

# NOTES TOWARD A CRITICAL CONTEMPLATION OF LAW

SONIA K. KATYAL\*

I want to begin by thanking Kendall Thomas and Penny Andrews for bringing us all together to celebrate Derrick's legacy—a legacy that has been so life-changing for so many people, personally as well as professionally. It is an understatement to say that Professor Bell's impact was not just significant, but transformative, for so many of us who strove to find our places within the law and civil rights, but who found it difficult to explain our inherent discomfort, our inherent kind of unwillingness to wholeheartedly embrace the idea that the law, once equal, would solve all of our problems forever. Derrick's work forced us to contemplate, not just the possibilities of the law, obviously, but also its profound limitations. And, his work gave us not just a voice and a framework for analytical thought, but also an incredibly powerful area of creative possibility: the idea that narrative and creative fictional accounts of experiences, fables, and people could really help us to understand and recognize on a deeper level the kind of “incompleteness” of law and the civil rights project.

Even aside from Derrick's wonderful experiments with narrative and allegory, there is also a remarkable body of work on how to become a better person, scholar, and teacher. In *Ethical Ambition*, Derrick explores six areas of importance: passion, courage, faith, relationships, inspirations, and humility.<sup>1</sup> To say that he exemplified many of these areas is obvious, but most touching about Derrick's life and legacy were two acts that embodied his courage, passion, relationships, and inspiration. The first that comes to mind to me was his public willingness to sacrifice a prestigious position in order to openly challenge the hiring practices of Harvard Law School. The second is Derrick's being an early advocate for embracing the concept of LGBT equality.

As a woman of color, it changed my life to hear that there was this person out there who had given up a Harvard professorship to protest the absence of women of color on the tenured faculty. It was the first time that I felt personally challenged to critically contemplate the way in which we are taught—especially in elite law schools—to worship prestige, with the notion of “merit” being coterminous with these ideas. And the idea that someone would give all of that up for the principle of faculty diversity was deeply transformative for me, and it really forced me to ask myself the question: What would you give up for a principle, for being critical, for seeing a deeper kind of structural equality or the absence of that kind of structural equality? I found this question difficult to answer in law school, but as a law professor and a scholar, I try to grapple with the various implications of this question.

Equally outstanding was Derrick's early embrace of the overlap between civil rights regarding race and those involving sexual orientation. Keith Boykin, a former Bell student and a gay rights activist, remembers Bell immediately agreeing to speak at a Black gay men's rally in 1995, and he writes, “In many ways, Professor Bell was ahead of his time. He was a heterosexual, married Black man who publicly supported gay marriage long before any state had recognized it or allowed it.”<sup>2</sup> In 2002, long before Massachusetts or any other state had allowed gay marriage, Bell wrote: “That the laws of most countries recognize only unions between a man and a woman is testimony to what a slow and lumbering creature

---

\* Joseph M. McLaughlin Professor of Law, Fordham University School of Law.

<sup>1</sup> See DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002) [hereinafter *ETHICAL AMBITION*].

<sup>2</sup> Keith Boykin, *Remembering Derrick Bell*, THE HUFFINGTON POST (Oct. 6, 2011, 12:04 PM ET), [http://www.huffingtonpost.com/keith-boykin/derrick-bell-dead\\_b\\_998024.html](http://www.huffingtonpost.com/keith-boykin/derrick-bell-dead_b_998024.html).

the law can be, and not to any ultimate validity of those laws.”<sup>3</sup> And no one could master the power of the word and the power of the image in the way that Derrick Bell had.

Turning to the gift that Derrick gave to us—a gift that is both lasting and inspiring, but also incredibly difficult to surmount—that is, the gift of being critical and of seeing civil rights through a lens that forces us to explore perpetual structural inequality. I want to return to Boykin’s observations and Bell in his defense of marriage equality and gay civil rights, and ask today what a critical sexuality theory might look like. Would it accomplish the same work as critical race theory has done or would it accomplish different goals? Is it possible to use what Derrick has taught us to explore how LGBT rights can employ the language and the lens of critical race theory more effectively? Now, at the time that Bell embraced the notion of gay marriage, it was a deep structural shift, and in some ways, it was a profound critique of the notion of marriage being limited to a man and a woman.

But today, even just a few years later, I wonder what a critical sexuality theory would comprise. Are gay rights lawyers in some ways “serving two masters” by enabling their clients to marry while not engaging, changing, or dismantling the structures of marriage itself?<sup>4</sup> Are gay rights litigators seeking to marginally improve the lives of some gay clients, the wealthy, the White, the enfranchised, over other strategies that might be less normative, might be less socially acceptable, but still valuable at the same time? And I imagine that Bell would force us to ask whether there are ways in which the optimistic language of gay civil rights overlooks the deeper structural inequalities that divide gay from straight, or how race and gender play a role in predicating certain gay rights over others. One need only glance at the chilling statistics governing LGBT teens regarding bullying, or the sobering accounts from transgender individuals in the workplace and elsewhere, or the protection/segregation of LGBT folks in prisons and elsewhere, to see that Derrick’s message of always looking to those who are left out, always asking “who is excluded,” offers us a powerful and lasting set of questions for the future of LGBT rights. As Derrick Bell wrote in his article *Racial Realism*, “As every civil rights lawyer has reason to know, despite law school indoctrination and belief in the rule of law, abstract principles lead to legal results that harm Blacks and perpetuate their inferior status.”<sup>5</sup>

Derrick Bell was a master at imbuing those abstract legal principles with an immediate and vivid visual quality. Consider the familiar and timeless imagery of the allegory of *The Space Traders*,<sup>6</sup> where he presents us with a question of how far a majority would go to “sell out” a minority, even handing them over to an alien group. Now at the time that the allegory was written, it was groundbreaking for its willingness to embrace and pull apart the dark forces of racism for its revelatory offerings. But when I reread *The Space Traders* more recently, I was actually thinking of an entirely different set of stories. I was struck by how much some of that story has actually taken place, not just with respect to race, but particularly with respect to indigenous people, and not just in the United States, but globally.

Listen to the last section of *The Space Traders*, where Bell writes about how white America decides ultimately to “sell out” the Black minority and deliver them to the group of alien invaders in order to secure their own prosperity in the United States: Bell writes,

---

<sup>3</sup> ETHICAL AMBITION, *supra* note 1, at 97, *cited in* Keith Boykin, *Remembering Derrick Bell*, THE HUFFINGTON POST (Oct. 6, 2011, 12:04 PM ET), [http://www.huffingtonpost.com/keith-boykin/derrick-bell-dead\\_b\\_998024.html](http://www.huffingtonpost.com/keith-boykin/derrick-bell-dead_b_998024.html).

<sup>4</sup> See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>5</sup> Derrick Bell, *Racial Realism*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 304 (Kimberlé Crenshaw et al. eds., 1992).

<sup>6</sup> DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158 (1993) [hereinafter *FACES*].

In the night, the space traders had drawn their strange ships right up to the beaches and discharged their cargos of gold, minerals, and machinery, leaving vast empty holds. Crowded on the beaches were 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.<sup>7</sup>

Derrick's voice is not only salient, but necessary to the landscape of current federal Indian law, which, in some ways, embodies the limitations of law and exploring those issues of equality. One might argue that this body of law is "darkness visible" on multiple levels. This body of law, and now particularly at the hands of a Supreme Court that fails to recognize the proper functioning of the trust relationship between indigenous Native Americans and the federal government, is really about a feeble trust. It is about a disabled trust, I think Derrick would say, something that is promised but fails to fully deliver. The body of federal Indian law can thus be described along the same lines as he offers us in *The Space Traders*: a group of minority individuals utterly disenfranchised from a tripartite system of governance, and left in some ways to a kind of sovereignty that is not a true kind of sovereignty, but a faltering kind of dependence, an incomplete and unequal legacy. And so I was struck in *The Space Traders* by how Blacks were banished to another world, an alien world, just as Native Americans were banished to infertile small parcels of land and subjected to enormous challenges and genocide on the way, just as the Trail of Tears, the legacy of *Cobell v. Salazar*,<sup>8</sup> and *Johnson v. M'Intosh*,<sup>9</sup> clearly demonstrates.

As Derrick's work teaches us, when we are intimately tied to the language of law, as so much of federal Indian law is motivated towards small marginal changes in accommodations, we fail to really imagine a deeper structural kind of equality. His remarkable work has spurred us to imagine, I think, a greater kind of sovereign self-determination, a greater kind of parallel between "Afro-Atlantica," as explained by Twila Perry in her remarks, and the sovereign basis of independence. And so I interpret Derrick's work as pushing us not to just explore indigenous rights in the context of critical race theory but also to carve out a space for critical indigenous theory as well.

And this is where his work leads us on civil rights, whether it be race, LGBT studies, disability, indigenous rights, or all of these: Derrick leaves us with a lasting challenge to always look to who is being left out by the language of civil rights and why, and to "criticalize" these areas, to look to the "faces at the bottom of the well,"<sup>10</sup> to really engage with how much Derrick's unique analytical perspective teaches us about our system of legal relations with minority groups.

I also wonder whether Bell leaves us with the question about the lasting legacy of critical theory upon the vaunted language of civil rights. He once wrote: "Your faith in what you believe must be a living, working faith that draws you away from comfort and security, and towards risk through confrontation."<sup>11</sup> And so Derrick would encourage us to take greater risks in our scholarship and to

---

<sup>7</sup> *Id.* at 194.

<sup>8</sup> *Cobell v. Salazar, rev'd sub nom. Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), *aff'd*, *Cobell v. Babbitt*, 240 F.3d 1081 (D.C. Cir. 2001) (finding that Departments of the Interior and Treasury had breached their fiduciary duties in managing individual Indian money trust accounts and were required to reform oversight procedures).

<sup>9</sup> *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (ruling that land ownership rights granted by the United States government invalidated those derived from Native Americans because "[c]onquest gives a title which the Courts of the conqueror cannot deny.") (Marshall, C.J.).

<sup>10</sup> See *FACES*, *supra* note 6.

<sup>11</sup> Derrick Bell, *Foreword: The Power of Prophets*, *BEYOND A DREAM DEFERRED: MULTICULTURAL EDUCATION AND THE POLITICS OF EXCELLENCE* x (Becky W. Thompson & Sangeeta Tyagi eds., 1993); see also Matthew S. Bromberg, *Harvard Law School's War Over Faculty Diversity*, *J. BLACKS IN HIGHER EDUC.*, Autumn 1993, at 76 (quoting Bell's speech at a rally of students at Harvard Law School in 1992, where Bell uses the same phrase).

really explore and confront how to employ those powerful lessons that he left us with. The notion of risk through confrontation lives on in the law professors who follow him, in the legacy of local social protests, as it lives on in the legacy of indigenous land protests, and it lives on in myriad spaces that are both uncommon and elegantly situated in places that aim to realize Bell's eternally inclusive vision.