

1999

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Recommended Citation

Calmore, John O., "Random Notes of an Integration Warrior--Part 2: A Critical Response to the Hegemonic Truth of Daniel Farber and Suzanna Sherry" (1999). *Minnesota Law Review*. 1672.
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Random Notes of an Integration Warrior— Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry

John O. Calmore†

It is apparent on closer study that, while the “official discourse” of anti-racism is one of universalism, there are various important subtexts or counter-themes which are used as part of common sense without stock of their implications for the general model.

—Cathie Lloyd¹

Hegemony contributes to or constitutes a form of social cohesion not through force or coercion, nor necessarily through consent, but most effectively by way of practices, techniques, and methods which infiltrate minds and bodies, cultural practices which cultivate, behaviors and beliefs, tastes, desires, and needs as seemingly naturally occurring qualities and properties embodied in the psychic and physical reality (or “truth”) of the human subject.

—Barry Smart²

† Reef C. Ivey II Research Professor of Law, University of North Carolina School of Law at Chapel Hill. I thank Dean Judith Wegner and the law school for generous research support. I dedicate this essay to the inspiring memory of A. Leon Higginbotham, a true integration warrior. His obituary reports that the judge had expressed increasing alarm at what he viewed as the erosion of hard-won progress on racial issues in the law. Yet, in speaking to young persons, such as those graduating seniors at Wesleyan University in 1996, he said, “I will make two requests of you. They are that you always attempt to see those human beings who become invisible to most people, and that you always try to hear the pleas of those persons who, despite their pain and suffering, have become voiceless and forgotten.” William Glaberson, *A. Leon Higginbotham, Jr., Federal Judge, Is Dead at 70*, N.Y. TIMES, Dec. 15, 1998, at B14. Ironically, he once wrote to me, “with admiration for your impact and tenacity.” The irony is that this, really, is what so many of us should be saying of him.

1. Cathie Lloyd, *Universalism and Difference: The Crisis of Anti-Racism in the UK and France*, in RACISM, MODERNITY AND IDENTITY ON THE WESTERN FRONT 222, 237 (Ali Rattansi & Sallie Westwood eds., 1994) [hereinafter RACISM, MODERNITY AND IDENTITY].

2. Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 882 n.106 (1996) (book review) (quoting Barry Smart, *The Politics of Truth and the Problem of*

As indicated by the epigraphs above, universal dictates contain unacknowledged subtexts that infuse conventional wisdom and common sense in ways that can and do adversely implicate an anti-racism stance. These dictates become hegemonic in ways that continue to subordinate people of color. The resultant hegemony glues together a socially cohesive set of practices, habits, and value orientations in a way that establishes a collective reality, or "truth." I hope to indicate in this essay that, in racist ways, this so-called truth operates to deny humanity to those who are rendered as the racial grotesque—people of color in the United States.³ This depiction extends to the scholarship of critical race theory, which is constructed as a freakish sideshow within the legal academy. Counter-hegemonic voices are necessarily raised by the racial grotesque. Thus, in responding to the hegemonic "truth" of centrist legal scholars, Daniel Farber and Suzanna Sherry, I join with the counter-hegemonic voices.

This essay responds to their recently published book, *Beyond All Reason: The Radical Assault on Truth in American Law*.⁴ In matters of race we must proceed with due care.

Hegemony, in FOUCAULT: A CRITICAL READER 157, 160 (David C. Hoy ed., 1986)).

3. See generally LEONARD CASSUTO, *THE INHUMAN RACE: THE RACIAL GROTESQUE IN AMERICAN LITERATURE AND CULTURE* (1997).

4. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997). I have responded previously to some of the views of Farber and Sherry. See generally John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441 (1997). As I will indicate below, the popular press has reviewed the book favorably. It has been less well received by the legal academy reviews. See, e.g., Kathryn Abrams, *How To Have a Culture War*, 65 U. CHI. L. REV. 1091, 1115 n.43 (1998) (faulting Farber and Sherry for having "declared victory without even having waged the war"); Richard Delgado, *Rodrigo's Book of Manners: How To Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051, 1054 (1998) (criticizing Farber and Sherry's reliance on "a string of provocative-sounding quotations, divorced from context and calculated to make major critical writers sound like extremists"); Roderick M. Hills, Jr., *Truth or Consequences? The Inadequacy of Consequentialist Arguments Against Multicultural Relativism*, 15 CONST. COMM. 185, 191 (1998) (identifying the book's central problem as its focus "entirely on the rhetorical consequences of radical multiculturalism rather than on its intellectual merits"); Francis J. Mootz, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 646 (1998) (noting that Farber and Sherry "fall short of their stated goal to impeach radical multiculturalism as an expression of an implausible philosophy that yields dangerous tendencies"). In short, as Peter Margulies observes, "while Farber and Sherry talk humanist talk, they do not

Farber and Sherry have not done so. Their book, moreover, has done more harm than they may claim, because it has furnished the occasion for foreseeable support from various quarters to reinforce their critique. The voices of support are virtual echoes that add at least insult to injury and give an air of common sense to Farber and Sherry's propositions.

In reading the book, I recall the comment of Amiri Baraka: "not only does the white man oppress the Negro, but he is even going to tell him how to react under the oppression."⁵ In this sense, Farber and Sherry have written quite the officious, condescending book. I find it awkward to respond to the book because I am shedding light on something I think should really be buried. I think that the editors of the current *Minnesota Law Review* give their scholarship more attention than it deserves, making it appear to be more significant and legitimate than I think it is. But as Gramsci warned, "once hegemony takes hold in oppositional thought, debate drifts to tangential issues."⁶

I am an unapologetic critical race theorist. I have been one since the initial critical race theory workshop, held at the University of Wisconsin in 1989. It is a difficult association, sometimes causing one to live the life of the lightning rod. While I do not write in defense or explanation of critical race theory, I think that it is unfairly attacked. I take it personally, not so much as a critical race theorist, but, rather, as a black person (human being) who sees such attacks as related to, not distinct from, a more general disrespect and contempt for the African-American community, scholarly and otherwise.⁷

I believe that Daniel Farber and Suzanna Sherry have joined in that attack, regardless of their disclaimers. I believe

walk the walk." Peter Margulies, *Inclusive and Exclusive Virtues: Approaches to Identity, Merit, and Responsibility in Recent Legal Thought*, 46 CATH. U. L. REV. 1109, 1160 (1997).

5. LE ROI JONES, HOME 151 (1966). Jones is now known as Amiri Baraka.

6. Camille A. Gear, Note, *The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholarship*, 107 YALE L.J. 2473, 2499 (1998).

7. According to Martin Duberman, "[m]ostly in private, more and more whites are saying they are fed up with hearing about black grievances, that everything within reason has been done to improve the lot of African Americans . . . that if anything more is to be done, it is up to blacks themselves to do it: to get the needed education and job skills, to rid their communities of drugs, crime, teenage pregnancy and welfare loafers." Martin Duberman, *Promised Land*, L.A. TIMES, Oct. 12, 1997, at 11 (book review).

that they typify those who fit within the phenomenon, "the unavoidable conclusion," that conservative black scholar Glenn Loury describes:

[I]t is hard to avoid the conclusion that in some influential quarters, when the object of discussion is the African-American community, basic principles of decency and of scholarly and journalistic integrity no longer apply. Blacks seem to be held in such contempt that we can be slandered, defamed, and insulted without remorse or consequence.⁸

Although Farber and Sherry criticize a generic group, labeled "radical multiculturalists," the center of their target is the subgroup of critical race theorists and, among them, particularly those who are African-American.

Critical race theory has become sort of a moving target, as it and scholarly allies change various landscapes.⁹ This scholarship is now quite broad-based. As it has evolved, it has attracted a motley crew, and its body of scholarship is actually improvisationally incoherent, diffuse, and stunningly eclectic in both method and message. Critical race theory primarily investigates how the law contributes to and diminishes racial subordination. Beyond that, it is harder to identify and, like rain, its fallout varies in impact. Critical race theory is also practice. It is conceptual analysis, it is discourse analysis. It is identity, it is politics. Race is central, but not essentialist. It is intersectional.¹⁰ There are Latino and Asian scholars who are enriching and expanding the critical literature as they deal, inter alia, with issues of racialized immigration, race-ethnicity, and the effort that presses critical race theory to move beyond the black-white paradigm.¹¹

8. Glenn C. Loury, *Perspective on Racism: A Well-Funded Entry in the Black Inferiority Sweepstakes*, L.A. TIMES, Sept. 24, 1995, at 5.

9. Kathryn Abrams criticizes Farber and Sherry for, at this late date, seeking to "bring the legal culture wars to a rapid and conclusive resolution." Abrams, *supra* note 4, at 1092. In her view, "The multiculturalist challenge has inevitably altered the landscape in which legal scholars think and work. The question is not how to vanquish it at last but how participants might begin to speak to each other across the chasms of conceptual pluralism that it has helped to create." *Id.* at 1092-93.

10. There are now three major anthologies: CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY]; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) [hereinafter THE CUTTING EDGE]; and CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

11. See, e.g., Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Symposium in Honor of Neil Gotanda, 4 ASIAN L.J. 1 (1997); Symposium,

According to Derrick Bell,

[C]ritical race theory is a body of legal scholarship, now about a decade old, a majority of whose members are both existentially people of color and ideologically committed to the struggle against racism, particularly as institutionalized in and by the law. . . . [Critical race theory adherents] 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.¹²

The editors of a book on critical race theory's foundational writings suggest two unifying themes:

The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and in particular, to examine the relationship between the social structure and professed ideals such as "the rule of law" and "equal protection." The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it. The essays gathered here thus share an ethical commitment to human liberation—even if we reject conventional notions of what such a conception means, and though we often disagree among ourselves, over its specific direction.¹³

As these descriptions indicate, critical race theory is not nihilistic, not merely deconstructionist. There is a real tension between modernist optimism and efforts to transform society and postmodernist, corrosive critique.¹⁴ Hence, critical race theory "seeks in its own way not simply to explicate but also to intervene in the ideological contestation of race in America and to create new, oppositionist accounts of race."¹⁵

Citizenship and Its Discontents: Centering the Immigrant in the International Imagination, 78 OR. L. REV. 207 (1997).

12. Derrick Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 898-99 (1995). Moreover, according to Bell, "[t]hose critical race theorists who are white are usually cognizant of and committed to the overthrow of their own racial privilege." *Id.* at 898.

13. CRITICAL RACE THEORY, *supra* note 10, at xiii.

14. See, e.g., Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice—Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993, 1002 (1991).

15. CRITICAL RACE THEORY, *supra* note 10, at xiii.

I. THE "TRUTH" CLAIMS OF FARBER AND SHERRY

Indeed it is at present virtually impossible to write or say anything on the topic of race that is not in some way objectionable or embarrassing.

—Dominick LaCapra¹⁶

Ah, miserable, thou, to whom Truth, in her first tides, bears nothing but wrecks.

—Herman Melville¹⁷

Farber and Sherry describe the radical assault on truth as a campaign of scholarship waged by progressive scholars such as critical race theorists, radical feminists, and scholars engaged in "queer" or "gay" legal theory. What unites the group is their rejection of the aspiration to universalism and objectivity that is the fruit of the European Enlightenment and their conviction that reality is subjective and socially constructed.¹⁸ The radical multiculturalists seek to advance a shared ideology—that is, "a set of relatively simple ideas and slogans that help hold a group together and give it a coherent view of the world."¹⁹

16. Dominick LaCapra, *Introduction* to *THE BOUNDS OF RACE: PERSPECTIVES ON HEGEMONY AND RESISTANCE 2* (Dominick LaCapra ed., 1991).

17. LE ROI JONES, *TALES* 49 (1967) (quoting Melville). See generally FARAI CHIDEYA, *DON'T BELIEVE THE HYPE: FIGHTING CULTURAL MISINFORMATION ABOUT AFRICAN-AMERICANS* (1995).

18. See FARBER & SHERRY, *supra* note 4, at 5.

19. Farber and Sherry do not intend the term "ideology" to be pejorative. They acknowledge that "centrists like us have our own ideology." *Id.* at 9. Farber and Sherry summarize the fundamental tenets of radical multiculturalists as follows:

If the modern era begins with the European Enlightenment, the postmodern era that captivates the radical multiculturalist begins with its rejection. According to the new radicals, the Enlightenment-inspired ideas that have previously structured our world, especially the legal and academic parts of it, are a fraud perpetrated and perpetuated by white males to consolidate their own power. Those who disagree are not only blind but bigoted. The Enlightenment's goal of an objective and reasoned basis for knowledge, merit, truth, and the like is an impossibility: "objectivity," in the sense of standards of judgment that transcend individual perspectives, does not exist. Reason is just another code word for the views of the privileged. The Enlightenment itself merely replaced one socially constructed view of reality with another, mistaking power for knowledge. There is naught but power.

Id. at 33.

Farber and Sherry are amazingly infatuated with the European Enlightenment, observing that "American constitutional democracy is a product of the Enlightenment—the age of Jefferson, Madison and Voltaire. The Enlightenment turned the old hierarchical, authoritarian society on its head, replacing birthright with merit and talent."²⁰ Their interesting take on "our" Enlightenment heritage includes the notion that "[s]uccess is—or at least ought to be—based not on who your parents were, but on what you know and what you do: on merit and hard work."²¹ The occlusion here is stunning. David Goldberg traces how territorial imperialism, colonization, and chattel slavery were all instances of Enlightenment-driven universal merit, reason, and white supremacy. As he says, "subjugation perhaps properly defines the order of the Enlightenment."²² The Enlightenment philosophers, from Locke to Hume to Kant, saw the African as inherently inferior, lacking a capacity to reason, and their moral notions of equality remained intact only through denying blacks "the very condition of their humanity."²³

I thus have difficulty seeing the age of Jefferson and Madison as glorious. As Jefferson scholar Charles Miller notes, "We routinely return to Jefferson and his era in order to discover the glory of America. . . . We should also be willing to return in order to find early evidence of our distress."²⁴ The problem of racism, however muted and buried by an evolving sense of the nation doing "the right thing," is still driven by what was written and lived through Jefferson and Madison as they extended the Enlightenment heritage to America. No wonder Ali Rattandi and Sallie Westwood remind us that "anti-racism has involved in part a struggle over how the uni-

20. Suzanna Sherry & Daniel A. Farber, *Beyond All Reason*, STAR TRIB. (Minneapolis), Feb. 19, 1998, at A19.

21. *Id.*

22. DAVID THEO GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 29 (1993).

23. *Id.* at 32.

24. David K. Shipler, *Jefferson Is America—and America Is Jefferson*, N.Y. TIMES, Apr. 12, 1993, at A17 (quoting Miller). The invention of racism in the Enlightenment is linked to the defense of slavery and colonialism: "Those excluded from the domain of knowing, reason, equality and freedom by a buoyant British and French slavery or an expanding colonialism are rendered in racist terms as qualitatively different. This identity in essential difference becomes an 'other', a counter in the making of modern European identity." THE BLACKWELL COMPANION TO THE ENLIGHTENMENT 442-43 (John W. Yolton et al. eds., 1995).

versalist humanism of the Enlightenment and liberalisms of its aftermath can be turned to anti-racist advantage.”²⁵ That is the challenge that Farber and Sherry so badly fail to meet. Instead, they chastise those radical law professors who have been “attacking the Enlightenment and all that it stands for.”²⁶

25. Ali Rattansi & Sallie Westwood, *Modern Racisms, Racialized Identifiers*, in RACISM, MODERNITY AND IDENTITY, *supra* note 1, at 1, 9; see also Joe L. Kincheloe & Shirley R. Steinberg, *Addressing the Crisis of Whiteness: Reconfiguring White Identity in a Pedagogy of Whiteness*, in WHITE REIGN: DEPLOYING WHITENESS IN AMERICA 3, 5 (Joe L. Kincheloe et al. eds., 1998) (tracing the “positionality” and deployment of whiteness to construct racial hierarchies to the Enlightenment where “whiteness begins to establish itself as a norm that represents an authoritative, delimited, and hierarchical mode of thought”).

26. Sherry & Farber, *supra* note 20. They warn: “Remember, these are law professors, teaching the next generation of lawyers and leaders . . . that the United States is irredeemably racist and sexist, that there is no objective way to resolve our differences and that the law is just a tool to achieve political goals.” *Id.* They sample a few quotations from these grotesque figures. I offer them as an objective, true-false test. Circle the correct answer:

“If you are black or Mexican, you should flee enlightenment-based democracies like mad” because “enlightenment-style Western democracy is . . . the source of black people’s subordination.”

—Richard Delgado, University of Colorado law School
[True or False]

Knowledge is “a function of the ability of the powerful to impose their views.”

—Gary Peller, Georgetown Law School
[True or False]

“There is no such thing as intrinsic merit.”

—Stanley Fish, Duke Law School
[True or False]

Merit is “affirmative action for white males.”

—Catharine MacKinnon, University of Michigan Law School
[True or False]

“‘Experienced’ and ‘qualified’ are con words, shiny mirrors that dazzle the eye.”

—Patricia Williams, Columbia Law School
[True or False]

“Universal notions of merit serve as an important reinforcement of white privilege.”

—John Calmore, University of North Carolina Law School
[True or False]

Farber and Sherry thus see themselves as intervening in the cultural wars that have spread from the humanities departments to the law schools. Indeed, there really is a war going on in the United States right now, and critical race theorists are a part of it. From the deployment of oppositional scholars within a "war of position," the critical race theorists have armed themselves with a new critical vocabulary, a new way of thinking, a new morality, and a barrage of new ideas that have been lodged against the dominant interests of white supremacy, power, and privilege.²⁷ In response, those who benefit from the dominant interests have fought back. Farber and Sherry are simply among those who are fighting back on behalf of white supremacy, power, and privilege. There is no way to understand their scholarship outside the context of this battle. Carter Wilson describes generally how the dominant group fights back:

The dominant class fights back with its ideology, its morality, its belief system and its way of thinking. It uses existing culture and tradition to convince other social groups to accept the existing order as natural, rational, and legitimate. It depicts alternative orders as unnatural and irrational. It exploits the values, sensitivities, and identities of other groups in order to persuade them to support the present order. If their ideas are refuted and their political position weakened, they struggle to reformulate their ideology and reinforce their position.²⁸

This describes the scholarly program and orientation of Farber and Sherry; it is a remarkable fit.

At first, I thought that Farber and Sherry had simply stereotyped critical race theorists as "extremists," who had abandoned not only "moderation," but also "common sense." Critical race theorists were authors of "childish stories" that turned out to be anti-Semitic, they distorted discourse, and they threatened the sound education of law students. Beyond simple stereotype, however, something deeper is at play in Farber and Sherry's scholarship. It is related to what Leonard

Criticism of radical theories is "a pathetically poor effort to regain a position of dominance."

—Derrick Bell, New York University Law School
[True or False]

27. See generally Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

28. CARTER A. WILSON, *RACISM: FROM SLAVERY TO ADVANCED CAPITALISM* 24 (1996).

in this story) as a part of the attempt to dehumanize them.²⁹ Racial objectification is the attempt to convert a person into a thing, because of the person's race. This remains an attempt because the thing and the human are really conflated, rather than either being erased.³⁰ So, blacks and other colored people continually assert their humanity, while whites deny it. One feature of this dialectic is the linkage between human objectification with the racial grotesque. In reviewing Farber and Sherry's book, for instance, David Wagner sympathizes with their attempt to invite dialogue and their acknowledgement that there is much that is valuable in the work of those they criticize.³¹ That acknowledgement, however, is just "wasted ink," because the radical legal academics are "folks for whom merit-based hiring is a front for racism, sincere disagreement is impossible, debate is only a maneuver in a scorched-earth culture war and the personal is the political."³²

In many ways, Farber and Sherry have taken the humanity out of critical race theory and linked it to the racial grotesque. According to Cassuto, the thing-human dichotomy is part of a categorical system and, in terms of cultural categories, the grotesque is "a social construction rather than an absolute value."³³ As the racial grotesque, critical race scholars are viewed as freak scholars who are racialized radical multiculturalists, who emerge from the edges of fundamental boundaries, who are viewed as the opposite of normal, and who are to be "shunted off into a corner."³⁴ Farber and Sherry's rendering of critical race theorists as grotesque explains why I did not recognize that with which they have been associated in Farber and Sherry's views. It also explains, however, a continuing unease among those who attempt this form of objectification. As Cassuto explains,

29. See generally CASSUTO, *supra* note 3.

30. See *id.* at 16.

31. See David Wagner, *A Liberal Attack on the Radical Left*, WASH. TIMES, Jan. 7, 1998, at A15 (book review).

32. *Id.*; see also Robert L. Hayman, Jr., *Race and Reason: The Assault on Critical Race Theory and the Truth About Inequality*, 16 NAT'L BLACK L.J. 1, 9 (1998-1999) ("To paraphrase, then, this invitation to dialogue reads roughly as follows: 'Your methods are irrational, your positions are counter-productive, your interpretations are wrong, you speak rubbish, and you are, above all, unreasonable; and oh, I almost forgot to mention, you are also anti-Semitic. So let's talk.'").

33. CASSUTO, *supra* note 3, at 6.

34. *Id.* at 8.

The grotesque has a peculiar disruptive power—it is a conflicting mixture of signals that intrudes upon the desired order of the world. This idea of disorder is central to the working of the grotesque; tension is the common element to virtually every definition of the term. This tension results from anomalousness. That is, the grotesque is hard to apprehend because it doesn't fit neatly into a category. This makes it a threat to the entire system. Dracula, for example, is "undead," a word that is virtually impossible to define, except as "alive"—which the vampire most assuredly is not.³⁵

Critical race theorists exist within the legal academy as living within an undefinable state of being that defies fundamental categorization. Personifying the racial grotesque, critical race theorists are the embodiment of anomalousness and taboo, which renders their scholarship as grotesque, freakish. Farber and Sherry, however, do not desire a dialogue with Dracula; they intend to destroy him. As Kathryn Abrams observes,

For all its invocation of rational exchange, *Beyond All Reason* does not, in fact, encourage dialogue. It is difficult to find a point of entry into the authors' discussion or to imagine a response that would elicit their attention, let alone their respect. The book's argument is constructed not so much to assess or even engage as to defeat. It does so by employing a distinctive methodology that carefully defines both the targets of its attack and the idiosyncratic terms on which they will be evaluated.³⁶

Still, the radical critique that they attack is precisely what must continue to be waged if the nation is to reflect a more open society, a society that builds on two important constitutive elements—social justice and multiracial democracy. Farber and Sherry's Eurocentric views reinforce a monocultural, assimilationist ideology that directs exclusion and subordination on many levels.³⁷

35. *Id.*

36. Abrams, *supra* note 4, at 1098.

37. See Calmore, *supra* note 4, at 1470-76.

II. THE CHALLENGE TO THE MOVEMENT FROM CONVENTIONAL WISDOM AND COMMON SENSE TO HEGEMONIC TRUTH

[T]he essence of hegemony is the diffusion throughout society, in its culture and institutions, of "one concept of reality" that is perpetuated by, and serves the interests of, the dominant power bloc.

—A. B. Cochran, III³⁸

[T]he most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.

—Robert W. Gordon³⁹

As implied in the introduction, I am writing this essay from within what Angela Harris characterizes as the tension between postmodernist critique and modernist optimism.⁴⁰ She observes that law professors tend to view postmodernism as suggesting that that which has been presented in our social-political and our intellectual traditions as "knowledge," "truth," "objectivity," and "reason" are actually something else. They are really "the effects of a particular form of social power, the victory of a particular way of representing the world."⁴¹ At the end of the day, they self-present themselves as truth itself. As the virtue of a knife is its sharpness, the virtue of postmodernism is its corrosiveness. As Harris says, the deeper we dig, the more embedded racism seems to be and the more necessary it seems that one must critique western culture: "By calling everything taken for granted into question, postmodernist critique potentially clears the way for alternative accounts of social reality, including accounts that place racism at the center of western culture."⁴²

38. A. B. Cochran, III, *We Participate, They Decide: The Real Stakes in Revising Section 8(A)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458, 505 n.258 (1995).

39. Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 418 (David Kairys ed., rev. ed. 1990).

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

41. *Id.* at 748 (quoting Gary Peller, *Reason and the Mob: The Politics of Representation*, TIKKUN, July/Aug. 1987, at 28, 30).

42. *Id.* at 749.

On the other hand, I also claim a modernist orientation that resembles critical social science, which assumes:

First, that there be a *crisis* in a social system; second, that this crisis be at least in part caused by the *false consciousness* of those experiencing it; third, that this false consciousness be amenable to the process of *enlightenment* . . . ; and fourth, that such enlightenment lead to *emancipation* in which a group, empowered by its new-found self-understanding, radically alters its social arrangements and thereby alleviates its suffering.⁴³

This is my continuing relation to the legacy of the civil rights movement. To the degree I am a deconstructionist, it is similar to clearing the ground to engage in a reconstructed open and democratic society and a reformulated concept of social justice.⁴⁴

In my personal view, critical race theory engages in fundamental criticism as opposed to bit criticism.⁴⁵ Fundamental criticism is directed toward challenging the prevailing set of assumptions that the members of society share to establish the context for their view of the world and themselves. Much of the conflict over race and multiculturalism is a conflict over the context-setting assumptions that dominant society, institutions, and culture have adopted. These assumptions are, in turn, rigorously contested by the oppositional accounts of outsiders, incorporated troublemakers, and marginalized insiders who argue that those very as-

43. *Id.* at 751.

44. As Gerald Torres says:

Among the practical problems facing Critical Race Theory . . . is how to regulate the conflicting idioms in a way that does not depend upon a universalizing norm or vision of the good. These theorists need to reform conceptions of democratic representation in a way that supports the underlying legitimizing justifications of democracy without systematically repressing the capacity for minority self-determination. There must be strong democratic support for group difference and, from those differences, complex equalities. The interest group model of representation . . . fails in this task. A pure majoritarian model would also fail where it does not give weight to culturally specific definitions of the good.

Torres, *supra* note 14, at 1006-07 (footnote omitted); see also Derek P. Jinks, Note, *Essays in Refusal: Pre-Theoretical Commitments in Postmodern Anthropology and Critical Race Theory*, 107 YALE L.J. 499, 509 (1997) ("In its modernist moments, CRT is deeply committed to a vision of liberation in the sense that it aims not to topple the Enlightenment, but to make the Enlightenment's promises real.").

45. For a previous, more elaborate discussion of fundamental criticism, see 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, 2135-37 (1992).

sumptions must be revised. This is characterized as “fundamental criticism,” because it challenges not just bits or parts that could be changed or reformed within the existing contextual frame, but, rather, the context itself. Through contesting the foundational assumptions, the context itself is potentially transformed by reformulating those very assumptions. The same context cannot remain; it cannot be seen as capable of adaptation. Bit criticism is a tinkering within. As people of color are “integrated” within the mainstream, we tend to personify this kind of systemic tinkering—reinforcing a feigned flexibility. Bit criticism too often accepts feigned flexibility, surface change, as something more radical or transformative than it really is. It delays the overall transformation that is needed to make things just. Hoodwinked liberal agents of change actually serve to reinforce the social, institutional, and cultural context-setting assumptions by accepting the legitimacy of their explanation and justification—their “truth.”

Critical race theorists, necessarily, assert a freedom from the constraints of traditional scholarship. This is not simply a matter of academic freedom. This is not simply identity politics. Race-conscious experience and perspective are the springboard from which we engage in a fundamental criticism of an oppressive version of truth that tells lies about the colored past, present, and future. This race-conscious point of view and fundamentally critical orientation direct our appreciation that reality is socially constructed and, moreover, it implores us to engage in counter-hegemonic moves.

From this vantage, the social construction of reality provides room to challenge what Peter Berger and Thomas Luckmann call the “conceptual machineries of universe-maintenance.”⁴⁶ Issues that arise within the conceptual framework of socially constructed reality and hegemonic truth are tied to the contestation of universe-maintenance. Race plays an important part in this and critical race theory brings that home.⁴⁷

46. PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 104 (1966).

47. See generally Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1998). Race is socially constructed, but biology is not irrelevant. What biology signifies leads to a process of race's formation. As Howard Winant observes, “we can speak of racial formation as a *process* precisely because the inherently capricious and erratic nature of racial categories forces their constant rearticulation and

Berger and Luckmann argue that the symbolic universe provides order for the "subjective apprehension of biographical experience."⁴⁸ Thus, "objective truth" itself is subject to fundamental criticism and I perceive a big difference between my sense of self that identifies me as a scholar who just happens to be black and one that identifies me as a black scholar. A conscientious reliance on my experience in this nation as a black man is crucial to my analysis of the various machineries of universe-maintenance that Farber and Sherry so uncritically accept and seek to impose universally. Their symbolic universe is problematical for me as a black person (human being). It is not inviting. Let me explain why. It starts with the recognition that the symbolic universe has both an ordering and legitimating function. At bottom, its nomic function, as described by Berger and Luckmann, is to put "everything in its right place."⁴⁹ They add:

In this way, the symbolic universe orders and thereby legitimates everyday roles, priorities, and operating procedures by placing them *sub specie universi*, that is, in the context of the most general frame of reference conceivable. . . . It can readily be seen how this procedure provides powerful legitimation for the institutional order as a whole as well as for particular sectors of it.⁵⁰

Farber and Sherry claim that critical race theory has reduced achievement by Jews to a function of illegitimate power only. Of course, critical race theory, as a body of scholarship, makes no such claim. (Indeed, I am unaware of a single scholarly expression that makes such a claim.) By distorting the claim of critical race theorists that success is reduced solely to a function of illegitimate power, moreover, Farber and Sherry would have one believe that white success has *nothing* to do with power holdings and exercises of privilege that are part of a structured and systemic oppression of people of color.⁵¹ Herein lies a contest over "reality." Again,

reformulation—their social construction—in respect to the changing historical contexts in which they are invoked." HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, AND COMPARISONS* 115 (1994).

48. BERGER & LUCKMANN, *supra* note 46, at 97.

49. *Id.* at 98.

50. *Id.* at 99.

51. Moreover, their position would seem to view achievement and success by Latinos and blacks, who lack power or privilege, as functions of mere exceptional luck or special favoritism. They also discount benign reasons for Jewish success. A beneficiary of white privilege is not necessarily evil. Complicit involvement in oppression is different from active support of oppression.

in light of the dominant symbolic universe, as contrasted to that of the critical race theorists, the problem of power is certainly implicated as critical race theorists present an alternative symbolic universe and the advocacy of a different "reality." The power issue, so casually dismissed by Farber and Sherry, is "which of the conflicting definitions of reality will be 'made to stick' in society."⁵² As Berger and Luckmann point out, "The appearance of an alternative symbolic universe poses a threat because its very existence demonstrates empirically that one's own universe is less than inevitable."⁵³ Critical race theory is, at the very least, an impediment to Farber and Sherry's attempt to drive the inevitability of their symbolic universe down the throats of people of color.

Critical race theorists, therefore, must challenge the conventional wisdom that functions as hegemonic truth. Here, Antonio Gramsci's concept of hegemony is tied to that of the symbolic universe:

By hegemony Gramsci meant the permeation throughout civil society—including a whole range of structures and activities like trade unions, schools, the churches, and the family—of an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it. . . . To the extent that this prevailing consciousness is internalized by the broad masses, it becomes part of "common sense."⁵⁴

Farber and Sherry seek to reinforce a dominant "common sense" about race in this very sense of hegemony. Only the most delusional, color-blind, individualistic, assimilated "acceptable Negro" colored person would accept this without protest.

Moreover, "[f]or hegemony to assert itself successfully in any society . . . it must operate in a dualistic manner: as a 'general conception of life' for the masses, and as a 'scholastic programme' or set of principles which is advanced by a sector of the intellectuals."⁵⁵ I do not view Farber and Sherry as academic free agents. Rather, as well-known, elite white legal scholars, their interpretative authority is significant. Relying on that interpretative authority, they endorse significant

52. BERGER & LUCKMANN, *supra* note 46, at 109.

53. *Id.* at 108.

54. CARL BOGGS, GRAMSCI'S MARXISM 39-40 (1976), *quoted in* David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 250 n.12 (1984).

55. *Id.* This explains, in part, why critical race theory simultaneously emphasizes resistance to dominant truth and the establishment of radical possibilities of liberation.

aspects of an oppressive hegemonic truth through their participation in its "scholastic programme."

Although representing themselves as liberals, though centrist, with a special empathy for the oppressed because they are Jewish, Farber and Sherry really write against the liberal to progressive Jewish tradition. They are apologists for the very workings of the dominant hegemony and, in this way, they act as secret agents of a very right-wing racial project. Theirs is not friendly fire at all, but, rather, enemy fire. Their so-called invitation to "dialogue" is really a command for the critical race theorists to "shut up" and "stay in your place."

III. THE INCREDIBLE CHARGES OF RACISM: THEIRS AND MINE

There is no racism; there is nothing but racism. The issue sends people scurrying in extremist directions. And thus there is almost no overlap between opposing views, and little sympathy and understanding across the lines of political battle.

—Stephen & Abigail Thernstrom⁵⁶

The newer expanded definitions of racism just do not make much sense to most whites. . . . The new meanings make sense to blacks [I would say people of color generally], who live such experiences in their bones.

—Bob Blauner⁵⁷

As racism mutates and varies over time and space, we can become entrapped by it as it sneaks up on us in changed dress, perspective, and articulation. Farber and Sherry make an incredible claim that critical race theorists, who are so-called radical multiculturalists, implicitly endorse racism.⁵⁸ They fail, however, to recognize their own entrapment by the range of advanced racisms that plagues not only their good faith and credibility, but also the significance of their arguments and text. In their charge that the radical multiculturalists are anti-Semitic and racist, Farber and Sherry trivialize the ra-

56. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE* 13 (1997).

57. Bob Blauner, *Talking Past Each Other: Black and White Languages of Race*, in *RACE AND ETHNIC CONFLICT: CONTENTING VIEWS ON PREJUDICE, DISCRIMINATION, AND ETHNOVIOLENCE* 22 (Fred L. Pincus & Howard J. Ehrlich eds., 2d ed. 1994).

58. See FARBER & SHERRY, *supra* note 4, at 138.

cism that afflicts most people of color under the domain of white supremacy, power, and privilege. They live in a glass house, so to speak, throwing stones of aversive, symbolic, and modern forms of racism.⁵⁹

One feature of today's advanced racism is "[a] particular type of ambivalence in which the conflict is between feelings and beliefs associated with a sincerely egalitarian value system and unacknowledged negative feelings and beliefs about blacks."⁶⁰ This is known as "aversive racism."⁶¹ The ambivalence that stems from aversive racism is a product of the assimilation of an egalitarian value system, on one hand, and contrasting feelings and beliefs associated with a cultural context of racism that is both historical and contemporary, on the other hand.⁶² While studies and conceptual development of aversive racism have focused on black-white relations, I see it manifested toward Latinos and Asians as well.

Aversive racists are not dominative racists, not old-fashioned racists. Instead, "the aversive racist feels discomfort, uneasiness, disgust, and sometimes fear in the presence of blacks or of race issues. These feelings tend to motivate avoidance rather than intentionally aggressive, destructive, and hostile behaviors directed at blacks."⁶³ I believe that a lot of racial resentment and negative stereotyping arises from aversive racism. Farber and Sherry's racism, however tainted by these features, is not one of aversion, but, rather, is one of *racist engagement*. In that sense, their racism represents a bias *for* people of color, but only *as long as people of color stay in our place*.⁶⁴ Their conflict between egalitarian values and anti-nonwhite sentiment lies right here. Critical race theorists determine their own place. They do not defer to the voices of white supremacy or privilege. They won't just stay in their deferential place and, evidently, this is profoundly upsetting to Farber and Sherry.

59. I have analyzed these forms in the operational context of impediments to fair housing. See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1087-92 (1998); see also JAMES M. JONES, PREJUDICE AND RACISM 124-31 (2d ed. 1997).

60. Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION AND RACISM 62 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

61. *Id.*

62. *See id.*

63. JONES, *supra* note 59, at 127-28.

64. *See id.* at 130.

Farber and Sherry, additionally, embrace symbolic racism. Their attitude is "a blend of anti-Black affect and . . . traditional American moral values . . . a form of resistance to change in the racial status quo based on moral feelings that Blacks violate such traditional American values as individualism and self-reliance, the work ethic, obedience, and discipline."⁶⁵ While this advanced form is different from old-fashioned racism, the two are nonetheless correlated in that both articulate a strong anti-black component. Traditional values that are rooted in Eurocentrism and the Enlightenment cloak a racist subtext. Modern racists tend to support four principles, all of which are implicitly endorsed by Farber and Sherry. Those principles are:

1. Discrimination is a thing of the past, because blacks now have the freedom to compete in the marketplace and enjoy those things they can afford.
2. Blacks are pushing too hard, too fast, and into places where they are not wanted.
3. These tactics and demands are unfair.
4. Therefore, recent gains are undeserved, and the institutions are giving blacks more attention and status than they deserve.⁶⁶

Moreover, those who have favorably reviewed their book have also endorsed these views, supporting their case by citation to the book. Farber and Sherry fit within the stock denial of modern racists that they are not racists, because (1) they are not like old-fashioned racists and (2) their beliefs are factual, universally normative, rational, true, objective, and meritorious. They are immune to charges of racism, because they are so camouflaged in their racism that they themselves cannot even recognize and acknowledge it.⁶⁷

Let me be clear that Farber and Sherry are not hard-core, race-hating white supremacists. They are just caught up in a racism they do not understand. They are not evil, but they are responsible. This is seen in the commitment to the Enlightenment heritage. As Eurocentric assimilationists, Farber and Sherry articulate the rankest cultural imperialism and

65. *Id.* at 124.

66. *See id.* at 126.

67. With "modern racism," it is difficult to challenge racism by characterizing it as bad, illegal, or immoral, because modern racists reject the message as applying to them. *See* Gaertner & Dovidio, *supra* note 60, at 85.

cultural racism. These features of subordination proceed in lock-step. As cultural imperialists, Farber and Sherry extend white supremacy by applying dominant, hegemonic meanings of society to render the particular perspectives of people of color invisible, while simultaneously stereotyping them as dangerous, deviant, and inferior.⁶⁸ The injustice of cultural imperialism, then, in society and the academy, is that the nonwhite group's "own experience and interpretation of social life finds little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life."⁶⁹ This places Farber and Sherry in the bad company of others who participate in racist engagement, such as Stephen and Abigail Thernstrom, Dinesh D'Souza, and Jim Sleeper. Their so-called racial realism induces a "race fatigue" and complacency that shift virtually the exclusive responsibility for overcoming racism to those who are subordinated by it.⁷⁰

Cultural imperialism is embedded within cultural racism. In introducing the concept of cultural racism, James Jones notes that culture "is the medium in which racial thinking, racialism, and racialization processes were planted and have grown."⁷¹ Many aspects of the so-called culture wars and the associated politics of race reflect the continuing dynamics of that growth, a new racism that grows from the roots of the old. Traditional values of individual rights and colorblind equality of opportunity now mask not only persistent anti-black sentiment, but also growing sexism, xenophobia, heterosexism, and cultural homogenization.⁷²

The term "culture wars" discounts the significance of what is at stake. It deflects from the acknowledgement that critical race theorists are engaged not only in those wars, but also in the linked racial politics that serve subordinating racial projects.⁷³ Moreover, as culture is implicated, critical race

68. See IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 58-59 (1990).

69. *Id.* at 60.

70. Philip Klinkner, *The "Racial Realism" Hoax*, NATION, Dec. 14, 1998, at 33.

71. JONES, *supra* note 59, at 472.

72. See *id.*

73. See Howard Winant, *Racial Formation and Hegemony: Global and Local Developments*, in RACISM, MODERNITY AND IDENTITY, *supra* note 1, at 266.

theorists' efforts are necessarily counter-hegemonic battles against cultural racism. According to Jones:

Cultural racism comprises the cumulative effects of a racialized worldview, based on belief in essential racial differences that favor the dominant racial group over others. These effects are suffused throughout the culture via institutional structures, ideological beliefs, and personal everyday actions of people in the culture, and these effects are passed on from generation to generation.⁷⁴

The plague of cultural racism is why critical race theory must, in response, be insurgently and critically multicultural. The presence of cultural racism suggests that antiracist projects—discourse and practice—must proceed on various fronts that include efforts to renegotiate culture as we also seek to transform the nation's societal organization to reflect an open society, to disrupt illegitimate power imbalances, and to reorient institutional arrangements from their subordinating ways. It is why those who work for open society, multiracial democracy, and social justice must distrust the Farber-Sherry "truth."

Farber and Sherry's critique of the radical multiculturalists is an expression of cultural racism. In attacking the conceptual framework of critical race theory, they further the "logic of domination" by endorsing an oppressive framework that, in Karen Warren's view, "explains, justifies, and maintains the subordination" of people of color.⁷⁵ Farber and Sherry's logic of domination is not simply a structure of logic. It expresses a substantive system of values, providing an "ethical premise" to "permit or sanction the 'just' subordination of that which is subordinate."⁷⁶ Here, Farber and Sherry's moralizing about "reason," "merit," "objectivity," and "universal truth" are cited as characteristics that dominant scholars possess, but the critical race scholars lack.

Like environmental pollution, cultural racism transcends individual harms and private disputes. As Andrew Kernohan suggests, "[t]aken in isolation, the behavior of a solitary racist is likely to be no more than offensive. But the cumulative effect of the behavior of many racists will create an oppressive

74. JONES, *supra* note 59, at 472.

75. ANDREW KERNOHAN, LIBERALISM, EQUALITY, AND CULTURAL OPPRESSION 53 (1998) (quoting Karen J. Warren, *The Power and Promise of Ecological Feminism*, in PEOPLE, PENGUINS, AND PLASTIC TREES 214 (Christine Pierce & Donald VanDeVeer eds., 1995)).

76. *Id.*

culture which crosses a threshold into being harmful.⁷⁷ This is an important recognition, because Farber and Sherry are not merely offensive, but harmful. They pollute the culture by contributing to racist accumulative harms, harms that are done by a group to a group and spread over space and time. The polluting effects of Farber and Sherry's book can be seen in the views that have been expressed by those who have endorsed the book. Jeffery Rosen, usually a lucid commentator, wildly claims that the O.J. Simpson case represents "the most striking example of the influence of the critical race theorists" and that Jonnie Cochran's trial strategy was "applied critical race theory."⁷⁸ Associating critical race theory with the acquittal of O.J. Simpson in this fashion is not only intellectually dishonest, but it is also irresponsibly divisive and prejudicial. Ironically, he praises Farber and Sherry's book, observing, "[m]ore effectively than any scholars I know, they remind us of the moral, legal, and political stakes in the current academic battles between the party of reason and party of emotionalism and subjectivity."⁷⁹

The tag "emotional" has often been used to deride black intellect. Blacks are thus not associated with ideas. In viewing black art, theatre, music, and intellectual enterprise, blacks have historically been deemed marginal. As Toni Morrison observes, "[t]here's a notion out in the land that there are human beings that one writes about, and then there are black people or Indians or some other marginal group. If you write about the world from that point of view, somehow it's considered lesser."⁸⁰

In continuation of Morrison's historical observation, the nonwhite intellect is suspect and demeaned among those who support Farber and Sherry. Thus, for instance, Michael Skube

77. *Id.* at 73.

78. Jeffery Rosen, *The Bloods and the Crits*, NEW REPUBLIC, Dec. 9, 1996, at 27, 27. This association impugns the credibility and competence of Cochran's ability. As Margaret Russell observes, moreover, "[t]he intolerance conveyed by such an accusation serves a policing function by warning the would-be race-card transgressor that his or her complaints of racism will be interpreted as irrelevant, self-serving, and maliciously advanced." Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 792 (1997).

79. This is his book jacket endorsement of *Beyond All Reason*.

80. WILLIAM M. BANKS, BLACK INTELLECTUALS: RACE AND RESPONSIBILITY IN AMERICAN LIFE 212 (1996) (quoting interview with Toni Morrison, in BLACK WOMEN WRITERS AT WORK 121 (Claudia Tate ed., 1983)).

describes Farber and Sherry's book as "an overdue criticism of *intellectual imposters* who once were a *lunatic fringe* but now lay siege to the most basic tenets of the Western Enlightenment. . . . The authors single out, in particular, the proponents of what is called critical race theory."⁸¹ These scholars, in his view, are "[c]ourted and attended to by the best universities, they retail absurdities that haven't the remotest connection to jurisprudence but get disproportionate play in law reviews."⁸² He concludes his review by stating: "When the truth no longer matters, everything else falls by the wayside with it, and *barbarism* wins out."⁸³ (I am not sure if it is progress for blacks to be characterized as "barbaric" rather than "savage." What do you think?) Based on reading Farber and Sherry, Skube picks up their charge of anti-Semitism: "The Holocaust matters because it *did* happen, not because someone imagined it. Yet there are those who deny anything unusual was going on in those ovens. Would Patricia Williams say it isn't so important? You wonder."⁸⁴ This is libelous and Farber and Sherry need to disassociate themselves from such anti-black, racist babble. They need to do so as explicitly as they can and they should do so in the pages of this law review.

William Domnarski characterizes the Farber-Sherry critique of radical multiculturalists as "admittedly harsh"—but "only because it is so effective at exposing the *looniness* of the movement and its advocates."⁸⁵ Relying on Farber and Sherry, he reinforces their suggestion that radical multiculturalists "present dangers to the social fabric, in part because they, like true *totalitarians*, want to silence their opposition."⁸⁶ Such scholars represent "all that is wrong with the legal academy and what passes these days as scholarly writing."⁸⁷

These reactions generated by Farber and Sherry extend to Richard Posner, who also endorses their engaged racism. Mind you, Posner is the Chief Judge of the United States Court of

81. Michael Skube, *Law's Radical Academics Get Thrashing They Deserve*, ATLANTA J. & CONST., Nov. 16, 1997, at L12 (emphasis added).

82. *Id.*

83. *Id.* (emphasis added).

84. *Id.*

85. William Domnarski, *An Academic Theory Threatens the Foundations of the Law, Authors Say*, 143 CHI. DAILY L. BULL., Oct. 21, 1997, at 3 (emphasis added).

86. *Id.* (emphasis added).

87. *Id.*

Appeals for the Seventh Circuit and the Senior Lecturer at the University of Chicago Law School. However racist and goofy, his words count. He characterizes the so-called multiculturalists as an intellectual movement that “*is distinguished by having a rational fringe and a lunatic core.*”⁸⁸ Under Posner’s dominant gaze, people of color who are critical race theorists are not only lunatics, but they seem to lack some of “the necessities” to be intellectuals and scholars. In deference to his intellectual status among the bench and bar as well as the legal academy, I quote Judge Posner at length:

What is most arresting about critical race theory is that, as Farber and Sherry amply document, it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites. . . . Since [probably meaning “because”] they do not have literary skills, they cannot excuse their turn to narratives by claiming merely to be better storytellers than analysts.

The ironic consequence is that the critical race theorists are poor role models. Instead of exemplifying in their careers the potential of members of their groups for respected achievement in the world outside the ghetto of complaint—the kind of exemplification that we find in the career of Colin Powell—critical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write *childish stories* about how awful it is to be a member of such a group.

. . . .

. . . [Critical race theorists] come across as *labile* and *intellectually limited* . . . divisive . . . [and] their suggested cures (rigid quotas, 1960s-style demonstrations, transformations of the American spirit, socialism, poverty law practice) [*poverty law?*] are tried and true failures. Their lodgment in the law schools is a

88. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 43 (book review). Who’s who? Critical race theorists—such as Derrick Bell, Kimberlé Crenshaw, Jerome Culp, Richard Delgado, Alex Johnson, Mari Matsuda and Patricia Williams—personify the all-colored lunatic core, and the rational fringe is all-white—Michael Foucault, Stanley Fish, Duncan Kennedy, and Catherine MacKinnon. Posner does, however, seem to characterize Richard Delgado as white. He ridicules Delgado for claiming to belong to a group he calls “people of color.” He says, “I have met Professor Delgado. He is as pale as I am, has sharply etched features in a long face, speaks unaccented English, and, for all that appears upon casual acquaintance, could be a direct descendant of Ferdinand and Isabella.” *Id.* at 41.

disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement's scholarship bunk.⁸⁹

Talk about the grotesque! Is this a kinder, gentler bell-curve thesis? This assessment is remarkable, not just in text but in authorship. For many of the public, this is the authoritative interpretative assessment of critical race theory. Farber and Sherry have presented the occasion for Posner to present his version of engaged racism.

It goes to show you that there is a thin line between today's aversive, symbolic, and modern racism and the old-fashioned racism of naked white supremacy. It's hard to fight back, however, when you are reduced to reckless, paranoid totalitarians who are irrational, labile, intellectually suspect, bad role models, unsuitable to teach or write—so grotesque. Fire music, where are you when I need you?

IV. CRITICAL RACE ATTITUDE: THE JAZZ CONNECTION

I'd rather hear Louis Armstrong play "Tiger Rag" than wander into Westminster Abbey and find the lost chord.

—Edward, Duke of Windsor

I agree with that.

—Louis Armstrong⁹⁰

Like jazz music, critical race theory tends "to make the familiar strange and the strange familiar."⁹¹ It strikes me that jazz belongs in this essay, because for those who can dig it, jazz is an open-society music, an expression of freedom and multicultural bridge-building. For those who can't dig it, it is a radical assault on truth. Jazz music has a hip attitude, technique, and sound. Thus, in speaking appreciatively of Ornette Coleman's music, Gary Giddins says that it "hits me in

89. *Id.* at 41-42.

90. This pair of complementary epigraphs appears in Gary Giddins' wonderful book celebrating jazz's first century. GARY GIDDINS, *VISIONS OF JAZZ: THE FIRST CENTURY* 83 (1998).

91. Peggy Davis described critical race theory in these words at an early annual workshop. It remains the case today. In discussing the erosion of classic norms in anthropology, Renato Rosaldo makes a similar observation, stating that "[i]n presenting culture as a subject for analysis and critique, the ethnographic perspective develops an interplay between making the familiar strange and the strange familiar." RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 39 (1989).

unprotected areas of the brain.⁹² Jazz requires more than just listening. For instance, Giddins tells of George Russell learning that Coleman did not count off tempos. The astonished Russell asked, "How did that work?" "Insight" was Coleman's answer.⁹³ Finally, Giddins also describes a solo played by Archie Shepp as "granite talking."⁹⁴ Critical race theory, too, intrudes into unprotected areas of the brain, attempts to bring cross-cultural insight without counting tempos, and continues in the rock-steady voice of granite talking.

To appreciate both jazz and critical race theory, one must be open and intellectually curious in ways that Eurocentric, assimilationist dictates frustrate. One certainly cannot assume that one has a conceptual corner on the market of "truth," "value," and "reason." Playing against this tendency, jazz musicians are strong-willed and committed to their art in unshakable ways. Over the century, jazz has persisted against the odds and despite popular apathy, misunderstandings, and harsh critique. Like critical race theory, people have always messed with it without even getting it. In many ways jazz and critical race theory are coherent and not at the same time. As Ornette Coleman observes, "[y]ou can be in unison without being in unison."⁹⁵

John Coltrane personifies a giant in jazz, but in 1961 he took off in directions that invented a heavier music than his time could handle. His saxophone playing represented a yearning for a new world.⁹⁶ Critical race theorists also yearn for a new world and, like Coltrane, we are misunderstood and mischaracterized. Jazz critics labeled Coltrane's new sounds as "musical nonsense" and "anti-jazz."⁹⁷ Today, there is a critical consensus that these sounds were brilliant in pushing the art to more profound depth and breadth. But during its initial offering, critics rejected it out of hand, characterizing it as "in effect, an extended cadenza to a piece that never gets played," "one big airleak," "one of the noblest failures on record."⁹⁸ In the final analysis, however, "Coltrane altered the

92. GIDDINS, *supra* note 90, at 469.

93. *Id.* at 470.

94. *Id.* at 487.

95. *Id.* at 469.

96. *See id.* at 476.

97. *Id.* at 477.

98. *Id.*

flavor of jazz. He didn't force a comprehensive retooling of the music, as Armstrong and Parker did, but *he instigated a reimagining of possibilities and brought back a solemnity of purpose* that shook up the old order."⁹⁹ In other words, a radical assault on truth is not necessarily a bad thing.

Coltrane is known for his extended blowing. According to Coltrane, "the main thing a musician would like to do is to give a picture to the listener of the many wonderful things he knows of and senses in the universe."¹⁰⁰ When Miles asked him why he played such long solos, Coltrane answered: "It took that long to get it all in."¹⁰¹ Seeking justice involves long-haul work, extended blowing, if you will. As multiculturalists who seek social justice and an open society we know what Coltrane meant. That is why we chase the Trane.

I have mixed emotions as the larger culture comes to appreciate jazz, for often African-American culture has either been denigrated or misappropriated. One aspect of this so-called appreciation is found in the use of jazz by advertisers.¹⁰² Explanations among advertisers vary. Some see jazz as "fresh" and "break[ing] through the clutter."¹⁰³ As I claim, jazz is open-society music and this feature makes it attractive to advertisers. A survey determined that the primary audience of jazz listeners is "racially diverse, made up of 35- to 49-year-old college graduates who earned at least \$75,000 a year."¹⁰⁴ Among those surveyed, some 40 percent said "they either owned or planned to buy a luxury car or sport utility vehicle within the next year."¹⁰⁵ Jazz appeals to this group, because "[b]ottom line, jazz has integrity," says Eric Korte, the music director at the advertising agency Saatchi & Saatchi. He adds, "It's never corny. It moves. And its percussive quality, its energy, livens up anything connected with it."¹⁰⁶

In speaking before various student groups and in teaching a seminar on critical race theory, I see a similar openness to

99. *Id.* at 489 (emphasis added).

100. *Id.* at 490.

101. *Id.*

102. See Valerie Gladstone, *Advertisers Play a New Tune: Jazz*, N.Y. TIMES, Dec. 6, 1998, at 34.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

critical race theory.¹⁰⁷ Its percussive quality is freedom drumming and its energy is enough for the long haul. I'm not really bothered that Farber and Sherry are not buying it. As Giddins says, "The most neglected component of a successful concert is a good audience."¹⁰⁸ It really is okay that Farber and Sherry are not happily within that audience. Perhaps Farber and Sherry are as out of step as those who once observed of jazz: "Jazz is the expression of protest against law and order, the bolshevik element of license striving for expression in music." "What a terrible revenge by the culture of Negroes on that of the whites!" "Jazz opposes to our classical conception of music a strange and subversive chaos of sounds . . . it is a fashion and, as such, destined some day to disappear."¹⁰⁹

I continue to find inspiration in jazz, because the music has resiliency, it has attitude, and its artists keep their own counsel. Think, as examples, of Billie Holiday, Miles Davis, Charlie Parker, Thelonius Monk, Abbey Lincoln, Archie Shepp, Cecil Taylor, Max Roach, Sarah Vaughn, John Coltrane, Ornette Coleman, Dizzie Gillespie, and Charles Mingus. Would they be bothered by critiques from the likes of Farber and Sherry? Would they defiantly continue to play and sing their music and be themselves?

CONCLUSION

David Shipler concludes from his extensive interviews with African-Americans that

[d]istrust is a major obstacle to black-white friendships. It is the fault beneath the fragile common ground. It results from all that has gone before: the images of immortality, the hurtful expectations, and the pain of real experiences, which undermine the belief that virtue can exist across the racial line.¹¹⁰

I may be wrong, but I do not see how Farber and Sherry's book and related writings can help to improve this situation. I am not really concerned about friendship, but I am concerned

107. See John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903 (1997).

108. GIDDINS, *supra* note 90, at 509.

109. *Id.* at an unpaginated epigraph page preceding the table of contents (quoting Anne Shaw Faulkner, Ignace Paderewski, and Igor Stravinski, respectively).

110. DAVID K. SHIPLER, *A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA* 346 (1997).

about the prospects for believing that virtue can exist across the racial line. Regardless of vantage point, one cannot be sure. So much depends on good faith. Perhaps most troubling about the Farber-Sherry view is that I do not see good faith there. I could be wrong, but there is just too much bad, "unavoidable conclusion" stuff in their writing.¹¹¹ The picture they paint is just not right. In the words of Pat Williams:

Stop. What's wrong with this picture? Could we get a grip for just a moment? Critical Race Theory is a zero-budget, peripatetic, more-or-less-annual conference, not a conspiracy. It is by no means a "black" movement, even if you think "race" excludes those who call themselves "white." . . .

Far from taking over legal academia, only about 11 percent of full-time law professors are minorities of any stripe, and only a tiny subgroup of those have ever produced scholarship that has anything at all to do with race. . . .

The recent flurry of attacks on Critical Race Theory . . . share a number of troubling features. One is that they take a fluidly left-leaning group and depict it as an idiotically "separatist," right-wing monolith. This "why did you beat your wife" strategy means that real debate of issues posed by a serious, responsible left is eternally circumvented as we sacrifice precious time to the kind of simple-minded but necessary refutation that only sets you up for more: I am *not* a neo-Nazi! I can so tell the difference between fantasy and fact! And of course, Some of my best friends are white!¹¹²

In closing this essay, let me acknowledge that I am privileged and I do not take it for granted. I have been fortunate to have numerous opportunities to engage in sustained collaboration and work with people across color lines, both within and beyond the black-white paradigm: from practicing law as a Legal Services attorney to serving on community boards, from teaching law students to chairing the Board of Directors of the New World Foundation and serving on the Board of Directors of the National Asian Pacific American Legal Consortium. Experiences such as these have established a broader, deeper appreciation for humanity and the sense that this precious humanity is what links us and inspires us.

Blacks and whites assume familiarity with each other, even though we really tend not to know each other well. The assumed familiarity really blocks the attempt to appreciate our common humanity. The history of conflict preempts the future

111. See *supra* note 8 and accompanying text (discussing comments of Glenn Loury).

112. Patricia J. Williams, *De Jure, De Facto, De Media*, NATION, June 2, 1997, at 10.

of collaboration. It causes us to forget, or discount, the common enterprises we have furthered, from the inspiring Olympic Games to the depressing wars. Our mutual suspicions, threats, and fears seem inevitable, though they are not. With the increasing numbers of Asians and Latinos now in the United States, there is a wonderful opportunity to step outside of what we know and how we have come to know our "truths" about race/ism. We really have a new chance to solidify and broaden the human connection. At least that has been my experience.

Thus, my varied experiences as a practicing multiculturalist convince me that the multicultural future is viable. Social justice can be reflected in the make-up and operation of a more open society and democracy. Justice can be experienced, day by day, even among those who now might least expect it. This, however, is long-haul work. At that work, enemies will be made and disagreement among friends will occur. It just goes with the territory; it is part of the serious business being conducted. It is worth the effort.

Finally, I have come to identify with Georgia Congressman John Lewis, a courageous integration warrior. Recently Paul Begala, an advisor to President Clinton, described how he grew up in the suburbs as a privileged white man and how he came to view Congressman Lewis as his civil rights hero. In responding to why he was not better-known, Congressman Lewis remarked: "I'm more like a pilot light than a firecracker. I burn low, but I burn long and strong. I don't just pop off then go away."¹¹³ As with all who struggle for social justice, for an open society, and for a multiracial democracy, I hope that we hard-core integration warriors and social justice workers, regardless of our color, gender, or sexual orientation will stay the course and sustain the struggle. I hope, then, that we will continue to be pilot lights who will burn long and strong. Most importantly, as this essay suggests, I hope we will not let others reduce us to firecrackers who merely pop off and then go away.

113. *What is a Hero?*, *ESQUIRE*, Nov. 1998, at 104, 108.