) insistence on “naming our own reality”; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform.

Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter*, 76 VA. L. REV. 95, 95 n.4 (1990).



a formal mechanism for determining outcomes in a neutral fashion—as traditional legal scholars maintain—but is rather a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law.<sup>20</sup>

Adherents of critical race theory basically agree with this assessment. They depart from their critical legal theory colleagues regarding what is to be done with this tangle of illogic and corrupted jurisprudence. I think Professor Patricia Williams speaks for most practitioners of critical race theory when she concedes that the concept of rights is indeterminate, vague, and disutile. She readily acknowledges as example that the paper-promises of enforcement packages like the Civil Rights Act of 1964 have held out as many illusions as gains. Recognizing further that blacks have never fully believed in constitutional rights as literal mandate, Williams states (in terms that constitute as much creed as response):

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, mothered them—not just the notion of them. We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. [This was the story of Phoenix]; the parthenogenesis of unfertilized hope.<sup>21</sup>

It seems fair to say that most critical race theorists are committed to a program of scholarly resistance, and most hope scholarly resistance will lay the groundwork for wide-scale resistance. Veronica Gentilli puts it this way: “Critical race theorists seem grouped together not by virtue of their theoretical cohesiveness but rather because they are motivated by similar concerns and face similar theoretical (and practical) challenges.”<sup>22</sup> To reiterate, the similar concerns referred to here include, most basically, an orientation around race that seeks to attack a legal system which disempowers people of color.

Although critical race theory is not cohesive, it is at least committed. As John Calmore observes, “almost all the critical race theory literature seems to embrace the ideology of antisubordination in some

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20. STANLEY E. FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 21 (1994).

21. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987).

22. Veronica Gentilli, Comment, *A Double Challenge for Critical Race Scholars: The Moral Context*, 65 S. CAL. L. REV. 2361, 2362 (1992).

form."<sup>23</sup> It is our hope that scholarly resistance will lay the groundwork for wide-scale resistance. We believe that standards and institutions created by and fortifying white power ought to be resisted.<sup>24</sup> Decontextualization, in our view, too often masks unregulated—even unrecognized—power. We insist, for example, that abstraction, put forth as “rational” or “objective” truth, smuggles the privileged choice of the privileged to depersonify their claims and then pass them off as the universal authority and the universal good. To counter such assumptions, we try to bring to legal scholarship an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies.<sup>25</sup> John Calmore puts it well:

[C]ritical race theory can be identified as such not because a random sample of people of color are voicing a position, but rather because certain people of color have deliberately chosen race-conscious orientations and objectives to resolve conflicts of interpretation in acting on the commitment to social justice and antisubordination.<sup>26</sup>

Professor Charles Lawrence speaks for many critical race theory adherents when he disagrees with the notion that laws are or can be written from a neutral perspective. Lawrence asserts that such a neutral perspective does not, and cannot, exist—that we all speak from a particular point of view, from what he calls a “positioned perspective.”<sup>27</sup> The problem is that not all positioned perspectives are equally valued, equally heard, or equally included. From the perspective of critical race theory, some positions have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of this, not accidentally. Conversely, the law simultaneously and systematically privileges subjects who are white.

Critical race theorists strive for a specific, more egalitarian, state of affairs. We seek to empower and include traditionally excluded views and see all-inclusiveness as the ideal because of our belief in collective wisdom. For example, in a recent debate over “hate speech,” both Chuck Lawrence and Mari Matsuda made the point

23. See Calmore, *supra* note 1, at 2189.

24. For example, Mari Matsuda is not willing to accede to the prevalent notion that reparations are dead, and has put forth a powerful call that America redress the harms it inflicted on blacks, Native Americans, and Native Hawaiians, as a means of salvaging the national soul. Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1333 (1991).

25. See Calmore, *supra* note 1, at 2146.

26. *Id.* at 2163. A partial listing of these “people of color” can be found in Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Biography*, 79 *V.A. L. REV.* 461 (1993).

27. See Gentilli, *supra* note 22, at 2363 (citing Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 *S. CAL. L. REV.* 2231, 2282-83 (1992)).

that being committed to "free speech" may seem like a neutral principle, but it is not.<sup>28</sup> Thus, proclaiming that "I am committed equally to allowing free speech for the KKK and 2LiveCrew" is a non-neutral value judgment, one that asserts that the freedom to say hateful things is more important than the freedom to be free from the victimization, stigma, and humiliation that hate speech entails.

We emphasize our marginality and try to turn it toward advantageous perspective building and concrete advocacy on behalf of those oppressed by race and other interlocking factors of gender, economic class, and sexual orientation. When I say we are marginalized, it is not because we are victim-mongers seeking sympathy in return for a sacrifice of pride. Rather, we see such identification as one of the only hopes of transformative resistance strategy. However, we remain members of the whole set, as opposed to the large (and growing) number of blacks whose poverty and lack of opportunity have rendered them totally silent. We want to use our perspective as a means of outreach to those similarly situated but who are so caught up in the property perspectives of whiteness that they cannot recognize their subordination.

I am not sure who coined the phrase "critical race theory" to describe this form of writing, and I have received more credit than I deserve for the movement's origins. I rather think that this writing is the response to a need for expressing views that cannot be communicated effectively through existing techniques. In my case, I prefer using stories as a means of communicating views to those who hold very different views on the emotionally charged subject of race. People enjoy stories and will often suspend their beliefs, listen to the story, and then compare their views, not with mine, but with those expressed in the story.

Probably my best known story is *The Space Traders*,<sup>29</sup> which I wrote to convince a resisting class that the patterns of sacrificing black rights to further white interests, so present in American history, pose a continuing threat. In the story, as at least some of you know, aliens from outer space visit this country on New Year's Day in the year 2000. They promise wealth in the form of gold, environmental-cleansing material, and a substitute for fossil fuels. If accepted, their gold and space-age technology will guarantee another century of prosperity for the nation. In return for these wares, the space traders want to take back to their home star all black people. Given two weeks to

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28. See generally 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).

29. DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158 (1992).

decide, Americans in a variety of settings debate the trade offer. Finally, in a referendum vote, they opt for the trade by a seventy to thirty percentage. The story ends:

The last Martin Luther King holiday the nation would ever observe dawned on an extraordinary sight. In the night, the Space Traders had drawn their strange ships right up to the beaches and discharged their cargoes of gold, minerals, and machinery, leaving vast empty holds. Crowded on the beaches were the inductees, some twenty million silent black men, women, and children, including babes in arms. As the sun rose, the Space Traders directed them, first, to strip off all but a single undergarment; then, to line up; and finally, to enter those holds which yawned in the morning light like Milton's "darkness visible." The inductees looked fearfully behind them. But, on the dunes above the beaches, guns at the ready, stood U.S. guards. There was no escape, no alternative. Heads bowed, arms now linked by slender chains, black people left the New World as their forbears [sic] had arrived.<sup>30</sup>

Initially, a number of reviewers criticized *The Space Traders* story as negative and unremittedly despairing. Blacks should be more grateful, critics complained, given the substantial gains made by your people in this great country. Some even condemned me as a racist for daring suggest that white Americans would ever trade away any American lives for profit and well-being. Most black people accepted the story as an all too accurate portrayal of their worst fears. Always, there were a few blacks in my audiences who not only were certain that if offered, Americans would accept the trade, but also indicated their willingness to go voluntarily. "Better the unknown," one man told me, "than the certainty of the disaster that awaits us here."

This is a strong statement, but even criticism of the story has been muted by subsequent events. While some blacks are doing very well—the true beneficiaries of the civil rights era—more than one-third of all black people are mired in poverty that is degrading, dispiriting, and destructive. Those in the middle-class have seen their progress halted and many are sliding back toward the low-income status they worked so hard to escape. The spaceships are looking more like a means of escape rather than vehicles of danger, exile, and death.

Let us further consider another phenomenon. Whites in this society seem so willing to accept their own subordination to other whites because of class and social barriers, yet they portray so much hostility toward blacks. The historian, C. Vann Woodward, put the issue well when he wondered how much racism must exist in the bosom of a

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30. *Id.* at 194.

white man who feels superior to a black while working at a black man's wages. I have suggested that in this country (which views property ownership as a measure of worth), many whites with relatively little property of the traditional kind—money, securities, and land—see their whiteness as a property right.

Professor Cheryl Harris takes up this challenge<sup>31</sup> and examines how whiteness, initially constructed as a form of racial identity, evolved into a form of property, historically and presently acknowledged and protected in American law. To state this view is to meet resistance. There is no direct support for it in the precedents or in the traditional legal writing on race and rights. Harris sets the stage for her long piece by telling the reader about her grandmother. Harris writes:

In the 1930s, some years after my mother's family became part of the great river of Black migration that flowed north, my Mississippi-born grandmother was confronted with the harsh matter of economic survival for herself and her two daughters. Having separated from my grandfather, who himself was trapped on the fringes of economic marginality, she took one long hard look at her choices and presented herself for employment at a major retail store in Chicago's central business district. This decision would have been unremarkable for a white woman in similar circumstances, but for my grandmother, it was an act of both great daring and self-denial, for in so doing she was presenting herself as a white woman. In the parlance of racist America, she was "passing."

Her fair skin, straight hair, and aquiline features had not spared her from the life of sharecropping into which she had been born in anywhere/nowhere, Mississippi—the outskirts of Yazoo City. But in the burgeoning landscape of urban America, anonymity was possible for a Black person with "white" features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/bad, white/Black. No longer immediately identifiable as "Lula's daughter," she could thus enter the white world, albeit on a false passport, not merely passing, but trespassing.

Every day my grandmother rose from her bed in her house in a Black enclave on the south side of Chicago, sent her children off to a Black school, boarded a bus full of Black passengers, and rode to work. No one at her job ever asked if she was Black; the question was unthinkable. By virtue of the employment practices

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31. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

of the "fine establishment" in which she worked, she could not have been. Catering to the upper-middle class, understated tastes required that Blacks not be allowed.

She quietly went about her clerical tasks, not once revealing her true identity. She listened to the women with whom she worked discuss their worries—their children's illnesses, their husband's disappointments, their boyfriends' infidelities—all of the mundane yet critical things that made up their lives. She came to know them but they did not know her, for my grandmother occupied a completely different place. That place—where white supremacy and economic domination meet—was unknown turf to her white co-workers. They remained oblivious to the worlds within worlds that existed just beyond the edge of their awareness and yet were present in their very midst.

Each evening, my grandmother, tired and worn, retraced her steps home, laid aside her mask, and reentered herself. Day in and day out, she made herself invisible, then visible again, for a price too inconsequential to do more than barely sustain her family and at a cost too precious to conceive. She left the job some years later, finding the strain too much to bear.

From time to time, as I later sat with her, she would recollect that period, and the cloud of some painful memory would pass across her face. Her voice would remain subdued, as if to contain the still remembered tension. On rare occasions she would wince, recalling some particularly racist comment made in her presence because of her presumed, shared group affiliation. Whatever retort might have been called for had been suppressed long before it reached her lips, for the price of her family's well-being was her silence. Accepting the risk of self-annihilation was the only way to survive.

Although she never would have stated it this way, the clear and ringing denunciations of racism she delivered from her chair when advanced arthritis had rendered her unable to work were informed by those experiences. The fact that self-denial had been a logical choice and had made her complicit in her own oppression at times fed the fire in her eyes when she confronted some daily outrage inflicted on Black people. Later, these painful memories forged her total identification with the civil rights movement. Learning about the world at her knee as I did, these experiences also came to inform my outlook and my understanding of the world.<sup>32</sup>

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32. *Id.* at 1710-12.

Professor Harris conveys to her white readers what those who are black already know, namely, that her grandmother's story is far from unique. Indeed, there are many who crossed the color line never to return. Passing is well known among black people in the United States and is a feature of race subordination in all societies structured on white supremacy. Notwithstanding the purported benefits of black heritage in an era of affirmative action, passing is not an obsolete phenomenon that has slipped into history.

The persistence of passing is related to the historical and continuing pattern of white racial domination and economic exploitation that has given passing a certain economic logic. It was a given to Harris's grandmother that being white automatically ensured higher economic returns in the short term, as well as greater economic, social, and political security in the long run. Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic needs and, therefore, survival. Becoming white increased the possibility of controlling critical aspects of one's life rather than being the object of others' domination.

Harris's grandmother's story illustrates the valorization of whiteness as treasured property in a society structured on racial castes. In ways so embedded that they are rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed sought to attain—by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privileges, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.

In a fairly traditional fashion, Professor Harris develops these themes and their effect on racial policies from slavery to affirmative action. But the tragic image of her grandmother provides an almost mystical presence to her piece that informs, validates, and finally renders her conclusions impossible to avoid or deny.

As Harris's article illustrates, critical race theory writing embraces an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies. Indeed, even a critical race theory critic finds that the "clearest unifying theme" of the writing is "a call for a change of perspective, specifically, a demand that racial problems be viewed from the perspective of minority groups, rather than a white

perspective.”<sup>33</sup> We use a number of different voices, but all recognize that the American social order is maintained and perpetuated by racial subordination. The narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian. The voice exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change.

Given all of this, you will not be surprised to learn that the legal academy has come to recognize, but is far from ready to embrace, critical race theory, particularly at the faculty level. Indeed, there is now a small but growing body of work that views critical race theory as interesting, but not a “subdiscipline” unto itself and therefore must be amenable to mainstream standards.<sup>34</sup> These writers are not reluctant to tell us what critical race theory *ought* to be. They question the accuracy of the stories, fail to see their relevance, and want more of an analytical dimension to the work—all this while claiming that their critiques will give this writing a much-needed “legitimacy” in the academic world.

In one of the major critiques by Daniel Farber and Suzanna Sherry, the authors urge the storytellers in critical race theory to tell stories that are more “accurate” and “typical,” that “articulate the legal relevance of the stories,” and that “include an analytic dimension.”<sup>35</sup> The authors seem unaware of the bizarre irony in their pronouncement that “[w]e know of no work on critical race theory that discusses psychological or other social science studies supporting the existence of a voice of color.”<sup>36</sup>

They do not tell us just what such a study would look like, and why centuries of testimony by people of color regarding their experiences, including individuals like Frederick Douglass, W.E.B. Du Bois, Charles Wright, and Toni Morrison, are not measure enough. But Farber and Sherry “find little support for the general claim that traditional [academic] standards are inherently unfair to work by women and minorities,” and contend that “creating literature has little nexus with the specific institutional traits of law schools.”<sup>37</sup> They urge criti-

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33. Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 904 (1994).

34. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 960 (1992) (“Critical Race Theory is only a partial subdiscipline; although it is based on distinctive norms [i.e., distinctive from the liberal positivist tradition], it lacks the distinctive methodology that characterizes [the definite partial subdisciplines of] critical legal studies or law and economics.”).

35. Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993).

36. *Id.* at 814.

37. *Id.* at 842, 845.



cal race theory writers to include more "traditional" scholarship in their approach.<sup>38</sup>

Perhaps critical race theory's most politically damaging critic is Randall Kennedy, whose blackness lends his critique a super legitimacy inversely proportional to the illegitimacy bequeathed to critical race theory. Kennedy notes the "insurgent" quality of minority scholars whose "impatience" has succeeded in making the race question a burning issue as never before in legal academia.<sup>39</sup> But, he says, the writings of critical race theory reveal "significant deficiencies"; they "fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars of color produce a racially distinctive brand of scholarship."<sup>40</sup>

Kennedy adds to his critique by severely criticizing critical race theory's race-conscious perspective. When a black scholar at a prominent law school tells anyone who will listen that other folks of color are deluded about being excluded on the basis of their race; when a black scholar argues against race-conscious legal remedies or hiring policies; when a black scholar contends that there is no hidden "white" normativity or perspective but rather a meritocratic normativity (the companion claim to the claim that there is no minority perspective); when a black scholar says these things, all who rarely listen to scholars of color sit up and take notice. And take notes. And turn those notes into more fuel for the legitimacy debate that has always attended renegade movements. And critical race theory is renegade in the best sense of the word. Having drawn on the experience of the failed Second Reconstruction, how ironic and *scary* it is that the twentieth century draws to a close with racial hostility in full cry just as it was at the end of the nineteenth century.

At a time of crisis, critics serve as reminders that we are being heard, if not always appreciated. For those of us for whom history provides the best guide to contemporary understanding, criticism is a reassurance. The reason for this reassurance is contained in this final observation.

### III. BLACK ART IN A WHITE LAND

It was in the early years of African slavery, after the point where the nation decided that slaves were essential for the exploitation of the land's natural resources, but before the techniques of enslavement had been perfected. As a part of the subjugation process, newly arrived

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38. *Id.* at 842.

39. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1748 (1989).

40. *Id.* at 1749.

Africans—those who had survived the dreaded middle-passage—were separated from those of the same tribe. They were barred from using their native language or practicing their customs. While required to learn sufficient English to understand the white masters who would rule their lives, penalties for actually learning to read and write were severe. Despite the dangers, we know that many of the enslaved did acquire basic literacy skills. The Bible was often their primer as well as the primary access to their adopted religion, Christianity.

The Africans were allowed to sing. It is said that many had voices that were pleasant to the ear, and their singing in the evening after a day of hard labor in the fields or in the master's house, seemed an innocent relaxation for the slaves and those who owned them. It was a long time before the masters learned, if they ever did, that the slaves used their songs as a means of communication: giving warning, conveying information about escapes planned and carried out, and simply for uplifting the spirit and fortifying the soul. It was even longer before the Spirituals were recognized as a theology in song, a new interpretation of Christianity, one far closer to the original than that practiced by those who hoped the Bible would serve as a tool of pacification, not enlightenment.

At some point, white scholars must have heard the Spirituals. It is easy to imagine their reaction. Even the most hostile would have had to admit that the sometimes joyous and often plaintive melodies had a surface attraction. The scholars would have concluded, though, that the basically primitive song-chants were not capable of complex development and were certainly too simplistic to convey sophisticated musical ideas. The music, moreover, was not in classical form, likely deemed a fatal defect. Indeed, the slave songs were not even written down by those unknown persons who had composed them. Surely, these simple melodies could not be compared with the lieder of Haydn, Mozart, Schubert, or Brahms.

Whatever they were, the critics would conclude, these songs were not art. There was no potential in the music for intellectual inspiration as opposed to purely emotional satisfaction. Of course, the critics might concede, in the hands of classically trained composers and musicians, the Spirituals might serve as folk melodies from which true art might be rendered. Stephen Foster was said to have done this, and later Antonin Dvorak, and still later, George Gershwin. Many others followed. A few of them credited the genius in the slave songs, but most simply took what they wanted and called it their own without acknowledgement of the sources that, when asked, they deprecated and denied.

Need it be said that fortunes were made through the utilization and often the corruption of the slave melodies? Need it be said that those who originated this music seldom benefitted financially from

their creations? There is no surprise here. A nation built on the backs of black labor would have little difficulty profiting from the product of black minds and hearts.

#### IV. CONCLUDING THOUGHTS

Comparing critical race theory writing with the Spirituals is an unjustified conceit, but the essence of both is quite similar: to communicate understanding and reassurance to needy souls trapped in a hostile world. Moreover, the use of unorthodox structure, language, and form to make sense of the senseless is another similarity. Quite predictably, critics wedded to the existing legal canons will critique critical race theory, and the comparable work by feminists, with their standards of excellence and find this new work seriously inadequate. Many of these critics are steeped in theory and deathly afraid of experience. They seek meaning by dissecting portions of this writing—the autobiographical quality of some work, and the allegorical, story-telling characteristic in others. But all such criticisms miss the point. Critical race theory cannot be understood by claiming that it is intended to make critical race studies writing more accessible and more effective in conveying arguments of discrimination and disadvantage to the majority. Moreover, it is presumptuous to suggest, as a few critics do, that by their attention, even negative attention, they provide this work with legitimacy so that the world will take it seriously. Even if correct, this view is both paternalistic and a pathetically poor effort to regain a position of dominance.

I hope that those doing critical race theory, when reviewing these critiques, will consider the source. As to a response, a sad smile of sympathy may suffice. For those who press harder for explanations, both Beethoven and Louie Armstrong are available for quotation. When questioned about the meaning of his late quartets, Beethoven dismissed the critics with a prediction: "it was not written for you, but for a later age." And when asked for the meaning of jazz, Armstrong warned, "Man, if you don't know, don't mess with it."

These are wonderful retorts precisely because they do not seek to justify. The work, they say, speaks for itself and is its own legitimation. It was written to record experience and insight that are often unique and prior to this new work, too little heard. There is sufficient satisfaction for those who write in the myriad methods of critical race theory that comes from the work itself.