

COLUMBIA JOURNAL OF RACE & LAW

VOL. 1

JULY 2012

NO. 3

FOREWORD

WHEN THE STARS BEGIN TO FALL: INTRODUCTION TO CRITICAL RACE THEORY & MARXISM

*Anthony Paul Farley**

My Lord, what a morning
My Lord, what a morning
*When the stars begin to fall.*¹

Slavery is not dead. Slavery is death. Slavery is white-over-black to white-over-black to white-over-black, and that continually. Whether white-over-black appears before us as slavery or as segregation or as neosegregation is not at all important. All three haunts, slavery, segregation and neosegregation, present us with the same death, white-over-black, that we have all already died.

Slavery to segregation to neosegregation is not progress, it is not even movement. Slavery is death and death is the end. But the motionless movement of death through slavery, segregation and neosegregation is not the end of death. The cycle of repetition, slavery-to-segregation-to-neosegregation, white-over-black to white-

* James Campbell Matthews Distinguished Professor of Jurisprudence, at Albany Law School. I thank all participants for their brilliant responses to my request that they take seriously a missing element of Critical Race Theory, the critique of political economy, and contribute to this symposium, *Critical Race Theory & Marxism*. I thank the organizers of the National People of Color Conference at Seton Hall for granting so much space in the program to *Post-Marxism, Post-Racialism and Other Fables of the Dispossession*, the three-panel stream that I organized. I thank Sheila Ruby Adams, Editor-in-Chief of the *Columbia Journal of Race and Law*, and all her colleagues. I thank Maria Grahm-Farley, as always. I dedicate this project to my friend Keith Aoki, 1956-2011.

¹ *My Lord, What a Morning* (traditional). See MARIAN ANDERSON, *My Lord, What a Morning*, on SPIRITUALS (BMG 1999) and PAUL ROBESON, *My Lord, What a Morning*, on PAUL ROBESON: THE COMPLETE EMI SESSIONS, 1928-1939 (EMI 2008), for two beautiful interpretations of the tradition.

over-black to white-over-black, is not living; it is not life, it is only the imitation of life.

Critical Race Theory's critique of political economy begins by calling the imitation of life into question. The modern world was neither modern nor *the* world before the Middle Passage. Capitalism is the first system to wind itself around the entire world, and it is the capitalist unification of the globe that most sets us apart from history as modern. The capitalist cycle began with a total death event: slavery. Capital, Marx observed, has its point of origin in genocide, colonialism and "the conversion of Africa into a preserve for the commercial hunting of blackskins."² Capitalism, born of black slavery, entered history "dripping from head to toe, from every pore, with blood and dirt."³ Frederick Douglass described the "blood-stained gate"⁴ through which everyone passed to begin the capitalist cycle:

I have often been awakened at the dawn of day by the most heart-rending shrieks of an old aunt of mine, whom he [the overseer] used to tie up to a joist and whip upon her naked back till she was literally covered with blood. No words, no tears, no prayers from his gory victim seemed to move his iron heart from its gory purpose. The louder she screamed, the harder he whipped; and where the blood ran fastest, there he whipped longest It struck me with awful force. It was the blood-stained gate, the entrance into the hell of slavery, through which I was about to pass. It was a most terrible spectacle.⁵

² Marx commented on the global genocide that began the capitalist cycle:

The discovery of gold and silver in America, the extirpation, enslavement and entombment in mines of the indigenous population of that continent, the beginnings of the conquest and plunder of India, and the conversion of Africa into a preserve for the commercial hunting of blackskins, are all things which characterize the dawn of the era of capitalist production. These idyllic proceedings are the chief moments of primitive accumulation.

KARL MARX, CAPITAL (Vol I) 915 (Ben Fowkes Trans., 1976).

³ *Id.* at 926.

⁴ NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE, WRITTEN BY HIMSELF 25 (1968) (1845).

⁵ *Id.* at 24-25.

The “spectacle” reproduces itself each and every cycle.⁶

Slavery is death. We do not want to remember our death, and so we repeat it. Repetition of the capitalist cycle is the mode by which our refused memories return to haunt us. The law we hope will banish the shadow becomes instead the vehicle of its return. Law, the instrument by which we refuse painful memories, remembers everything, but it remembers only in the mode of repetition.

Death reproduces itself through law’s memory:

The law of slavery has not been forgotten by the law of segregation; the law of segregation has not been forgotten by the law of neosegregation. The law guarding the gates of slavery, segregation, and neosegregation has not forgotten its origin; it remembers its father and grandfather before that. It knows what master it serves; it knows what color to count.⁷

Nothing survived slavery. White-over-black begins with slavery. The endlessly-evolving forms of white-over-black, sometimes called “racial progress,” are not the death throes of slavery, they are its perfection. The rest is just dreaming:

*Up over my head
I see freedom in the air
Up over my head
There must be a god somewhere.*⁸

This “freedom in the air” has a cost that is buried in the ground:

⁶ Marx wrote:

However long a series of periodical reproductions and preceding accumulations the capital functioning today may have passed through, it always preserves its original virginity. So long as the laws of exchange are observed in every single act of exchange the mode of appropriation can be completely revolutionised without in any way affecting the property rights which correspond to commodity production.

MARX, *supra* note 2, at 733.

⁷ Maria Grahn-Farley, *The Master Norm*, 53 DEPAUL L. REV. 1215, 1227 (2004).

⁸ *Up Over My Head* (traditional), in SING FOR FREEDOM: THE STORY OF THE CIVIL RIGHTS MOVEMENT THROUGH ITS SONGS 156 (Guy and Candie Carawan eds., 1990) [hereinafter SING FOR FREEDOM].

*Before I'll be a slave
I'll be buried in my grave
and go home to my Lord
and be free.⁹*

The critique of political economy is an attempt to awaken us from the dream that slavery is over. *Critical Race Theory & Marxism* is therefore a hopeful enterprise.

If there is reason to hope, and if that hope is something more than morbid, then it surely must be the hope that the dead are not dead, only sleeping. If the dead are only sleeping, then there is a chance that they are dreaming. If the slave dreams, and if the dream is a wish-as-if-fulfilled, then it must be a dream of a freedom that waking life forbids. If the dream is the disguise of the wish, then the slave's dream, the substance of the thing it hopes for, must be the dream of waking from the non-life of slavery, of waking "one glad morning."¹⁰

Singing is an especially hopeful form of dreaming:

*One glad morning
When this life is over
I'll fly away¹¹*

When we sing we reveal things that we have forbidden ourselves to say, even to ourselves. It is in this way that singing is like dreaming:

*Woke up this morning with my mind / Set on freedom
Woke up this morning with my mind / Set on freedom
Woke up this morning with my mind / Set on freedom
Hallelu, Hallelu, Hallelujah.¹²*

Dreaming may be the way that we *set* our minds on freedom. But we have known, at least since W. E. B. Du Bois' *The Souls of Black*

⁹ *Oh Freedom* (traditional), in *SING FOR FREEDOM*, *supra* note 8, at 74.

¹⁰ Albert Brumley, *I'll Fly Away*, in *AFRICAN AMERICAN HERITAGE HYMNAL: 575 HYMNS, SPIRITUALS AND GOSPEL SONGS 601* (Delores Carpenter and Nolan E. Williams eds., 2001) [hereinafter, Brumley]. The story goes that Brumley, a white farmer and musician, completed this hymn, one of the most recorded of all time, while picking cotton on his father's farm. *ENCYCLOPEDIA OF AMERICAN GOSPEL MUSIC 54-55* (W.K. McNeil ed., 2005). See also REV. GARY DAVIS, *I'll Fly Away*, on *HAVE A LITTLE FAITH (Remastered)* (Fantasy, Inc.: 1999); KANYE WEST, *I'll Fly Away*, on *THE COLLEGE DROPOUT* (Roc-A-Fella Records: 1999).

¹¹ See Brumley, *supra* note 10.

¹² *Woke Up This Morning With My Mind On Freedom* (traditional), in *SING FOR FREEDOM*, *supra* note 8, at 83.

Folk, that the slave, the eternal citizen of death's dream kingdom, is of two minds.¹³ Its questions, the things it questions, are, therefore, of necessity, thought and rethought, doubled. Death, then, is an old question that now begs to be rethought:

Who would fardels bear,
To grunt and sweat under a weary life,
But that the dread of something after death
The undiscover'd country, from whose bourn
No traveller returns, puzzles the will,
And makes us rather bear those ills we have
Than fly to others that we know not of?¹⁴

We already know the answer. We already know the “undiscover'd country from whose bourn no traveller returns” because it is the country of our captivity.¹⁵ Slavery is death, death only, and that continually.

The death event at the navel of our modernity is unimaginable. Where there is nothing, there is nothing to be thought or rethought. If you live in the present made possible by slavery, and everyone does, then death appears as your father and your mother and your country and your lord and your salvation, and your law. You are not alive. We are not alive. We are a repetition, an echo, a reflection of the great darkness of slavery, the original accumulation:

By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion. We hanged our harps upon the willows in the midst thereof. For there they that carried us away captive required of us a song; and they that wasted us required of us mirth, saying, Sing us one of the songs of Zion. How shall we sing the LORD's song in a strange land?¹⁶

The life you think you are living is not real, it is a shadow of slavery, and slavery is itself only shadow:

¹³ W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* 3 (1989) (1903) (“It is a peculiar sensation, this double-consciousness . . .”).

¹⁴ WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc. 1.

¹⁵ *Id.*

¹⁶ Psalm 137:1-4 (King James)

*One glad morning
When this life is over
I'll fly away*¹⁷

The end is not yet; it is already. It has *already* ended. We are, it seems, *living* in the present that was made possible by slavery. But all is not what it seems. No one lives here now. We are all already gone. We are ghosts that have already given up.

The *already gone* is the beginning of Critical Race Theory. Derrick Bell's *And We Are Not Saved*, the beginning of Critical Race Theory, is a postmodern Jeremiad of the gone world: "The harvest is past. The summer is ended. And we are not saved."¹⁸ Critical Race Theory is the study of the *already gone*. If slavery is death, death only, and that continually, then white-over-black is that same death perfecting itself.¹⁹

We are the dead.²⁰ Rather than bury the dead, we dead perpetually repeat the fatal injury that brought us to this dark place.²¹ That makes us eaters of the dead.²² The parasite spirals deeper into the corpse and imagines itself to be flying free. Law is the form of this repetition, the content of our replenishment, our strange Communion.

On the eve of the one hundredth anniversary of the Emancipation Proclamation, James Baldwin wrote an open letter to his nephew to let him know that we who are black were never meant to survive.²³ There are no accidents. We did not survive slavery. Nothing survives slavery. Baldwin understood, like the Rev. Dr. Martin Luther King Jr., that the Emancipation was being celebrated too early. Critical Race Theory understands the dark side

¹⁷ Brumley, *supra* note 10.

¹⁸ Jeremiah 8:20 (King James), *quoted in* DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE*, at vii (1989).

¹⁹ Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 221, 221-26 (2004).

²⁰ Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229, 1229 (2004).

²¹ Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51, 54-55 (2005).

²² Anthony Paul Farley, *Zombie Jamboree*, *The Third Annual Jerome M. Culp Memorial Lecture at the Twelfth Annual LatCrit Conference*, 4 FIU L. REV. 175 (2008); Anthony Paul Farley, *Thirteen Stories*, 15 TOURO L. REV. 543, 594-625 (1999).

²³ JAMES BALDWIN, *My Dungeon Shook: Letter to My Nephew on the Eve of the 100th Anniversary of the Emancipation Proclamation*, in *THE FIRE NEXT TIME* (1993) (1963).

of history. We are not too early, we are too late. Whatever it was that might once have seemed a cause for celebration is *already gone*.

Critical Race Theory is a modernist project. Marxist and Freudian influences abound. Critical Race Theorists, Marx and Freud in tow, read law with a purpose, not as “signifying nothing.”²⁴ With Marx, there are no accidents. With Freud, there are no accidents. With Critical Race Theorists, there are no accidents. There are no accidents. There are no accidents *because slavery is fatal. Slavery was fatal.* There has already been an accident. There were no survivors. There are, therefore, no more accidents to be had. This thing of darkness cannot be illuminated.²⁵ It is in *that* sense that there are no accidents.

Marx was known to his family, affectionately, as “the Moor.”²⁶ Freud, too, was known to his family as “a little Moor.”²⁷ Let us regard the blackness of Marx and Freud as no accident. Let us go on and regard these two *blackamoors* as comrades and racemen:

*How I wish you could see the potential
The potential of you and me
It's like a book elegantly bound, but
In a language that you can't read, just yet*

*You gotta spend some time, love
You gotta spend some time, with me*

²⁴ WILLIAM SHAKESPEARE, *MACBETH*, act 5, sc. 5.

²⁵ WILLIAM SHAKESPEARE, *THE TEMPEST*, act 5, sc. 1 (“These three have robb’d me, and this demi-devil—For he’s a bastard one—had plotted with them to take my life. Two of these fellows you must know and own; this thing of darkness I acknowledge mine.”).

²⁶ Marx’s children referred to him not as father, but as the “Moor.” ERICH FROMM, *MARX’S CONCEPT OF MAN* 180 (2004) (1961). Eleanor Marx writing of her father, Karl Marx, calls him the “Moor”:

Moor got the better of his illness again. Never shall I forget the morning he felt himself strong enough to go into mother’s room. When they were together they were young again—she a young girl and he a loving youth, both on life’s threshold, not an old disease-ridden man and an old, dying woman parting from each other for life.

Id. at 67-68.

²⁷ “It appears that I came into the world with such a tangle of black hair that my young mother declared I was a little Moor.” SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (1900), in Volume IV-V *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 352 n.1 (James Strachey ed., 1971).

*And I know that you'll find love
I will possess your heart.*²⁸

Critical Race Theory and traditional civil rights advocacy both might find themselves at home in the immediately above lyrics, but there is an important difference. The latter sing to win the hearts and minds of their owners. Such singing gives another meaning to the word “possession.”²⁹ The former, the race crits, sing with and to each other, and the song they sing is new.

The dead have nothing to sing about. Their song is over. But the singing is not over. We hear the singing. We cannot think of singing without thinking of singers and so we are brought to the joyful conclusion that there must be singers. We are the singers. The singing—the fact that our singing cannot be stopped—takes us to the emancipatory conclusion that the dead are not dead, only sleeping. The Rev. Dr. King used theological terms to discuss the power of the empty crypt:

Easter tells us that everything that we see is a shadow cast by that which we do not see. The visible is a shadow cast by the invisible. Easter cries out to us that the idealists are right, that it is ultimately mind, personality, and spiritual forces that are eternal and not merely these material things that we look about and see. For, one day, the gigantic mountains will pass away. *One day, even the stars that bedeck the heavens will move out of their course But there is something that will stand.*³⁰

The empty crypt is a power:

There is faith, there is love, there is hope, there is something beyond the external that will stand through the ages The Christian faith says this is the testimony of Easter. That Christ on the day that he walked with a group of men on the Emmaus road was a little more real than he was the day before that So Easter comes and says to us that the invisible forces are

²⁸ DEATH CAB FOR CUTIE, *I will possess your heart*, NARROW STAIRS (Atlantic Recording Corporation: 2008).

²⁹ Anthony Paul Farley, *Critical Race Theory & Marxism: Temporal Power*, 1 COLUM. J. RACE & L. 247 (2012).

³⁰ Martin Luther King, Jr., *Questions that Easter Answers, Sermon Delivered at Dexter Avenue Baptist Church, 21 April 1957*, in THE PAPERS OF MARTIN LUTHER KING JR: VOLUME VI: ADVOCATE OF THE SOCIAL GOSPEL, SEPTEMBER 1948—MARCH 1963, at 283, 286 (Clayborne Carson ed., 2007).

the forces that are ultimately real and the visible forces are merely shadows cast by the invisible.³¹

This can be explained in other ways:

Awareness is the place of the deathless;
 Unawareness is the place of death.
 The aware do not die;
 The unaware are as though dead already.³²

If “unawareness is the place of death” and “awareness is the place of the deathless,” then Critical Race Theory, having awareness as its aim, *is* the awakening of the dead.

There is no death darker than slavery. But if the dead are not dead, only sleeping, then their waking is cause for celebration. We ourselves are the sleepers whose eyes must open:

And I can hear something saying, ‘King, you are stopping at Good Friday, but don’t you know that Easter is coming. Don’t worry about this thing! You are just in the midst of a transition now. You are just in the midst of Good Friday now. But I want you to know, King, that Easter is coming! One day truth will rise up and reign supreme! One day justice will rise up. One day all the children of God will be able to stand up on the third day and then cry, ‘Hallelujah, Hallelujah’ because it’s the Resurrection day.

And when I hear that I don’t despair. I can cry out and sing with new meaning. This is the meaning of Easter, it answers the profound question that we confront in Montgomery. And if we can just stand with it, if we can just live with Good Friday, things will be all right. For I know that Easter is coming and I can see it coming now.³³

This symposium, *Critical Race Theory & Marxism*, is a celebration, a “Hallelujah.” The authors all have written of the occulted history that shapes the visible present. They have written with the faith—call it Easter³⁴ or call it magic or call it the end of

³¹ *Id.*

³² THE DHAMMAPADA 2.1 (Valerie J. Roebuck trans., 2010).

³³ King, *supra* note 30, at 289.

³⁴ *Id.* at 283.

colonialism or call it the black radical tradition³⁵ or call it anarchism or call it free communism or join the Rev. Dr. King in calling it something “far beyond communism.”³⁶ The freedom dreams we have been dreaming can be made a waking reality for all:

*Didn't my Lord deliver Daniel
Then why not every man?*³⁷

There are no *bright* lines in the undiscovered country, this crypt we must leave, but this symposium has followed Rev. Dr. King's line throughout.

The participants in this symposium have traced different parts of the line. In alphabetical order, they are: Anthony Paul Farley, *Critical Race Theory & Marxism: Temporal Power*; Adam Gearey, *W. E. B. Du Bois' Ambiguous Politics of Liberation: Race Marxism and Pan Africanism*; Neil Gotanda, *Beyond Supreme Court Anti-Discrimination: An Essay on Racial Subordinations, Racial Pleasures and*

³⁵ CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (2000).

³⁶ This was Rev. Dr. King's way:

[O]ne day we must ask the question, “Why are there forty million poor people in America?” And when you begin to ask that question, you are raising a question about the economic system, about a broader distribution of wealth. When you ask that question, you begin to question the capitalistic economy. (Yes) And I'm simply saying that more and more, we've got to begin to ask questions about the whole society. We are called upon to help the discouraged beggars in life's marketplace. (Yes) But one day we must come to see that an edifice which produces beggars needs restructuring. (All right) It means that questions must be raised. And you see, my friends, when you deal with this you begin to ask the question, “Who owns the oil?” (Yes) You begin to ask the question, “Who owns the iron ore?” (Yes) You begin to ask the question, “Why is it that people have to pay water bills in a world that's two-thirds water?” (All right) These are words that must be said. (All right) Now, don't think you have me in a bind today. I'm not talking about communism. What I'm talking about is *far beyond communism*.

MARTIN LUTHER KING, *Address at the 11th Annual Southern Christian Leadership Conference: Where Do We Go From Here?* (Aug. 16, 1967), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 193-194 (Clayborne Carson and Kris Shepard eds., 2002).

³⁷ *Didn't My Lord Deliver Daniel?* (traditional). PAUL ROBESON, *Didn't My Lord Deliver Daniel?* on *ON MY JOURNEY: PAUL ROBESON'S INDEPENDENT RECORDINGS* (Smithsonian Folkways: 2007); JAMES WELDON JOHNSON AND ROSAMOND JOHNSON, *Didn't My Lord Deliver Daniel?*, in *THE BOOKS OF THE AMERICAN NEGRO SPIRITUALS* 148 (1969) (1925).

Commodified Race; Gill Gott, *Race, Rights and Reterritorialization*; Peter Halewood, *Citizenship as Accumulated Racial Capital*; Angela Harris, *Compassion and Critique*; César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*; Pantea Javidan, *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multidimensional Understanding*; Ravi Malhotra, *The Legal Politics of Hubert H. Harrison: Excavating a Lost Legacy*; Bekah Mandell, *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*; Deborah Waire Post, *Contract and Dispossession*; Reginald Leamon Robinson, "Precious": *Three Tales of Childhood Maltreatment*; SpearIt, *Why Obama is Black: Language, Law & Structures of Power*; Christian Sundquist, *Signifying on Passing: (Post) Post-Racialism, (Post) Post-Modernism, and (Post) Post-Marxism*; Patricia Tuitt, *Used Up and Misused: The Nation State, The European Union and the Insistent Presence of the Colonial*; and Donna E. Young, *Post Race Postbaste: Towards an Analytical Convergence of Critical Race Theory and Marxism*. Maria Grahn-Farley's critique of Marxist analysis, presented as a critique of binary thinking, provided a much-needed frame for all of the essays of *Critical Race Theory & Marxism*, as well as all of the other panel presentations of *Post-Racialism, Post-Marxism & Other Fables of the Dispossession*.

Neil Gotanda and Angela Harris, two of this nation's leading academics, have each made brilliant contributions.³⁸ Their contributions are brilliant in the sense that they light a path for a great deal of future research. Critical Race Theory may have as its most important contribution the development of new methods of taking value into account. Marxist Theory may have as its most important contribution the critique of capitalist methods of accounting for value. Gotanda and Harris both have taken bold steps in the direction of something that this Foreword will term communist accounting. Communist accounting looks at value as it relates to the totality, not as it appears when the inquiry is limited to the particular interests of a particular class or enterprise. Gotanda takes us *Beyond Supreme Court Anti-Discrimination: An Essay on Racial Subordinations, Racial Pleasures and Commodified Race* to show different ways in which contemporary critical race theorists have mapped how traditional representations of value have failed to account for

³⁸ See generally Neil Gotanda, *Beyond Supreme Court Anti-Discrimination: An Essay on Racial Subordinations, Racial Pleasures and Commodified Race*, 1 COLUM. J. RACE & L. 273 (2012); Angela P. Harris, *Compassion and Critique*, 1 COLUM. J. RACE & L. 326 (2012).

the totality.³⁹ Harris, recognizing, as Gotanda does, that “ideology critique has an emotional dimension,” takes us toward a greater understanding of that value-dimension in *Compassion and Critique*.⁴⁰

Gotanda begins boldly:

Within legal studies there is tension between the Supreme Court’s ever narrowing range of racial issues acceptable for Court review and efforts by legal scholars to examine racial subordinations that go beyond a narrow treatment of racial discrimination.⁴¹

After a series of disappointments—*McDonnell-Douglas v. Green*⁴²; *Griggs v. Duke Power*⁴³; *Washington v. Davis*⁴⁴; *Richmond v. Croson*⁴⁵; *Adarand Constructors, Inc. v. Peña*⁴⁶; *Grutter v. Bollinger*⁴⁷; *Gratz v. Bollinger*⁴⁸; and *Parents Involved in Community Schools v. Seattle School District*⁴⁹—Gotanda realizes that:

All government efforts to address questions of race directly now face almost certain rejection under strict scrutiny. The Court simply does not recognize any social concerns as meeting the ‘compelling governmental interest’ requirement under strict scrutiny.⁵⁰

Furthermore:

Since the Court controls the cases that it chooses to review, its non-acceptance of questions of racial subordination beyond this very narrow doctrinal range have resulted in legal scholarship similarly narrow in scope. Legal writers must either make strenuous efforts to push the boundaries of “disparate treatment” discrimination, racial “intent” or “compelling government interest” or simply abandon any pretense to

³⁹ See generally Gotanda, *supra* note 38.

⁴⁰ Harris, *supra* note 38, at 350.

⁴¹ Gotanda, *supra* note 38, at 274.

⁴² 411 U.S. 792 (1973).

⁴³ 401 U.S. 424 (1971).

⁴⁴ 426 U.S. 229 (1976).

⁴⁵ 488 U.S. 469 (1989).

⁴⁶ 515 U.S. 200 (1995).

⁴⁷ 539 U.S. 306 (2003).

⁴⁸ 539 U.S. 244 (2003).

⁴⁹ 551 U.S. 701 (2007).

⁵⁰ Gotanda, *supra* note 38, at 276.

working within the Supreme Court's doctrinal guidelines. This narrowing by the Court has been a continuing source of frustration for those seeking racial justice in the legal arena.⁵¹

If it is the worst of times in practice, it the best of times for theory. We have nowhere to go, practically speaking, but this leaves us, again, with the need for thinking of the widest-ranging sort. Facing what Frederick Douglass, Karl Marx, and W. E. B. Du Bois each would have called a crisis, we have to rethink everything about the world that seems to surround us, including ourselves and our roles. The political is personal. In Harris's words:

Ideology critique has an emotional dimension, in part because ideology itself is a strategy of emotion management. Maintaining hierarchical relations requires that we manage our emotions in certain ways, that we not care. Ideological critique seeks to spark caring and to build from it compassion, outrage, and the courage to make change.⁵²

Gotanda does three things along these same lines:

Section I reviews authors working in diverse doctrinal areas: Title VII, common law contract, racial profiling and intellectual property. Section II develops Anthony Farley's work on racial pleasure—the idea that racial subordination gives pleasure to the participants. Section III develops the idea that certain forms of racial subordination are commodified and may be theorized as commodified race within Marx' theory of capitalist commodity circulation.⁵³

Dialectical thinking, as can be seen in the relationship between Gotanda's work, Harris's work, and my own work, is the point of contact between Critical Race Theory and Marxism, which is also demonstrated by all the essays of this symposium:

Dialectic thinking is adequate to reality in that handling the concepts it is aware that the finite cannot fully render the infinite, nor the static the dynamic, and that every concept has to develop into new concepts, into its opposite. Dialectical thinking . . . understands that

⁵¹ *Id.* at 277.

⁵² Harris, *supra* note 38, at 350.

⁵³ Gotanda, *supra* note 38, at 277.

every concept has to develop into new concepts, even into its opposite. Metaphysical, undialectical thinking, on the other hand, leads to dogmatic assertions and contradictions because it views conceptions formulated by thought as fixed, independent entities that make up the reality of the world.⁵⁴

Dialectical thinking allows us to see even life and death—Long Friday and Easter—as containers for an ever-unruly reality.⁵⁵ Metaphysical thinking prevents us from understanding ways in which concepts like *colorblindness* and *rule of law* can be presented as the end of racism and yet serve as vehicles for racism’s return.⁵⁶ But dialectical thinking, understanding that all things are in flux, opens the mind to the ever-unruly reality that Critical Race Theory engages: “*Judicial freedom in capitalist development manifests itself as actual slavery.*”⁵⁷

My contribution to this volume, *Critical Race Theory & Marxism: Temporal Power*, begins like this:

Modern progress is “the thing with feathers.” Cruelty to children is its line of flight. It “never stops—at all.” But it never gets anywhere, either. And if it is true that it never asks for anything, that is only because it has already taken everything, and more.⁵⁸

And it ends with a theory of time that explains why our Long Friday seems to go on and on without end.⁵⁹

⁵⁴ ANTON PANNEKOEK, *LENIN AS PHILOSOPHER: A CRITICAL EXAMINATION OF THE PHILOSOPHICAL BASIS OF LENINISM* 30 (Translated by author, Merlin: 2007) (1938).

⁵⁵ Consider Martin Luther King’s dialectics:

And I can hear something saying, ‘King, you are stopping at Good Friday, but don’t you know that Easter is coming. Don’t worry about this thing! You are just in the midst of a transition now. You are just in the midst of Good Friday now. But I want you to know, King, that Easter is coming!’

King, *supra* note 30, at 289.

⁵⁶ Neil Gotanda, *A Critique of ‘Our Constitution is Colorblind’* 44 *STAN. L. REV.* 1 (1991).

⁵⁷ PANNEKOEK, *supra* note 54, at 30.

⁵⁸ Farley, *Temporal Power*, *supra* note 29, at 247 (citations omitted).

⁵⁹ English language speakers usually refer to Good Friday. The Swedish term, *Långfredagen* (Long Friday) better captures the sense of duration here referenced.

Gill Gott's *Race, Rights and Reterritorialization* contends with problems that are familiar to and important in Marxist theory.⁶⁰ What to do about rights? Some, like Patricia Williams, imagine that rights discourse is useful. Rights discourse is not useful. Others, following Derrick Bell, imagine that rights discourse is inevitable. Rights discourse is not inevitable. Rights are the form through which we experience our social alienation. Rights appear as instruments for a certain kind of progress, but they are in fact the vehicle of our return to our point of origin, to the original accumulation.⁶¹ Peter Halewood's *Citizenship as Accumulated Racial Capital* contends with these problems as well.⁶² Halewood sees post-racialism as "wishful thinking" and cautions readers to remember that crises exacerbate contradiction.⁶³

César Cuauhtémoc García Hernández' *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness* confronts the carceral society springing up everywhere, and most ferociously at the border.⁶⁴ We have:

. . . an immigration law scheme that, at its most fundamental, requires sorting desirable immigrants from undesirable immigrants, and that, in recent years, has accomplished this sorting through increased reliance on criminal records.⁶⁵

⁶⁰ Gill Gott's *Race, Rights and Reterritorialization*, 1 COLUM. J. RACE & L. 302 (2012).

⁶¹ Gott writes of Dialectics:

CRT theorizes rights and politics from a "place in the world" of political subjecthood. Marxism provides an impetus to think dialectically about rights in light of patterns and systems of accumulation. Everyone who works critically on race and law can benefit by addressing these polarities.

Id. at 311 (citations omitted).

⁶² Peter Halewood, *Citizenship as Accumulated Racial Capital*, 1 COLUM. J. RACE & L. 313 (2012); *see also* Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953 (2008); Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005).

⁶³ *See* Halewood, *supra* note 62, at 314.

⁶⁴ César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 COLUM. J. RACE & L. 353 (2012).

⁶⁵ *Id.* at 354.

Hernandez continues:

Placing these two features of contemporary immigration law within the context of two decades-old forms of indisputably racialized policing—mass incarceration of black and brown people for criminal law violations and the Supreme Court’s sanctioning of racial profiling in immigration law policing—the Essay concludes that it was inevitable for penal imprisonment trends to taint immigration law enforcement with raced and classed mass incarceration.⁶⁶

Pantea Javidan’s *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multidimensional Understanding*⁶⁷ and Reginald Leamon Robinson’s “Precious”: *Three Tales of Childhood Maltreatment*⁶⁸ both address another important and too-often neglected border, the one between the adult and the child.⁶⁹ These two classes, adult and child, engage each other in a way that leads to their mutual undoing. Javidan observes:

. . . [F]ocusing on childhood and age provides greater insight into inequalities. For example, one in seven of all people in the United States lived below the poverty line in 2009. This reveals information about class, specifically the relatively high proportion of poverty that exists in the wealthiest developed Western nation. An examination of child poverty reveals that of all children in the United States, one in five (approximately twenty percent) lived below the poverty line in 2009 as compared to less than one in seven adults (approximately thirteen percent). “Children represent twenty-five percent of the population, yet they comprise thirty-six percent of all people in poverty.” Thus, children bear the greater brunt of poverty in the United States. African-American children bear the greatest burden of child poverty and poverty in general. One in

⁶⁶ *Id.* at 354.

⁶⁷ Pantea Javidan, *Global Class and the Commercial-Sexual Exploitation of Children: Toward a Multidimensional Understanding*, 1 COLUM. J. RACE & L. 365 (2012).

⁶⁸ Reginald Leamon Robinson, “Precious”: *Three Tales of Childhood Maltreatment*, 1 COLUM. J. RACE & L. 434 (2012).

⁶⁹ See Maria Grahn-Farley, *Astrid AND Me*, 17 LAW & LIT. 269 (2005); Maria Grahn-Farley, *A Theory of Child Rights*, 57 U. MIAMI L. REV. 867 (2003).

three African-American children lived in poverty in 2009.⁷⁰

Robinson reminds us that the personal is political by asking us to look beyond structures which, in his words, position blacks as victims and “whites as singularly powerful reality co-creators” to explain why blacks or other historically oppressed people engage in self-annihilating and self-deceptive, and life devaluing, practices.⁷¹

Lou Andreas Salome sharply observed: “. . . the fictions of healthy people, by anticipating the prospects of the future, bring them to life in the present; the future is inwardly present before it is disclosed externally.”⁷² But white-over-black is an illness, a fatal one. James Baldwin, commenting on George Jackson’s diagnosis of oppression sickness, showed a way to a cure in his open letter to the then-imprisoned Angela Davis:

I am something like twenty years older than you, of that generation, therefore, of which George Jackson ventures that “there are no healthy brothers—*none at all*.” I am in no way equipped to dispute this speculation (not, anyway, without descending into what, at the moment, would be irrelevant subtleties) for I know too well what he means. My own state of health is certainly precarious enough. In considering you, and Huey, and George and (especially) Jonathan Jackson, I began to apprehend what you may have had in mind when you spoke of the uses to which we could put the experience of the slave.⁷³

Baldwin completes the portrait:

What has happened, it seems to me, and to put it far too simply, is that a whole new generation of people have assessed and absorbed their history, and, in that tremendous action, have freed themselves of it and will never be victims again. This may seem an odd, indefensibly pertinent and insensitive thing to say to a sister in prison, battling for her life—for all our lives.

⁷⁰ Javidan, *supra* note 67, at 368.

⁷¹ Robinson, *supra* note 68, at 451.

⁷² LOU ANDREAS SALOME, *THE FREUD JOURNAL OF LOU ANDREAS SALOME* 45 (Stanley Al Leavy trans., 1964).

⁷³ JAMES BALDWIN, *An Open Letter to My Sister Angela Davis*, in *THE CROSS OF REDEMPTION: UNCOLLECTED WRITINGS* 254 (Randall Kenan ed., 2011).

Yet, I dare to say it, for I think you will perhaps not misunderstand me, and I do not say it, after all, from the position of spectator.⁷⁴

Robinson's essay on health, then, addresses a most important issue. Every oppressed group has to reach into what seems to be the void in order to win its freedom.

Ravi Malhotra's *The Legal Politics of Hubert H. Harrison: Excavating a Lost Legacy* and Adam Gearey's *W. E. B. Du Bois' Ambiguous Politics of Liberation: Race Marxism and Pan-Africanism* recover lost histories of struggle.⁷⁵ Harrison has been largely forgotten.⁷⁶ Du Bois's Marxism has been forgotten.⁷⁷ Remembering, as Malhotra and Gearey show, is of the utmost importance. Patricia Tuitt's *Used Up and Misused: The Nation State, The European Union and the Insistent Presence of the Colonial*⁷⁸ and Bekah

⁷⁴ *Id.*

⁷⁵ Ravi Malhotra, *The Legal Politics of Hubert H. Harrison: Excavating a Lost Legacy*, 1 COLUM J. RACE & L. 382 (2012); Adam Gearey, *W. E. B. Du Bois' Ambiguous Politics of Liberation: Race Marxism and Pan-Africanism*, 1 COLUM J. RACE & L. 265 (2012).

⁷⁶ Malhotra writes:

Largely lost to history, Harrison's astonishing body of work on racism and the political issues of his time force us to rethink a period of African American history that typically has been regarded as a low point in the struggle against racism and white supremacy. Yet in fact, Harrison found answers to the questions that would haunt advocates of racial equality for years to come. Both the Black socialist tradition and the Black nationalist tradition owe an enormous debt to Harrison which has not been properly understood to date.

Malhotra, *supra* note 75, at 383.

⁷⁷ Gearey writes:

Commentators have realised, to some extent, the ambiguities of Du Bois' Pan Africanism. However, they have not shown how Du Bois' deployment of the concept opens up a more radical political thinking. . . . Pan Africanism demands a social, economic and political revolution that goes beyond the civil liberties struggle and its focus on constitutional recognition. . . . [T]his Essay will argue that Du Bois' Pan Africanism evoked energies of revolution that point at an unfinished, rather than failed, radical project.

Gearey, *supra* note 75, at 265-66.

⁷⁸ Tuitt describes her project in these terms:

Mandell's *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement* tell similar tales of memory-over-forgetting, as does Deborah Waire Post's *Contract and Dispossession*.⁷⁹ Post concludes: "If the liberatory potential of contract is to be salvaged or resurrected, legal scholars and judges may find it in the methodology of cultural critique and in the subversive behavior of their fellow humans."⁸⁰ Mandell shows "how the ruling class uses race and immigration status to isolate, alienate, dehumanize, and divide poor and working-class people. Those tactics work to keep working people (particularly Whites) dreaming the impossible dream that someday their oppressors—the ruling class—will offer them sweet the relief and prosperity they so desperately desire."⁸¹

SpearIt's *Why Obama is Black: Language, Law & Structures of Power*, Donna E. Young's *Post Race Postbaste: Towards an Analytical Convergence of Critical Race Theory and Marxism* and Christian

The state of post-war Europe need not be exaggerated: It was not a barren wasteland, populated by men in bearskins. Rather, what was to be transcended in the Discovery of Europe was the unwanted shadow of the modern at the dawn of the post-modern. The imperial continuum exists in the mode of the proposed settlement of the new Europe, which essentially is through migration of a particularly ruthless and frenzied momentum.

It is that process of constituting—that place which the European Union makes its own—that helps us make sense of the extraordinary prominence of free movement rights in the fashioning of the new Europe and the almost tyrannical pressure placed upon EU citizens to travel around the ever-increasing spaces of the new Europe. The appropriation of Europe to the exigencies of the European Union has occurred in the time-honoured fashion of encouraging the most courageous (most often too the economically advantaged) to test the new spaces to discover to what extent its seeming dissolution can yield hidden riches. The European Union surely presents us with a basis on which to question the wisdom of Schmitt's claim that "discovery . . . is not a timeless, universal, and normative concept."

Patricia Tuitt, *Used Up and Misused: The Nation State, The European Union and the Insistent Presence of the Colonial*, 1 COLUM J. RACE & L. 490, 497-98 (2012).

⁷⁹ Tuitt, *supra* note 78; Bekah Mandell, *Putting Theory into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*, 1 COLUM J. RACE & L. 402 (2012); Deborah Waire Post, *Contract and Dispossession*, 1 COLUM J. RACE & L. 418 (2012).

⁸⁰ Post, *supra* note 79, at 433.

⁸¹ Mandell, *supra* note 79, at 403.

Sundquist's *Signifying on Passing: (Post) Post-Racialism, (Post) Post-Modernism, and (Post) Post-Marxism* all deal with the politics of identity, a familiar theme in Critical Race Theory, in a way that takes Marxism seriously.⁸² SpearIt observes how "race" and "color" have been debunked by both biological and social science, yet the myths persist.⁸³ Young tells us that this persistence of race is useful to those who discriminate based on race.⁸⁴ Sundquist, like SpearIt, warns us that "[t]he call to a post-racial understanding of the nature of law and society is premature at best, and a disingenuous scheme to normalize racial subordination and class exploitation at worst."⁸⁵ The tradition is deep.

I gathered the participants in this symposium with a letter I wrote last year:

The idea is to use Marx in ways that avoid the terrible signal-noise-ratio that always seems to ruin things when racists who-happen-to-be-Marxists get involved in discussion and take it down the enervating road of class vs. race. The idea is to say *goodbye to all that*, and to do so in a way that leaves everyone free to tune in or tune out as schedule and passion allow.

⁸² SpearIt, *Why Obama is Black: Language, Law & Structures of Power*, 1 COLUM J. RACE & L. 468 (2012); Donna E. Young, *Post Race Posthaste: Towards an Analytical Convergence of Critical Race Theory and Marxism*, 1 COLUM J. RACE & L. 499 (2012); Christian Sundquist, *Signifying on Passing: (Post) Post-Racialism, (Post) Post-Modernism, and (Post) Post-Marxism*, 1 COLUM J. RACE & L. 482 (2012).

⁸³ See, e.g., SpearIt, *supra* note 82, at 479.

⁸⁴ Young writes:

As Marxism reminds us, looking at discrimination from the perspective of the worker reveals that the myriad forms of discrimination experienced in and beyond the workplace are part of a system of subordination that is: (i) supported by faith in free markets, and (ii) not amenable to the narrowly-drawn parameters of the American anti-discrimination framework. The framework, however, does fit nicely into a view of discrimination from the perspective of those put in the position of defending their conduct (the employer, the capitalist, etc.) because it treats discrimination as an uncommon, solitary, or purposeful act done by someone to someone else, not as a regular, systemic and necessary element of a capitalist system.

Young, *supra* note 82, at 499.

⁸⁵ Sundquist, *supra* note 82, at 484.

What to do about the death of Marxism? What to do about the death of racism? What is to be done?

Marxism, they say, is dead. But the classless society is nowhere in sight. Racism is also dead, or so they tell us. But the colorline is still wrapped tightly around the world. The reports of these deaths are *connected* and *premature*. They are *connected* to the destruction of words. They are *premature* in the way declarations of final victory are always premature. If we credit Louis Althusser's observation that "philosophy represents the people's class struggle in theory," then our engagement with these attempted dispossessions is a serious matter. This project will show the vitality of Marxism by locating it within what Critical Race Theory should become.⁸⁶

My message led to a three-panel stream at the National People of Color Conference at Seton Hall School of Law on September 9-11, 2010, under the heading, "Post-Racialism, Post-Marxism & Other Fables of the Dispossession." The stream, joined by the work of the editors of the Columbia Journal of Race and Law, produced this symposium, *Critical Race Theory & Marxism*, the first, it is hoped, of many.

⁸⁶ Anthony Paul Farley, E-mail to Symposium Contributors, Jan. 25, 2010 (citing Louis Althusser, *Philosophy as a Revolutionary Weapon*, 64 NEW LEFT REV. 3 (1970) (on file with the Author).