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To the Bone: Race and White Privilege

Jerome McCristal Culp, Jr.[†]

PROLOGUE

Toni Morrison once explained how deeply meaning can be buried in a text. She was asked where in the text of her novel, *Beloved*, Sethe killed the baby. She answered the questioner by replying confidently that it had happened in a particular chapter, but when she went to look for it there she—the author—could not find it. Meanings can be difficult even for the authors of a text. The same thing is true for the texts written by the multiple authors of a movement. What did we mean and where is a particular event or idea located? These are questions that are difficult for any one person, even someone who, like myself, has at least been a participant in the writing of the text. There may be meanings—unintended meanings—that we who participate are not aware of and it is important to ferret them out.

Ten years after its formal beginning, critical race theory is under assault by those inside and outside the legal academy for supposed ugly things contained within the texts that make up the body of its work. Our movement has been almost exclusively a written and spoken community. We have met to facilitate those words, and the product of those meetings and that collaboration is strewn among law reviews and books that have become central to aspects of the legal academy. Unfortunately, some of our critics have claimed to find within those multiple-authored multiple texts anti-Semitism, anti-white, anti-white male, anti-Asian and other uncivil by-

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products. The critics of critical race theory have attempted to find this message of hate buried in the clear testament of hope and a requirement of transformation stated in the pages of the law reviews and books written by many authors. I do not believe that an evil message is there and certainly none of the critics have come close to naming it. These critics do not understand that there are critical race theories. There are many theories that unite and divide everyone who could be accused of being or claim to be members of the critical race theory movement, but there is a common belief in an opposition to oppression.

In making this charge the critics of critical race theory have failed to acknowledge the deeply embedded message of critical race theory. That message is that race is only skin deep, but white supremacy runs to the bone.¹ Race is only skin

1. This is a paraphrase of an old Moms Mabley joke: Beauty is only skin deep, but ugliness runs to the bone. White supremacy is the idea by the largely white majority that their culture, ideas, and interpretation of the world is superior to the nonwhite minority. This majority is not necessarily exclusively all white. Nonwhite people can support white supremacy just as it is possible for white people to oppose it. See, e.g., Frances Lee Ansley, *A Civil Rights Agenda for the Year 2000: Confessions of an Identity Politician*, 59 TENN. L. REV. 593 (1992). Much of this superiority is structured around the way that race is constructed as a white/black issue. Michael Goldfield described the importance of race this way:

Race is the key to unraveling the secret of American exceptionalism, but it is also much more. . . . Race has been the central ingredient, not merely in undermining solidarity when broad struggles have erupted, not merely in dividing workers, but also in providing an alternative white male nonclass worldview and structure of identity that have exerted their force during both stable and confrontational times. . . . And race has been behind many of the supposed principles of American government (most notably states' rights) that are regarded as sacred by some people today.

MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 30 (1997). bell hooks put it this way:

In white supremacist society, white people can safely imagine that they are invisible to black people since the power they have historically asserted, even now collectively assert over black people accorded them the right to control the black gaze. As fantastic as it may seem, racist white people find it easy to imagine that black people cannot see them if within their desire they do not want to be seen by the dark Other. One mark of oppression was that black folks were compelled to assume that mantle of invisibility, to erase all traces of their subjectivity during slavery and the long years of racial

deep because it is always a social construction (but a very important social construction) and the work of critical race theory is to go beyond the socially constructed boundaries and is exactly about understanding race's importance but scientific insignificance.

The second and related part of the construction of critical race theory is that white supremacy goes to the bone. White racism in its many guises is deeply buried in the structure of the law and the legal academy.² This view of the world reverses the way that race has traditionally been seen in the legal academy. To the traditional legal scholar race, in the words of Neil Gotanda, is simply formal race—race is biologically connected and socially insignificant and racism is something that can only be done by Bull Connor or George Wallace before his salvation. The racism of proposition 187 or Amendment 2 in Colorado or the racism that is part of sexism are not possible. The people of California or Colorado or most men [white and nonwhite] are simply not racist or sexist. To the legal world before critical race theory, race went to the bone, but racism was only skin-connected and deep. The whole process of critical race theory has been to construct a new and powerful story. Part of the argument of American legal scholarship, like Sethe's baby, is dead and haunts our present. The ghost here is our loyalty to the status quo and a certain part of liberal theory. Ultimately, the part of liberal theory and the status quo that we must reject is the white privilege embedded there. The problem of course is to find it and our own privilege with it, and to keep it from continuing to haunt our present.

apartheid, so that they could be better less threatening servants.

bell hooks, *Representing Whiteness in the Black Imagination*, in *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* 165, 168 (Ruth Frankenberg ed., 1997).

2. For a historical analysis in support of this point, see GOLDFIELD, *supra* note 1; for a political science analysis of white supremacy, see CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997); and for a legal discussion of this point, see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). See also Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 *DUKE L.J.* 39.

I. INTRODUCTION: TRADITIONAL ACADEMY'S RESPONSE TO CRITICAL RACE THEORY

Daniel Farber and Suzanna Sherry in a series of articles and a new book have written a supposed defense of the Enlightenment view of knowledge, reason, merit and truth. With defenders like this the ideas they espoused are in more trouble than even I, part of apostate "radical multiculturalist" critical race theory legal academy, ever thought. It is not that an effective defense of disinterested knowledge could not be waged, but this poorly researched and written diatribe against a growing group of scholars of color and some of those allied with us is not it. I say poorly researched and written advisedly—not in anger but in truth. When Farber and Sherry find an idea of the scholars of color discussed in this book they distort it.³ When Farber and Sherry defend the ideas of Western European intellectual history they do so with little comprehension and no scholarly pretensions.⁴ The important ideas of the Enlightenment are so watered down as to be an unrecognizable imitation of their original power.⁵ The philosophical ideas expressed in this book and these articles are to philosophy what lite is to beer. When these ideas had real power that power stemmed not from universal truth but from something much more difficult to obtain, the ability to create a consensus about how to move forward while questioning the present. That consensus no longer exists, perhaps can never be reinvigorated, but that does not mean that we cannot discuss where we are and agree on some common parameters. Unfortunately, Farber and Sherry cannot help us with this project, because their apparent intention is to distort and destroy, not engage.

I will end this essay by trying to engage in a conversation with those in the academy who would like to deal with race as an issue. Farber and Sherry claim that they are trying to do this, but the book and their series of articles are devoid of any meaningful effort to do so.⁶ Farber and Sherry make three points:

Rather than asking whether radical multiculturalism is good philosophical theory, we prefer to ask whether it is wise politics. . . . In

3. See *infra* Part II.

4. See *infra* Part IV.

5. See *id.*

6. See *infra* Part V.

agreeing to debate whether radical multiculturalism provides a viable political vision, rather than whether it is true, we are in effect agreeing to fight on the radicals' own terms—perhaps at the risk of taking on some of their characteristics ourselves.

. . . [W]e believe that we do share some premises with them, or at least with many of their sympathizers. . . .

- A valid conception of equality should condemn racism not only against blacks and Hispanics but also against Asians and Jews.
- Advocates of equality need to be able to engage in constructive discussions with each other and to contribute to public discourse in society at large.
- In order to learn from experience, society should aim for the fullest possible understanding of the past, free from overt political pressures, and should reject any standard for truth that allows suppression of the memory of genuine suffering.⁷

The problem with these common assumptions is that they misunderstand critical race theory. With respect to the first point, critical race theory does not limit its discourse to blacks and Latinos. We have been among the most integrated of movements in the legal academy. Indeed we are African-Americans, Korean-Americans, Chinese-Americans, and Japanese-Americans, Latino/as, and Caribbean African-Americans, Christian, Buddhist, Moslem and Jew and nonbelievers. Of course, since we understand the difficulty of essentialism we do not believe that because we are all of these things that we are not necessarily racist, anti-Asian, anti-Semitic, or anti-black. If you read the substance of what we have written, however, you cannot find evidence of this in the central body of our work. Farber and Sherry can only see us as black and Hispanic and cannot see the multiple texture of our movement and its confrontation with law and the legal academy.

With respect to the second point the authors do not engage the very authors in critical race theory who have most clearly tried to engage in a discourse. Farber and Sherry would replace that discourse with a coerced agreement on what is important. If critical race theory agreed that the racial status quo is good, that concedes the key intellectual contest. Farber and Sherry fail to discuss this issue.⁸

7. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 50 (1997).

8. See *infra* Part IV.

I am still baffled by what Farber and Sherry mean by the last point. As I understand critical race theory we want to talk about the reality of racial suffering. Farber and Sherry seem to believe that they do not need to discuss real suffering and that we can simply replace that history of suffering with a celebration of assumed truths. *Brown* is unassailable. Law is good. Supreme Court Justices are in general racially wonderful. These views are barely defensible, but they are not mandated as the only way to have a real discussion about race. Farber and Sherry also write,

We do not, however, bring this argument [criticizing critical race theory] forward without misgivings. The people whose views we criticize are, after all, earnestly seeking to remedy some of the worst injustices of our society. Given our liberal Jewish backgrounds, we feel a particular sense of discomfort in attacking the work of progressive minority scholars, or of seeming to reopen old wounds between the Jewish and black communities. Moreover, we have a strong distaste for the growing incivility of academic disputes.⁹

I do not think you can read what I or other critical race theorists have done as being an effort to represent the communities of color in conflict with the Jewish communities. I would argue that raising this question without more evidence suggests an antipathy that I have not seen in the many critical race theory, Latcrit, and people of color conferences I have attended over the last ten years. It is almost as if they are saying they must be talking about us—what else is there. In addition, what does it mean to be liberal on the race question. I would not describe Professor Sherry necessarily as a racial liberal. Consider the following statement:

Aleinikoff, in his eagerness to empathize with the victims of racism, completely overlooks the victims of sexism. Similarly, his description of the young black man who felt resentful when a white woman with a baby crossed the street to avoid him naturally invites a comparison: he fears for his emotional well-being, but she fears for her physical safety. I, at least, would rather be snubbed than raped.¹⁰

She does not seem to be able to see racial oppression. As far as I can tell there is very little difference on the race question between Newt Gingrich and Farber and Sherry. They have a right to believe what they want, but it does not make them liberals on race issues even "if" they are liberal on other issues.

9. FARBER & SHERRY, *supra* note 7, at 13-14.

10. Suzanna Sherry, *The Forgotten Victims*, 63 U. COLO. L. REV. 375, 375 (1992).

It ought to be clear that one need not be a liberal to be a good person, but I am not sure I find the supposed liberalism in the public discourse of Farber and Sherry in the general discourse about race. As a Hubert Humphrey democrat I find the notion that they are liberals not supportable by the evidence.¹¹

One question should be addressed before I begin. If this book and the articles are so poorly researched and written, why pay attention to them? Unfortunately, much of the traditional legal academy takes these views expressed in books and articles seriously. Several important federal judges have reviewed the book and found it important, helpful and accurate.¹² Reviews by the important opinion makers of our society have appeared in the *New York Times*, *Wall Street Journal*, and *New Republic*. I do not believe they stand alone outside of or inside the legal academy. Some of my colleagues are likely to see Farber and Sherry's book as the final useful word on critical race theory. Because this view will hamper the potential for critical race theories to change the profession, I will take the criticisms—even though not seriously executed—seriously.¹³ I hope that those who want to engage on race—

11. For a useful defense of similar Enlightenment principles see CHRISTOPHER NORRIS, *RECLAIMING TRUTH: CONTRIBUTION TO A CRITIQUE OF CULTURAL RELATIVISM* (1996). Norris is wrong but his defense is important and serious.

12. See Alex Kozinski, *Bending the Law*, N.Y. TIMES, Nov. 2, 1997, at 46 ("While traditional liberals still dominate the law schools in terms of numbers, they are mostly a cowardly lot, unwilling to risk their peaceful careers to tell the alarming truth to the world outside. In writing this book, Farber and Sherry have taken a personal risk. If those of us outside the academy fail to take heed, we will not be able to say we were not warned."); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40. Alex Kozinski and Richard Posner are judges on the Ninth and the Seventh Circuits.

13. In this essay I am going to treat Farber and Sherry's book and the reviews by Judges Posner and Kozinski as part of the same criticism of critical race theory. However, sometimes slight differences exist. Farber and Sherry argue that they do not want to kick critical race theorists out of the legal academy. See FARBER & SHERRY, *supra* note 7, at 8 ("We don't want to drive these scholars out of the law school world; we would be happy, however, if they abandoned what we think is the least fruitful and most troublesome part of their message."). But see Jerome McCristal Culp, Jr., *You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021, 1022 (arguing that stories differ in how the white majority in the academy will hear them). They simply wish to have critical race theorists reform. But Judge Posner writes in his review:

whether they agree or disagree with me or others who do critical race theory—can begin to do so.

II. DISTORTIONS, LAW AND RATIONALITY

Dyslexia: Abnormal difficulty in reading and spelling, caused by a brain condition.

—OXFORD AMERICAN DICTIONARY 269 (Herald Colleges ed. 1980)

Farber and Sherry have developed a strange intellectual affliction. I term it intellectual dyslexia. Dyslexics—of which I am one—have difficulty with numbers and letters. They transpose them. So a dyslexic may read red for bed or 453 instead of 534. This problem can be adjusted for and often is by the dyslexic. She will check her interpretation or go back to make sure that the numbers or letters that she wrote down were in fact correct. Farber and Sherry seem to suffer from the first part of this problem, but have achieved no countervailing mechanisms that check their inability to read with any care. Maybe it is my own dyslexia that makes them read words I write out of context, but it is not confined to my work. The work and words of most critical race theorists are distorted beyond recognition. Like the dyslexic, Farber and Sherry often

By exaggerating the plight of the groups for which they are the self-appointed spokesmen, the critical race theorists come across as whiners and wolf-criers. By forswearing analysis in favor of storytelling, they come across as labile and intellectually limited. By embracing the politics of identity, they come across as divisive. Their grasp of social reality is weak; their diagnoses are inaccurate; their suggested cures (rigid quotas, 1960s-style demonstrations, transformations of the American spirit, socialism, poverty law practice) are tried and true failures. Their lodgment in the law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement's scholarship bunk. To be sure, it is not a unique embarrassment; there is plenty of shoddy legal scholarship. But this is hardly an excuse for the extremism, the paranoia, the hysteria, and the irrationalism of critical race theory, which are embarrassments to sober liberal egalitarians, such as Farber and Sherry, and obstacles to solving the problems created by the nation's racial and ethnic variety.

Posner, *supra* note 12, at 43. Judge Posner seems to argue for the elimination of critical race theory from the academy. In their book, Farber and Sherry, despite their protestation to the contrary, seem to call for our intellectual execution, and that is exactly what Judges Posner and Kozinski call for in their reviews.

see on the pages of articles what they hope is there, not what is written. *Beyond All Reason*, a book published by a famous academic press, is so full of misstatements and distortions that literally no statement can be taken at face value. Many of you who have not read and are not likely to read the work of critical race scholars are likely to think that I overstate this point. I do not. As proof of this point I am going to note several of their significant distortions.

The least useful part of their argument is the effort to make critical race theory anti-Semitic. Farber and Sherry make most of their criticism of Derrick Bell in two places. One argument is that in his *Space Traders* story¹⁴ he is unfair to Jews. As a small part of the story of the *Space Traders*, Professor Bell argues that in response to a fictional outer-space alien offer to trade African-Americans for economic progress, a group of Jews set up the Anne Frank Committee. As a militant group they offered to provide comfort to runaway African-Americans. The plan is not successful in the story because of the scapegoating of Jews and virulent anti-Semitism in the white community in response to those Jews who are part of the Anne Frank Committee. But what outrages Farber and Sherry is the statement in the story by Professor Bell that “[a] concern of many Jews not contained in their official condemnations of the Trade offer, was that, in the absence of blacks, Jews could become the scapegoats.”¹⁵ Farber and Sherry conclude that this means that Jewish support is “rooted firmly in group self-interest, and a rather ugly interest at that—for it appears that what the Jews really need is to be sure that blacks remain available as targets for white racism.”¹⁶

There are two parts to this claim. One is that Professor Bell is unfair to the Jewish communities who have often been political allies and supporters of the claims of African-American communities. The second is that Professor Bell’s telling of this story suggests that not all of the support that came from those Jewish communities or individuals was altruistic. Actually Farber and Sherry seem to read this even more negatively. They seem to suggest that none of what the

14. The *Space Traders* stories appear in two of Professor Bell’s books. See BELL, *supra* note 2; DERRICK BELL, *GOSPEL CHOIRS* (1996).

15. FARBER & SHERRY, *supra* note 7, at 25.

16. *Id.* at 26.

Jewish community has done historically or would do in this instance was altruistic as Professor Bell tells the story.

This seems a distortion of Professor Bell's story. The moral of his story seems to be that the people in the Jewish communities who believe that they might be next are right since they are subject to hideous harm because of their support of black people. That message seems to me to be the antithesis of anti-Semitism.¹⁷ The Jewish community has enemies and they are not among critical race scholars. The reading of the word "many" as "all" by Farber and Sherry seems just a pure distortion and an effort to take out of context Professor Bell's larger argument. Their reading of any criticism of the motives of a group they are members of as an attack on their bona fides also is a distortion.

Farber and Sherry see this part of Professor Bell's story as questioning the commitment by any Jew to racial justice.¹⁸ I do not believe that is a reasonable interpretation of the story. Professor Bell clearly believes that history suggests that such concern by Jews and other supportive whites has not been enough to eliminate racism, but that claim is clearly not anti-Semitic. Professor Bell's story is no more harsh on liberal whites than it is on progressive blacks, and no more harsh on Jews than it is on Gentiles. In that sense Professor Bell has taken the Jewish support of civil rights very seriously.

The issue of anti-Semitism comes up most viscerally in their reaction to Professor Bell's arguments about Louis Farrakhan. Professor Bell suggests, as have a number of people both black and white, Jew and Gentile, that some of what Louis Farrakhan has been criticized for has been taken

17. Farber and Sherry in their contribution to this symposium claim that my analysis of Professor Bell's work is inconsistent with the "standard conceptual apparatus of radical multiculturalism. There is no talk here of deep social structures, ingrained cultural attitudes, mindsets, or unconscious biases." Daniel A. Farber & Suzanna Sherry, *Beyond All Criticism?*, 83 MINN. L. REV. 1735, 1757 (1999). As always, Farber & Sherry get it wrong. I start off this section by making clear that I believe that anti-Semitism is a real and important problem. I note that all of our biases should be analyzed. This sounds like exactly the type of analysis that I have required of them, Richard Posner, and other traditional scholars. I do not claim that I or Professor Bell are free of hidden biases. I criticize Professor Bell for being too supportive of Farrakhan. In short, I do everything that they claim I do not. They fail to point out in my work or the work of Professor Bell the anti-Semitism that they suggest lurks unexamined in our work. It is exactly their failure to point out such hidden attitudes that mark their book and this response.

18. See FARBER & SHERRY, *supra* note 7, at 4.

out of context. Bell also argues that there is a form of white privilege involved in the requirement that every black person must start with a criticism of Farrakhan and a plan to do something about him before their statements can or will be heard. Neither argument is anti-Semitic. Professor Bell may be wrong about how to face anti-Semitism, but he is very upfront about his plan and his opposition to all the many evils of anti-Semitism. Professors Farber and Sherry seem to believe that they have an exclusive right to tell the story of Jewish discrimination. Is Professor Bell's refusal to condemn Farrakhan misplaced? I think so,¹⁹ but I think he explains his rationale in terms that are clearly not anti-Semitic. Farber and Sherry do not engage his point about Farrakhan's words and his point about privilege. It is as if after Louis Farrakhan's name is spoken nothing else is visible but Farrakhan's anti-Semitism. No reasoned discussion seems possible once that social construction that Louis Farrakhan has become is invoked.

The second distortion is from Farber and Sherry's criticism of my words. In summing up the supposed reaction of critical race scholars to those black scholars who hold different views, Farber and Sherry write:

Any story that is inconsistent with multiculturalist views can be knocked out—either the storyteller is not an authentic member of the group, or his perceptions have been warped by the dominant culture. So it doesn't matter, for example, what Yale law professor Stephen Carter may have to say about the effects of affirmative action in his own life, or what Justice Clarence Thomas may have to say about his experiences. They are merely, in Jerome [McCristal] Culp's terms, black men in white face.²⁰

Farber and Sherry's only citation for this phrase is to an article that I wrote entitled *Black People in White Face: Assimilation*,

19. I agree with Louis Farrakhan's critics that there is a significant element of anti-Semitism in many of his statements and actions. However, I disagree with Professor Bell that the use of categories of speech and anti-Semitism is justified as part of the response to the real racism that exists. Any use of the racial categories to build on oppression whether it is gender, sexual orientation, class, or racial or ethnic is not only wrong, but it is likely to not help in the liberation of those being liberated. Nevertheless, it is a far cry from that difference to an assertion that Farrakhan's statements and actions are rooted in anti-Semitism. That underlying principle is not justified anywhere in Farber and Sherry's critique of Professor Bell.

20. FARBER & SHERRY, *supra* note 7, at 128.

*Culture, and the Brown Case.*²¹ My article is about the question of assimilation for all black people and indirectly all people of color. In none of the several articles I have written have I ever accused Clarence Thomas or Stephen Carter of being in white face. Farber and Sherry misunderstand how I and critical race theory view assimilation. In a complex society assimilation happens to all of us, or white male Duke students would not have started wearing baseball caps backwards and black rap groups would not wear Duke and University of North Carolina shirts in their videos. So when I have written about assimilation I have never singled out particular individuals who assimilated. I have noted my own assimilation in at least one article and suggested my own ambivalence regarding its worth.²²

Assimilation is a complicated issue, and I and other critical race theorists have dealt with that complication with some care. But Farber and Sherry read into critical race theory the claim that everyone who is assimilated is a caricature of black people, in Farber and Sherry's term "black men in white face." Now I use Farber and Sherry's term advisedly because they have taken my term, which I borrowed from Kenneth M. Stampp, to mean something antithetical to how I use it.²³ Since I imported the term to legal discourse and its colorful style has been the product of chiefly my work, I believe it is fair to argue that they do a disservice to my term and its use in this book. Farber and Sherry do try to make the argument that a few passing criticisms of Clarence Thomas and some other "conservative" blacks by Professor Bell amounts to saying that they are duped or not black and

21. See *id.* at 182 (citing Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665, 670 (1995)).

22. See Jerome McCristal Culp, Jr., *The Michael Jackson Pill: Equality, Race and Culture*, 92 MICH. L. REV. 2613 (1994).

23. See KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH*, at vii (1956) ("I did not, of course, assume that there have been, or are today, no cultural differences between white and black Americans. Nor do I regard it as flattery to call Negroes white men with black skins. It would serve my purpose as well to call Caucasians black men with white skins."); see also FRANTZ FANON, *BLACK SKIN WHITE MASKS: THE EXPERIENCES OF A BLACK MAN IN A WHITE WORLD* (Charles Lam Markmann trans., 1967). Fanon's book was originally published in French under the title *Peau Noire, Masques Blancs*.

therefore are in white face. This is a distortion of what Professor Bell wrote. In *Faces at the Bottom of the Well*, on the pages cited by Farber and Sherry, Professor Bell explains one of his rules of racial standing. He does criticize Justice Thomas's appointment in these words:

Given Thomas's modest academic background, relative youth, lack of litigation experience, and undistinguished service in appointive government positions, only his 'enhanced standing,' in accordance with the Third Rule, as a well-known critic of affirmative action and civil rights policies and leaders in general could have won him priority over the multitude of lawyers, white and black, with more traditional qualifications for a seat on our highest Court.²⁴

This argument about Justice Thomas's modest credentials does not mean that he has said that Justice Thomas is in white face, but he is arguing that taking certain views raises the visibility of racial minorities in the white community. They are the black people who are heard by the white community. I have made similar arguments.²⁵ Since white face is how the white community sees black people, it may be that Farber and Sherry believe that Justice Thomas, by adopting certain views, has become white. Certainly that is the only way to make sense of a similar suggestion made by Farber and Sherry that black scholars cannot represent urban poor blacks because they are by definition not part of poverty.²⁶ This seems to be

24. See BELL, *supra* note 2, at 115.

25. See Culp, *supra* note 13, at 1022.

26. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 817 (1993). Farber and Sherry write:

In addition, it would be helpful to have a more complete explanation of how black law school professors—whose occupation confers social and economic privilege, and who may come from privileged backgrounds similar to their white counterparts—have a special claim to represent the views of poor blacks in urban ghettos. Indeed, there is evidence that they do not fully share the views of most African Americans. Stephen Carter points out that while most critical race theorists are politically to the left of their academic colleagues, most studies show African Americans to be considerably more conservative than whites on many issues. This suggests that perhaps only a minority of African Americans truly speak with a political voice of color.

See *id.* (citations omitted).

They seem to be convinced that they can speak as Americans or as members of the legal academy despite its heterogeneous nature, but that people of color are either black or members of the academy. It ought to be

the heart of Farber and Sherry's claim that nonwhite critics of the status quo should be guided by these "conservative" figures in the black community chosen by the white majority to speak for us. When we choose to examine the opinions and the ideas of those people for their content our criticism becomes ugly instead of just pointed. This is also true of their criticism of Professor Derrick Bell for comparing the appointment of Justice Thomas to the elevation of black overseers who are willing to mimic the master's views. Professor Bell follows that quote with a careful analysis of Clarence Thomas and Booker T. Washington and the way that some white people understand the stories told by black people. This analysis engages the effort of Clarence Thomas to deal with race. It does not dismiss his views out of hand or say that because he disagrees with Professor Bell he has nothing worth saying. Professor Bell questions the logic and sense of Justice Thomas's position. Professor Bell makes another point here that is important. Louis Harlan has reminded us that despite his public pronouncements, privately Booker T. Washington was a racial radical fighting lynching, disenfranchisement, peonage, educational discrimination, and segregation. The mask that Washington was forced to put on did not permit him to publicly take positions that he privately knew were right. The notion of outsiders having to put on such masks is neither new nor novel and it is not name-calling to note their existence. When is a conservative position a mask and when is it a well thought-out alternative to the conventional wisdom? It is always hard to tell, and it is clear that Farber and Sherry don't know the difference.

However, by calling my name in the text and citing my article Farber and Sherry make me the poster child for this simplistic version of assimilation, but they do not cite or quote what I actually wrote about assimilation. Instead, they sub-

clear that they would not ask the same question of white American privilege that they ask of scholars of color. Furthermore, when Farber and Sherry accuse the nonwhite professors of being "privileged," they assume a nonracial nature to "privilege" that is not supported by the racial reality. After all we know that in 1960—when many of the nonwhite professors now in the academy were growing up—a black person who graduated from college made less than a white person who graduated from high school. In the United States, privilege has always been racialized. Therefore, a black "privileged" person had more limited housing, school, and business choices. Farber and Sherry cannot understand this concern because they live in a world of blindness to that racial reality.

stitute their version of what I meant. The following is what I wrote about white face:

This requirement of black assimilation is akin to a requirement that black people put on white face and is ultimately unacceptable as a goal for a decolonized African American community. This desire for assimilation promotes the conclusion that it is permissible to create white culture but dangerous to have black culture on campuses or in the curriculum because it will politicize our universities. I call this misconception of the *Brown* orthodoxy the "assimilation assumption."

....

... When the students at the University of North Carolina sought to have a black cultural center placed at the heart of the college campus, in the only open space left near the center of campus, their demands were seen as militant and inappropriate. Editorials denounced them for their effrontery of wanting to make some part of the University of North Carolina respond to black concerns. What caused this anger at the effort of black students to make themselves participants in the university's activities? The only plausible answer is that many participants in the civil rights struggle, important and able participants, thought that black people were agreeing to a "neutral principle" of assimilation. Black students would become white students with black faces and our college campuses would not change at all. The issues we discuss, the concerns we emphasize, and the programs we administer would remain the same, only the complexions of some in the classroom and perhaps at the podium would be altered.²⁷

Nowhere in these two quotes are individuals criticized for assimilating and neither are the views of black critics dismissed because they disagree with me. I have tried to engage the words of Professor Carter, Thomas Sowell, and Clarence Thomas on a number of occasions, but I have never tried to dismiss them as simply exemplars of assimilation or as conservatives out of step with the "real" black community. Nor would I, since for me assimilation is a question all of us face every day. I would be dishonest if I did not admit that I sometimes assimilate nonblack culture into my life. In my work I am questioning the nature and the necessity of assimilation as a simple panacea for racism.²⁸

27. Culp, *supra* note 21, at 669-70, 679 (citations omitted). Farber and Sherry suggest in their response that my interpretation of assimilation refers to an earlier article, but the citation that is quoted in the text of this article and (in part) in their response is from the original article that they claimed proved that I am opposed to all assimilation. See Farber & Sherry, *supra* note 17, at 1742. What are they talking about? They seem not to have read my article originally and still haven't.

28. Indeed if they had read my articles they would have seen that I wrote something quite different about Stephen Carter. See Jerome McCristal Culp,

The William and Mary article argues that many of the "good" people who helped to make *Brown* were under a misperception that black people had agreed to complete assimilation in agreeing to or seeking the redress that *Brown* brought. The article questions that common assumption about *Brown* and integration. The article praises the many people who fought for *Brown*. Its rejection of what I call the assimilation assumption is troubling to many people, but Farber and Sherry don't attack or support that assumption. They instead attack me for something that I did not write and do not believe. Farber and Sherry seem to have read the title of my article and come to a conclusion about what it must have meant. They assume that I must be attacking those black people who have assimilated. The point of my article is that a decolonized African-American community must have at least the power to choose. Communities of color require the power to assimilate or to reject assimilation or even more powerfully to sometimes assimilate and sometimes not, and critical race theory requires the possibility of nonwhite people to be able to create additional possibilities outside the straitjacket of the status quo.²⁹ This denial of the freedom to not assimilate seems to me to be the real totalitarianism that is involved in race relations in America. Even Clarence Thomas and certainly Stephen Carter might agree with me on that issue.

In *Black People in White Face*,³⁰ I am worried about the much larger question of what assimilation means to legal

Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 229 (1993) (noting that Professor Carter is misunderstood by some in the white male professorate when he looks at merit and selection of law professors). *But see* Jim Chen, *Unloving*, 80 U. IOWA L. REV. 145 (1994) (arguing for a simplistic cure by assimilation for racial and ethnic ills).

29. Choice is sometimes problematic. True freedom would include something more than just choice. True freedom for the African-American community would include the right and power to participate in the creation of the choices. It is the failure to permit that option that is part of what critical race theory is all about.

30. *See supra* note 21. Farber and Sherry in their response to my criticism of their work have suggested that I could not have meant (originally?) what I have written in this response. They write, "Culp argues that he is 'ambivalent' about assimilation, and that his use of that phrase is meant only to express that ambivalence. This is an unlikely interpretation: the whole point of the metaphor seems to be that assimilated blacks are as inauthentic as whites wearing blackface . . ." Farber & Sherry, *supra* note 17, at 1742.

theory. White face is that comfortable spot where white people try to put black people. I do not believe that very many black people see themselves in exactly that way, and my guess is that Professor Carter and Justice Thomas have much more complicated views about who they are. But I have successfully tried to avoid guessing about what they might think and tried to deal with what they wrote. If you examine the pages of the multiple texts that are critical race theory, there is some criticism of blacks, Asians, and whites who disagree with our project, but that disagreement is with the substance of what they are arguing. Farber and Sherry want to elevate those blacks, Asians, and Latino/as who disagree with our project to a status outside discourse.

Farber and Sherry and most of the legal academy ask the wrong question. They say to critical race theory, how can you represent the poor and racial perspectives that are not represented when there are multiple perspectives and identi-

As I have suggested in this section, that is not what I meant originally or now. Farber and Sherry display a unique arrogance in concluding that their interpretation is the "right" one. They seem unable to engage in the civil discourse about real differences. Instead, they create their own strained interpretations of what others have said and then nash and wail about the consequences of their interpretations. It is particularly odd for two scholars who identify themselves as members of a religious (cultural?) minority to assume that assimilation is a one way street. The history of Jews, like other minorities, is full of examples of the balancing of assimilation and difference. Is it hard for Farber and Sherry to accept this interpretation by a black person because once blacks have formal equality no difference is permissible or because race for them is about cultural "inferiorities" so that black difference is always about those bad characteristics? I don't know the answer to that question, but I do know they cannot read with care what I and others have said.

Those who don't know me may think that I am a black nationalist given the Farber and Sherry reading of my work. I do not believe a fair reading would permit such an interpretation. Critical race scholars like myself can be criticized for believing too much in assimilation given the rewards it provides to minority communities, but we are not a simplistic version of the Black Panthers no matter how much Farber and Sherry would like us to be. Despite Farber and Sherry's claim that I have run from what I have written, I accept it. Could I have written it more clearly? Perhaps I might have changed "a" to "the" in the quote they cite, but the point is they didn't read the article at all. The article is not an attack on blacks who assimilate. The article challenges the assumption of assimilation imposed on blacks by the society in general. Farber and Sherry cannot see the difference. It is a criticism of a goal. Farber and Sherry are so sure that the goal they share with much of the academy (color blindness) is the only possible or permissible goal that they cannot understand that someone might carefully criticize it. I am sorry for their students who must have their examinations read so ineptly.

ties in the communities of color. The answer to those questions requires some care, but the problem is no more difficult than it is for a member of the House of Representatives who does not have much in common with her constituents but can still represent their views and may even be part of that heterogeneous district. Or the rich white woman law professor who claims to be able to understand the position of poor women or black women when she speaks for women. The right question is the race question. Here the race question is: Do the ghosts of our racial past affect how black and other nonwhite people—Asians, Native Americans, Latinos—present themselves to the white majority? How much does the majority assumption mentioned above distort the discourse of people of color? In Farber and Sherry's world that question cannot be asked, because for them race is defined by not being white. Since race is only a negation of whiteness, black people or other nonwhite people do not have the freedom to construct an identity. Either black people become white people or they are not white people. The right to create an identity resides only in white people. In that sense for Richard Posner, Colin Powell is white. Critical race theory rejects that construction of identity. Colin Powell can be partially assimilated and partially not and always be a black person.

If people of color can construct their own identity not tied to whiteness, then the question of how much, if any, the discourse is distorted by the demand of the empowered majority (or as in South Africa a minority) to structure the debate is the race question. If white face is put on, in Farber and Sherry's terms, it is when people of color change their discourse to win a case, avoid a political defeat or personal danger. I cannot accuse someone of being in white face because it is always obscured by the white supremacy that requires or rewards it. Our inability to measure how much the discourse is distorted obviously does not and probably cannot change the reality of that distortion. Because the voice is distorted does not mean that what is advocated by those distorted voices is wrong, but it does mean that we cannot use it to represent what Asians, Native Americans, Latinos and African-Americans "actually" believe. We also cannot use one part of the spectrum of views of communities of color to bludgeon the discussion to that consensus. If the views are a mask, they have already been distorted by white supremacy. Farber and Sherry do not confront what Stephen Carter and Clarence

Thomas claim about race any more than they confront the views of critical race theories. Race and identity for them are just mirrored images of the white face. White face for me is always an obscuring of our certainty about discourse's intellectual honesty and integrity. For Farber and Sherry white face is what black people become when they deviate from the supposed line of black critics of the status quo. The term white face as used by Farber and Sherry is not mine or critical race theory's. It is always just Farber and Sherry's.

The power of this distortion to be misunderstood is exemplified by the apparent use made of it by Judge Posner in his review of Farber and Sherry's book. He wrote:

[Critical race theory] is not primarily comical, and in fact it has an ugly streak. Its practitioners attack conservative blacks as white men with black faces (or as slaves "willing to mimic the masters' views," which is Derrick Bell's description of Clarence Thomas).³¹

It seems clear that this reference to calling black conservatives (query is Stephen Carter a conservative) white men with black faces must be attributable to my article. As I suggested above this quote stems from a misunderstanding of what I and the heart of critical race theory have written about black people who disagree with some of what we have written. Judge Posner apparently has simply imported the misreading of my work by Farber and Sherry into his own. He does not feel the need to be careful or thorough about the work of these scholars of color because he still believes—as a I criticized him for a number of years ago—that they (scholars of color) cannot possibly have anything to teach him.

But this is the heart of the danger posed by a book like this. Written to appease the conservative thirst to smite the infidels who have gathered in their temples this book simply has only the barest pretensions of the objectivity or the thoroughness that they require of others. It poses the danger that others will rely on it as the basis of their opinions of critical race theory. I believe that our work deserves better and more careful attention. It is a danger that Richard Posner demonstrates in his review.

A third example of distortion by Farber and Sherry is their criticism of Professor Patricia Williams' Benneton story. The Benneton story has been retold in a number of places by Professor Williams and it has strong bona fides in a number of

31. Posner, *supra* note 12, at 41.

disciplines. The story is about the interaction of her race, shopping, and white power. Farber and Sherry criticize this story for not having a moral:

Radical multiculturalists seem quite confident about the meaning of the story, but their confident readings are at odds. . . .

....

The absence of a clear analytic framework can make it difficult for stories to contribute to public debate. If the story has no ascertainable point, it is impossible for anyone to know whether to agree or disagree. Instead, the story merely lies on the table, offering an aesthetic experience like a coffee-table ornament.³²

Farber and Sherry note that this story has been the subject of much discussion by critical race theorists and feminists. It also has been used by literary theorists and social theorists on race. They have interpreted the story in a number of ways. Farber and Sherry find that these interpretations of Professor Williams' story are inconsistent and therefore that there is no moral to the story. It evidently did not occur to Farber and Sherry that there could be multiple consistent meanings. A story may have many meanings. In fact, the more powerful the story the more meanings that may exist. Those multiple meanings need not be inconsistent, but more importantly their inconsistencies can help us understand where the hidden disagreements are. This multilayered and powerful story has a long history in African-American literature. One important example is W. E. B. Du Bois's *The Souls of Black Folk*.³³

To see the power of this point outside of critical race theory one only has to consider the most important law and economics article ever written—*The Problem of Social Cost*, by R. H. Coase.³⁴ The power of that article was the story embedded in its message about externalities, social cost, pigovian taxes, and the role of government. The article led to what has been called the Coase Theorem, but the meanings of this article are

32. FARBER & SHERRY, *supra* note 7, at 85-86.

33. See W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* x-xi (Random House 1993) (1903). In the introduction to the 1993 edition Arnold Rampersad wrote that "Du Bois admitted in 1904, a year after publication, that 'the style and workmanship' of his book did not make its meaning 'altogether clear'. He believed that the collection conveyed 'a clear central message', but that around this center floated 'a penumbra' of vagueness and half-veiled allusions." *Id.*

34. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

multiple, perhaps inconsistent, and unclear.³⁵ The most important idea in the article and the idea named after the author is never clearly stated by him. Did Coase mean to argue for more or less governmental involvement in the market? In the article Coase does not explain.³⁶ As a result many scholars have attributed multiple meanings to his work. Farber and Sherry do not believe that Professor Williams can be sophisticated enough to bury deep and multiple meanings in her work. They distort her story and make it incomprehensible. This lack of clarity is created by their search for an imitation of meaning in Professor Williams' work instead of what is actually there.

Meaning to Farber and Sherry is singular, devoid of depth and texture. In the real world important meanings must have such depth or they will disappear. Farber and Sherry don't argue against the multiple meanings of *The Problem of Social Cost* or numerous important articles in the legal academy and outside.

Another example of distortion by Farber and Sherry is their defense of the moderate middle:

The standard radical multiculturalist complaint about the legal system is that judges are formalists who avidly believe in color blindness and ignore the historical and social contexts of legal issues. This is a fairly apt characterization of Justices Thomas and Scalia, a few prominent federal court of appeals judges, and a handful of conservative academics.

....

... [L]egal pragmatism . . . commands the allegiance of legal thinkers ranging from Judge Richard Posner on the Right to Harvard's Frank Michelman on the Left. . . . Pragmatists are notorious believers in sensitivity to context, history, and openness to empirical information.³⁷

The problem with this distortion of critical race theory is that they cite to no article that represents this "standard radical multiculturalist complaint."³⁸ There is a good reason for this. It is a complete distortion of the position of critical race theory

35. See, e.g., Robert Cooter, *The Cost of Coase*, 11 J. LEGAL. STUD. 1, 14 (1982).

36. See R. H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 159 (1988) ("Even those sympathetic to my point of view have often misunderstood my argument, a result which I ascribe to the extraordinary hold which Pigou's approach has had on the minds of modern economists.").

37. FARBER & SHERRY, *supra* note 7, at 131-32.

38. *Id.*

and the majority of the legal profession on the Supreme Court. The central argument made by critical race theory is to criticize some of the assumptions of the standard model held by most people in the legal academy.

To take just one example, I demonstrated with quotes from Richard Posner on the right and Paul Brest on the left that the vast majority of legal scholars accept an assumption about race and color blindness that I think is not true.³⁹ That assumption is that race is somehow a poor measure of disadvantage and that there are always better ways to measure it (class, income, other measures of economic disadvantage). I demonstrated that this view is held by Justice O'Connor and the center of the current Supreme Court. This criticism is not an attack on the periphery of the Court or on dissents by the Court's minority. It is a criticism at the heart of how the Court faces race and discrimination in the law.⁴⁰ Much of critical race theory is a criticism of the liberal majority in the academy.⁴¹ Why do Farber and Sherry not deal with the work of critical legal scholars who criticize the very heart of traditional racial and constitutional scholarship? How can an important press publish a book without any citation to support such a charge? How can the people who reviewed this book for publication, who presumably were experts in the field, not have known that this discussion of critical race theory was wrong? Is it that the people who reviewed this book for Oxford Press have never read the articles that would refute the points suggested by Farber and Sherry? There is no way to tell from what is presented. What we do know is that Farber and Sherry fail their scholarly requirements.

39. See Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading As Moral Claims*, 69 N.Y.U. L. REV. 162, 177 (1994).

40. Indeed I have criticized other Justices that Farber and Sherry believe represent the moderate middle of our legal and cultural discourse. See Jerome McCristal Culp, Jr., *An Open Letter from One Black Scholar to Ruth Bader Ginsburg: Or How Not To Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994) [hereinafter Culp, *Open Letter*]; Culp, *supra* note 22; Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994).

41. See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

There are other silly points of distortions in this book.⁴² I will not address them, but I believe every word by Farber and Sherry must be read through the lens of distortion.

III. WHITE LIKE US: ENGAGEMENT AND WHITE SUPREMACY

The author is Richard Delgado, who claims to be a member of, and a spokesman for, a group that he calls "people of color." The group seems to be more a state of mind than a race. 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. He lives and teaches, contentedly so far as I know, in an "Enlightenment-based democracy," namely the United States.

Delgado's whiteness lends an Evelyn Waugh touch to critical race theory.⁴³

An important issue for the law is can good people do racist, sexist, homophobic or other bad things. Some years ago I pointed out that in an article published in the *Duke Law Journal* Richard Posner committed a racist act. The act I spoke of was the exercise of his white privilege to ignore the words and actions of scholars of color. I pointed out that Judge Posner wrote about critical race theory without having read or engaged our project. I also noted that his article assumed a racist construct of what a black person was. Judge Posner claimed the right to apply a white gaze to identity and to decide for all of us who is black and who is white.

As Adrienne Davis has shown in other contexts, this use of white perspectives to determine race is part of the structure of

42. I do not say all problems in our society are the product of white people. Derrick Bell's interest convergence hypothesis is only a small [but important] deviation from public choice theory of the law and economics movement, not any more dangerous than that theory is. Cabrini Green is a housing project in a city where Northwestern University and the University of Chicago are important landowners and important political forces. Much of the urban policy (housing, crime and drugs) that led to the creation of Cabrini Green was invented by academics at these institutions. In such a context, I believe it is fair to say that Cabrini Green is connected to those institutions (in an unpublished talk that they cite without permission). Stanley Fish is not a postmodernist but a deconstructionist and there is a difference. It is as if they looked at the work that they disagree with and simply made up what they wanted it to say.

43. Posner, *supra* note 12, at 41.

white supremacy in the law.⁴⁴ I mentioned that I was not claiming that Judge Posner was Bull Connor turning water hoses on black people in the South, but I emphasized that his actions were part and parcel of a program of exclusion that was based in the privileged position from which he self-righteously wrote. I did not mean this as an ad hominem attack on Judge Posner, but as a direct engagement of his arrogance that I saw rooted in unexamined racism. I made it again in another article to which he was given an opportunity to respond, but he declined.⁴⁵ As we approach the end of this century it is surprising that one of our most influential federal judges and intellectual forces in the legal academy would not understand that the discussion of Professor Delgado's race in the quote from Judge Posner at the beginning of this section is both wrong and racist. Judge Posner seems to not understand that race cannot be discerned simply by physical examination. It is the physical side of his criticism of people of color stated above for not being Colin Powell.

Judge Posner, having met Richard Delgado, seems confident that he is neither biologically nor culturally a person of color because he looks white or speaks with "unaccented"⁴⁶ English. He has examined the corridors of the American legal academy and decided that the scholars of color are not authentic enough. As I pointed out in my original article and then in a follow-up article, this exercise of power is racist. It is racist in its assumption about the social meaning of race for scholars of color, and it is racist in reading inauthenticity into anyone who fails to meet his definition of a "real" black person. What can it possibly mean to Judge Posner to not see someone as culturally black? Is someone not culturally black if they have a college education, listen to Japanese music, or marry a nonblack person? Is a person black if they are gay/lesbian/bisexual or economically successful? What does Judge Posner mean by his cultural imperialism? No answers are provided

44. See Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 705 (1996).

45. See Culp, *supra* note 28, at 261.

46. What does accented mean in this context? Since now all five constitutional officers first in line to be President are from the South, do they speak with an accent or do those of us not from the South have unaccented speech? See generally Matsuda, *supra* note 41 (arguing that Title VII should apply to accent cases).

when he shifts to this exercise of white supremacy, because no answers are needed.

I know that Judge Posner is now Chief Judge of the Seventh Circuit, but his words speak for themselves. The criticism of Judge Posner's actions created a certain stir in the profession. It clearly irritates Professors Farber and Sherry and at least one other professor has tried to publicly criticize me for this point.⁴⁷ They implicitly contend that the charge is both ridiculous and outside the civility required of academic discourse. So it is particularly interesting that in reviewing their book that Judge Posner commits almost exactly the same act of both dismissal and nonengagement that I criticize him for in his earlier article.⁴⁸ His actions still are racist despite his high stature and keen intellect. The point I want to make about this is not to educate Judge Posner. The reason I note Judge Posner's racism is to contend that it is possible for good people and—I assume that Judge Posner is such a good person—to commit racist acts. Is it now possible to speak of the unspeakable inside the legal academy? Unfortunately, racism has become after the internment of formal Jim Crow unspeakable. Once we reduce aspects of formal racial inequality it is not possible to raise the issue of even one racist act by one federal judge without committing a form of civility suicide within the academy.

Many people differ with me about what racism is, and others cannot see the racism on the surface of the privileged claims of Judge Posner. To the liberal majority in the academy and on the bench, racism is believing in a very simplistic way in the superiority of your race. In this view David Duke and Louis Farrakhan are always racist, and Ronald Reagan, Jimmy Carter, Antonin Scalia, Jerome Culp, and Judge Posner never are. It is a view that I characterize as Mother Theresa cannot be racist or sexist or homophobic because she loves humankind. This view of racism is the narrowest way to understand it and it removes from analysis any person who is a "good" person. The problem with that formulation is that it permits hidden racist attitudes to be unexamined for their

47. Jonathan Macey, Remarks at a Duke University Federalist Society meeting (Spring 1997).

48. See generally Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992); Culp, *supra* note 28, at 228-29.

racist content. This view is also ahistorical. Racism that occurs now—this moment—is something disconnected from the history of our country that produced it. Current racist acts in this view are not connected to slavery, the slave codes, the end of reconstruction, Jim Crow, the Tulsa riots, the Scotsboro Boys, Anti-Chinese statutes, Emmitt Till, the Ku Klux Klan, segregation of black and Chicano children in the South and Southwest and California or anything else in our long history of racial and gender oppression.

Judge Posner's statements about who is a person of color are not racist in the former sense of the word. He is a good person, appropriately educated at places that should teach us that notions of racial superiority are out of place. But the point of Judge Posner's commentary on Richard Delgado and critical race theory in general is about a notion of racial privilege that is part and parcel of a larger construction of race and racism. If we look only at the goodness of the people and not at what they do, we cannot examine our own racism. All our actions should be subject to review—Judge Posner's and those of critical race theorists. The point of this fact is that it means that we do not get beyond racism by becoming good people. We get beyond racism by not committing new racist acts, by understanding its history, and by altering the social structures that support its reproduction.

I do not contend and do not believe that because someone commits a racist act that everything they do is racist, but neither do I believe that single acts of nonracism remove people from potential criticism. I am not offended that Farber and Sherry raise the issue of anti-Semitism about my work. I believe anti-Semitism is still real and sometimes very important in aspects of contemporary America, and if Farber and Sherry can show that some words or actions of mine are part and parcel of anti-Semitism I will do my best to admit error and try to change. Unfortunately (or perhaps more properly fortunately), in their article and the book chapter they do not explain how criticism of existing meritocratic standards is anti-Semitism because some Jews and some Asians do well. This argument would mean that criticism of existing meritocratic standards is anti-black because some blacks do well under them.⁴⁹ Under Farber and Sherry's view of the

49. For additional criticism of this argument in terms of their own worldview, see Peter Margulies, *Inclusive and Exclusive Virtues: Approaches*

world, as long as merit is not purely racially or religiously or ethnically based it is not challengeable. Their argument ultimately fails for the simple reason that one exception is not enough to disprove the larger point.

I do want to challenge those who disagree with my challenge of Judge Posner to engage my argument. Is it racist to ignore what scholars of color are saying? Is it racist to attribute a form of skin-based racial essentialism to race and to decide from the comforts of one's judicial chambers how people are racially constructed? Is it racist to construct an essentialist view of people of color that makes them "just" welfare recipients and gang members? There may be a defense of Judge Posner's earlier argument about race. Neither Judge Posner nor his defenders have made it. They have thought to simply ignore his actions and focus on my "incivility" in raising the issue of the potential racism of his words. If there is a nonracist explanation for these words, present it. I never contended that Judge Posner was off personally insulting black people on street corners (and I did not expect to find it on the pages of *The New Republic*), but unfortunately for them there are people of color who are impacted by Judge Posner's decisions as Chief Judge of the Seventh Circuit and by others who share his views in their decisions in law classrooms and courtrooms. Who knows when he or they will decide someone is not "black" enough or doesn't speak with enough of an accent to be considered a person of color.

The most important problem with the Farber and Sherry response to critical race theory is that it claims to engage without doing so. Farber and Sherry have defined away the need to respond by distorting what we have written into an altered vision. They have simply ignored important arguments about the law and race. They don't exist for Farber and Sherry and in many ways they don't exist for the legal academy. I do not believe we can move the racial situation in America if we fail to engage in a real process of giving up that privilege of nonengagement. If Farber and Sherry believe that Justice O'Connor's racial jurisprudence is just, explain how that jurisprudence deals with my charge that it provides no method

to Identity, Merit, and Responsibility in Recent Legal Thought, 46 CATH. U. L. REV. 1109, 1125-29 (1997); see also ROBERT HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 253-306 (1998).

for a change in the racial status quo.⁵⁰ If law can achieve some simplistic notion of universal objectivity then Farber and Sherry should respond to Patricia Williams' cogent interrogation of knowledge inside the legal academy and the law.⁵¹ It is clear that Farber and Sherry are incapable of taking on that task. Like the scientific defenders of a discredited theory they have nothing left inside their intellectual cupboard. The question is will the rest of the legal academy find comfort in the privileged position adopted by Farber and Sherry of not dealing honestly with the real challenges to the legal academy of how it treats race.

Can privilege be rejected? To reject the privilege of course does not mean acceptance of all that I or other critical race theorists have written. We may be wrong, confused, even racist, but the examination of that requires real engagement. The appropriate rules for that engagement require that authors actually attempt that difficult task. Farber and Sherry claim they do that, but the simple truth is that they cannot because to do so would put them at a privilege disadvantage and they are unwilling to ever admit that possibility.

An unexpected fact discovered by psychologists about the clinically depressed is that they usually tend to have a better grasp on reality than those who are not depressed. Psychologists term this realistic depression. The "happy" ignore the many obstacles in their lives and find happiness. Now with the invention of several psychotropic drugs it apparently is possible to deliver that happy view of life to everyone. In combination with some diet drugs it is apparently possible to achieve both happiness and thinness at the same time. Part of the obstacle to critical race theory is that, like the depressed, many of us see the world as it is without the comfort of induced happiness. We deny that the world is fine and we question whether it is getting better racially. When critical race theory sees that race matters we speak its name. The Farbers and Sherrys, Richard Posners, and Alex Kozinskis of this world suggest that if we ignore that racial reality we can be happy. Don't worry, just be happy. This drug of racial ignorance and the insignificance of the reality of that racial reality is supposed to create racial harmony.

50. See Culp, *Open Letter*, *supra* note 40, at 31-34.

51. See generally PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

We can drug ourselves out of this state so that we are no longer aware of its reality or we can change it. We can reason together without dealing with our racial past. Unfortunately, as some recent evidence has suggested, these psychotropic drugs seem to have unforeseen side effects. It may be that such legal psychotropic drugs will also have a potentially devastating impact on our lives. What critical race theory suggests is that we have the ability to face our racial reality, eliminate racial depression, and create a better world with respect to race, class, gender, and sexual orientation without imbibing the legal and political drugs of acceptance. The acceptance of the status quo by individuals may be reasonable, even necessary, for individual psychological health. However, it ought to be obvious that such acceptance is not necessary for society as a whole. The most likely rationale for not dealing with reality is an acceptance about the inability to create real change because of some inherent white superiority. It is that belief in this form of white supremacy that critical race theory rejects in law and legal scholarship and that implicitly Farber and Sherry and Posner and Kozinski accept.

IV. REASON, TRUTH AND JUSTICE: OR MAMA DON'T LET YOUR CHILDREN GROW UP TO BE "LAW PROFESSORS"?

Daniel Farber and Suzanna Sherry argue that those of us who have come to be called critical race theorists want to destroy reason. However, in their 143-page book there is no clear definition of exactly what they mean by reason. They suggest that reasoned argument explains the Supreme Court's decisions in *Brown v. Board of Education*, *Gideon v. Wainwright*, *INS v. Chadha*, and *TVA v. Hill*.⁵² They don't, however, defend these opinions from the questioning of critical race scholars, feminists, or their numerous critics in the legal academy who hold very different perspectives. The opinions they cite are supposed to prove the power of pure reason to produce judicial decisions that do good. Now I might point out that if reason explains *Brown*, *Gideon*, or *Chadha*, what explains *Buck v. Bell*, *Korematsu*, *Bowers v. Hardwick*, or *Hernandez v. Texas*? Is it that self-same reason or are the bad, the racist or sexist cases that more than dot our constitutional past the product of

52. See FARBER & SHERRY, *supra* note 7, at 6.

irrational jurists or unreasoning plaintiffs or I could go on, but the point ought to be clear. This is not a book that thinks it has to prove difficult claims by argument, but this book instead relies on fiat.

In the world of Farber and Sherry our job as law professors is to celebrate the Supreme Court's greatness and criticize only at the margins.⁵³ In the real world with disinterested reason, the argument that the Supreme Court is good because it produces good opinions based upon reason must be defended. What explains this unexplained and undefined reliance on reason? One cannot find it in this book, but one of the authors has expanded the argument made in the pages of the book in an article in the *Georgetown Law Review*. The article, entitled *The Sleep of Reason*,⁵⁴ argues that most (all? many? the article is unclear on the number) critical race scholars do not subscribe to reasoned argument. This argument at first suggested that Farber and Sherry—or at least Sherry—believe in pure reason and rational thought as the last defense of intellectual investigation. This kind of rational argument is described by Michael Oakeshott in the following way:

[T]he Rationalist . . . stands (he always *stands*) for independence of mind on all occasions, for thought free from obligation to any authority save the authority of "reason" He is the enemy of authority, of prejudice, of the merely traditional, customary or habitual. His mental attitude is at once skeptical and optimistic . . . because the Rationalist never doubts the power of his "reason" (when properly applied) to determine the worth of a thing, the truth of an

53. An excellent example of this celebratory rhetoric is Suzanna Sherry, *All the Supreme Court Really Needs To Know it Learned from the Warren Court*, 50 VAND. L. REV. 459 (1997). Professor Sherry argues that the Rehnquist Court has been wrongly criticized for a continuation of the notions of color blindness and First Amendment jurisprudence of the Warren Court. The "postmodern" criticism of judicial and legal neutrality is at the base of this misperception of the Rehnquist Court. *But see* Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503 (1997). Sherry mischaracterizes the Court's equal protection jurisprudence and misstates the history of neutrality in legal constitutional discourse. The argument, for example, that the Court's current trend toward absolute color-blindness is simply a continuation of the jurisprudence of the Warren Court ignores the extent to which the court limited that view of the law to certain areas. The O'Connor Court's jurisprudence of extending color-blindness to redistricting cases and to congressional efforts to rectify our history of discrimination is clearly new. Sherry misunderstands cases like *Gomillion*. *See generally* Culp, *supra* note 39.

54. Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 455 (1996).

opinion or the propriety of an action. Moreover, he is fortified by a belief in a reason common to all mankind, a common power of rational consideration, which is the ground and inspiration of argument . . .⁵⁵

But as I will show, Suzanna Sherry rejects this view of reason as being impractical. She argues that “reasoned” argument is:

First, I mean to include pragmatism, or practical reason, within the definition [of reason]: pure ratiocination is not the only form that reasoning can take. . . .

. . . .

In some ways, it is easier to describe what reason is by explaining what it is not. To be reasonable, an argument . . . cannot be illogical. It need not be entirely provable by scientific experiment, but it cannot be inconsistent with everything science and the social sciences know about reality—until and unless that reality is experimentally proven wrong. Reasoned appeals need not be fully successful, but if they convince no one except those who are already believers, they are probably flawed. Nor are common human emotions entirely excluded. But neither appeals to power nor “strategic arguments designed to persuade [primarily] by their emotional effect on the listener” are consistent with reasoned argument. Reason also stands on its own: neither the identity of the speaker nor her institutional role should be relevant to the persuasiveness of an argument.⁵⁶

Sherry clearly rejects the older version of pure reason advocated by scholars over the years both before and after the Enlightenment. Sherry is going to bow to some tradition [she doesn’t say what or how, though later she disclaims religion] and she is going to “sometimes use” scientific method and sometimes not. She claims that she finds reason in practical reason, but she does not define that, and her only definition seems to be to point to Judge Posner and Professor Frank Michelman of Harvard Law School who use this middle way against the extremists who don’t.

Her version of reason seems to have four requirements. First, reason requires in legal settings that those who are opposed to the status quo prove that it is wrong. In the world of Farber and Sherry the burden of proof is on those who seek change. This is what I will call the *status quo assumption*. The second argument is that reason cannot be affected by identity. Reason—practical reason as used by the traditional legal academy—is free of all aspects of identity or status or class. It is a product of some universal individuality. This

55. MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* 5-6 (New and expanded ed. 1991).

56. Sherry, *supra* note 54, at 456.

assumption I shall call the *identity assumption*. Third, she claims that to be reasonable you must always speak to persuade the majority. Now she doesn't quite claim this but what she says is that if you are only speaking to the already converted that is not sufficient, and she also argues that the majority of the country is reasonable and sensible and being attacked by the extremes. I call this assumption the *majority rules hypothesis*. Finally, Sherry argues that to be reasonable arguments have to be free of "too" much emotion. Emotion that persuades leads to totalitarianism and the holocaust and must be stopped at all costs. I might say at this point that maybe more emotion might have persuaded Nazi Germany. Certainly detached reason was not enough and there was reason (evil, monstrous, and ugly reason, to be sure, but reason nonetheless) in all that Nazi Germany did and (powerful and dispassionate) reason that unsuccessfully opposed it. This assumption I will call the *emotionless assumption*.

Farber and Sherry suggest in their book that critical race theorists in the heart of their work reject these four assumptions and therefore are "unreasoning" participants in the legal academy. They are in short just storytelling radical obstructivists and believers in the unbelievable. I will talk about the nature of some of the distortions in my and other scholars' work that leads them to this conclusion in the next section, but I want to examine these four assumptions in light of the claim by Sherry (and Farber?) that those who reject them are irrational unreasoning scholars.

I of course cannot hope to speak for all or necessarily most critical race theories or theorists, but my reading of critical race theory suggests that the vast majority of critical race theorists reject the majority assumption and the status quo assumption. The point of those two assumptions is to make it extremely difficult for those who seek change to accomplish it. If before you can alter society you must prove that the existing racial structure is wrong that slows down change, but is that assumption irrational? If you are standing in Virginia in 1837 and you cannot persuade the majority of white male voters that slavery is wrong does that make your argument irrational? I would argue these two assumptions at their heart are about protecting the racial status quo.⁵⁷ Since the essence of critical

57. I made this point in one of my first critical race theory articles. See Culp, *supra* note 2, at 87-97.

race theory is to reject that status quo many of us reject these assumptions. Does that mean we have given up on reasoned argument or trying to persuade people of the need for change? The answer is no. If the question is, does critical race theory seek to shift to the establishment the burden of defending itself, the answer at least by me is yes. Is that argument irrational? Certainly the establishment has had a difficult time defending its existing structures.

How do you defend the tests in *Washington v. Davis*, the decision in *Bowers*, or the rule in *Korematsu*, the failure to apply prior principles in *McCleskey*, or the reasoning in *Shaw v. Reno*? The court ultimately simply responds that we the white majority have the power to do what we want in these cases.

Farber and Sherry claim practical reason, but I believe the heart of that practical reason is simply that the status quo is good. Farber and Sherry don't prove that point, probably cannot prove that point, but if the status quo has no burden to defend itself, it will often win whether it is right or not.

Critical race theory rejects that placid assumption about the racial status quo. We look at our country's racial history and we do not see benign progress. There is evidence to support our position and I would argue less to support Farber and Sherry's position, but this is not an argument about reason or rationality. Now Farber and Sherry might claim that any process that removes these assumptions about the status quo is so indeterminate that by definition law collapses to questions of power. Power is always involved in aspects of law, but because power is involved does not mean that we cannot argue with reason about what justice and equality require.

Farber and Sherry seem mystified by the status quo assumption in their response to this article. They seem to think that putting the burden on those who seek change is required by logic, not politics. This assumption is part of the defense of our existing racial status quo. *You do not have to agree with my rejection of that assumption*, but you cannot claim that you are not defending the status quo when you make it. The emphasized part of the previous sentence should put to rest Farber and Sherry's claim that we believe we are beyond criticism. This is not a fight, despite their description about personal slights or rational thought. This is a fight about first principles. Farber and Sherry believe that society is "pretty good," not perfect, but pretty good, and that those of us who wish to change it must start where they are in terms of racial reality if we wish to challenge that reality. We differ on that first principle. It is their stubbornness on that point that is beyond criticism. I am happy to begin by acknowledging that I do not accept that view, but still believe that I am a "rational" person.

The point of critical race theory is that the status quo assumption about race is not just. One cannot hide that argument behind supposed rationality or cries of indeterminacy. Justice is a complicated issue and racial justice has been difficult to achieve. I am willing to argue about what that justice means, but I will not accept the description of racial justice because it has been tradition, or because mainly white and prejudiced Supreme Court judges decide it is so.

I claim the reasoned and reasonable right to challenge those assumptions. Farber and Sherry—if they are to persuade me—have to deal with the real issues of racial justice raised by the critical race theory project. Now Farber and Sherry can ignore me and critical race scholars, feminists, and queer theorists who do not accept their assumptions by appealing as they do in this book to the largely white male judiciary and legal academy to simply ignore our challenge as unreasoned emotion. Such an approach does a disservice to the important work done by Charles Lawrence,⁵⁸ Neil Gotanda, Paulette Caldwell, Patricia Williams, Derrick Bell, Frank Valdes, Dorothy Roberts,⁵⁹ Robert Chang,⁶⁰ Richard Delgado, and Jerome Culp—to name just a few.

Many critical race theorists do believe that identity matters. The problem for Farber and Sherry's argument is that they do not agree on exactly how it matters. I would say that my colleagues' writing on the notion of identity has made me less essentialist than I was when I started writing about race, but the point that is true about critical race theory is that, while we believe identity matters, we do not subscribe to some simple notion of identity politics. The funny thing about this assumption is that Farber and Sherry don't subscribe to it either in at least two ways. Throughout the book they keep describing the various identities of people who disagree with critical race theory. Clarence Thomas is black and a Supreme Court justice, Jim Chen is a native of Taiwan and a fellow law professor at Minnesota, Randall Kennedy is black and a Harvard law professor, Stephen Carter is black and a Yale law

58. See, e.g., Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

59. See, e.g., DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

60. See, e.g., ROBERT CHANG, *DISORIENTED: ASIAN AMERICANS, THE LAW, AND THE NATION STATE* (NYU Press, forthcoming 1999).

professor, Richard Posner is a judge on the Seventh Circuit Court of Appeals, my colleague Kate Bartlett is a reasonable feminist (which I assume means being a reasonable female), Martha Minow is a multiculturalist—but reasonable.

The race and gender of those seen as opponents or even fellow travelers of critical race theory seem to matter to the argument of Farber and Sherry when they disagree with critical race theory in the opinion of Farber and Sherry. This concession to identity grows out of the move from pure reason to practical reason. Once Farber and Sherry no longer subscribe to some simplistic notion of pure reason and tradition and practical issues matter, then of course status and identity matter. Farber and Sherry's notion of reason does not meet its own standards. As long as critical race theory is not saying that all that matters is one's identity—a claim that the heart of critical race theory long ago rejected⁶¹—there is very little difference between critical race theory and Farber and Sherry on identity, at least where they criticize identity in critical race theory. They concede that one can learn from those who have different experiences. The difference between Farber and Sherry and most critical race theorists is how much you can learn from those with different identity. Farber and Sherry, like most people, are anti-essential essentialist, but so are most (all) critical race theorists. The question is what should one be essentialist about and what should one be anti-essentialist about. I agree with Farber and Sherry that practical reason can help one do that, but we disagree on where that leads. The identity assumption is inconsistent with pure reason, but once we shift to practical reason identity matters.

The final argument made by Sherry about reason has to do with emotions. She suggests some emotions are permissible, but others are not. There are no reasoned explanations for what is appropriate emotion and what is not. One interpretation of her objection to critical race theory is that she believes that it is inappropriate for racial minorities to use emotion to persuade the majority that our current racial situation is wrong. Emotion has always been a factor for many of those racial minorities in the civil rights movement. There is more than a little emotion in cases as diverse as *Brown*, *Plessy*, or *Bakke*. Emotion matters in winning arguments

61. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

before the Court and in the court of public opinion, and sometimes pure reason, in order to be practical, needs the discipline of some appropriate emotion.

Let us return to Farber and Sherry's argument that pure reason—is that practical reason—is behind *Brown*. This is an odd argument by constitutional law experts who have to know that *Brown* has been criticized precisely because, it has been argued, it was not reasoned enough. Is *Brown* the reasoning result of a 200-year-old gradual process of getting closer and closer to the universal good or is *Brown* the unreasoning shift from separate but equal? Nothing in this book helps us understand that question or the appropriate answer. If Farber and Sherry had read with any care the words that a number of critical race theorists have written on this subject, they would not need to attack the straw claim of irrationality. As I look back at the articles I have written about law and race, I do see emotion. Indeed, in urging scholars of color to do research I have suggested that they find the anger within and use that anger to make change.⁶² Is it possible that anger could get in the way of "rational" debate? Maybe. However, Farber and Sherry have shown no examples of that possibility. Their real point is that there is nothing for people like me to be angry about. In reviewing their book Judge Posner put it this way:

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.⁶³

The point seems to be that the emotion is wrong because the picture is so rosy both for people of color in general and those of us in the legal academy in particular. This can be seen in Judge Posner's visceral reaction to our speaking as members of communities of color. When Judge Posner suggests that Richard Delgado and the rest of us have nothing in common with "the drug pusher in Harlem or a teenage mom in south Central," he is factually wrong. Many of us have our right to get on a plane, approach a border, or walk down a street

62. See Jerome McCristal Culp, Jr., *Firing Legal Canons and Shooting Blanks: Finding a Neutral Way in the Law*, 10 ST. LOUIS U. PUB. L. REV. 185 (1991).

63. Posner, *supra* note 12, at 42.

hindered, denied, or affected because officials see us as a drug pusher from Harlem, an alien un-American figure in their midst, or a Mexican trying to imitate real Americans. But there is a greater sense in which Judge Posner and Farber and Sherry are wrong about racial identity; those of us in critical race theory do not see our racial contemporaries as simply "other." Most of us see a connection between us and those individuals and communities of color in our society. Many of us live in or participate in many activities in such communities. Many of us feel direct personal connections to the people of color who have not been as economically fortunate as we. Most of us have connections to welfare and drug abuse that many white people do not have because of the racial income structure of our society. Some of us, while not being teenagers, are in fact unwed mothers in South Central Los Angeles. The truth of the matter is that for us in critical race theory our connection to the many communities of color are real and important. What critical race theory has started to do is to use the emotion of those connections to try to create legal and political change. It is that alteration in the status quo that is at issue.

V. DARKNESS VS. LIGHT

Social constructionism is an attack on the modern conception of Reason, and anti-Semitism is one of the first monsters produced when Reason dozes off. . . .

. . . .

. . . Largely politically progressive, radical multiculturalism includes adherents of a broad assortment of theories, including critical race theory, radical feminism, and . . . "gaylegal" theory. . . . This motley group is united primarily by their rejection of the aspiration to universalism and objectivity that is the fruit of the European Enlightenment. Reality, they suggest, is subjective and socially constructed.⁶⁴

Farber and Sherry claim that they are upholders of the Enlightenment project against the uncivilized hordes of postmodern attack on the legal academy. In doing so they attack all the post-theoretical projects of the last twenty-five years. Much of their intellectual fire is directed at Stanley Fish—who, despite their claims, is not part of the postmodern move proper, but instead a part of the deconstructive and post-

64. FARBER & SHERRY, *supra* note 7, at 4-5.

structuralist movement in the academy. With so much fire and so little light directed in multiple directions it is easy to see why they fail to capture critical race theory. I will try to restate what I believe they are attempting to write in this book and in their articles. The Enlightenment project to Farber and Sherry is a product of three things. Knowledge is produced by scientific investigation and rational debate about truth. Truth is partial in that we cannot know everything, but we can know more and get closer to universal truth as we investigate the universe. These universal truths could be discussed if known in some language that was objective and free of any political power. This knowledge allows the construction of neutral and objective rules for the treatment of people. These neutral and objective rules are the product of some universal notion of justice and equality. There is a sense of celebration and self-congratulatory nature to this notion of the Enlightenment project. It has a religious quality to it. The United States as the best and most important and most just society is an assumed truth. One cannot hear in this view of the Enlightenment an understanding that our society has more crime and more poverty than other industrialized societies. One can only understand the heart of their criticism of critical race theory right at the point that black people, the foremost benefactors of the freedom created by the Enlightenment project in the United States, seem to not appreciate what they have gained. The Enlightenment has cut your chains and you ungracious black people do not have the intellectual firepower to be thankful.

There are two points to make at the beginning. This statement of the Enlightenment project has already adjusted itself from the purest claims of universal rationality, objectivity and universalism of an earlier period. The Enlightenment project has been changed by the postmodern, post-structuralist, and deconstructivist movements. The post-modern movement among other things has attempted to alter the place of the subject in art, literature, and law. It has attacked and advocated the use of narratives and tried to put humanistic aspects of life back into art. The view of the Enlightenment project envisioned by Farber and Sherry is post-rational and more humanistic. They understand that the feminist project alters some of the contours of the model of knowledge and rationality, but they cannot admit it. They are like the former rulers of the Soviet Union who claimed to be

successors of Marx and Engel, but who governed more like the oligarchy of the Roman Empire. When they accept practical reason in place of pure reason they have become in their own view at least children of the twilight and not children of the pure light.

The second point to note is that Farber and Sherry are inconsistent in their rejection of parts of the standard Enlightenment project. Do they want to argue for a notion of objectivity that takes all the context out of our experiences? They attack critical race theorists for “supposedly” attacking black conservatives in ways that exclude their remarks, but in a world where identity does not matter at all in constructing the objective reality, why should it matter if they wrongly⁶⁵ think that Stephen Carter or Clarence Thomas have been silenced.

In other places they have criticized critical race theory for injecting the personal and the unimportant into the discussion of race. Identity matters when Farber and Sherry say it does and nowhere else. Part of the project of critical race theory has been to argue that with respect to that knowledge is contingent and a product of the people who are constructing the knowledge. So for many in critical race theory law can be apparently objective, rational, universal and racially unfair. The objectivity is chimerical, the rationality is dependent and the universality is simply nonexistent.

One example is the Court’s First Amendment jurisprudence. In *RAV* the Court examined whether a Minneapolis ordinance that criminalized “hate speech” violated the First Amendment. A unanimous Court held that the ordinance was unconstitutional as drafted. They concluded that the ordin-

65. I say wrongly by any standard. Professors Stephen Carter and Randall Kennedy are frequently published in the best law reviews and have several books published by important publishers. They frequent the news pages of our major papers and are seen on the most illustrious panels and seminars. Professor Kennedy has a well-funded magazine that he publishes to reflect his views of the world. Justice Clarence Thomas is one of nine people in one of three branches of the federal government of the most significant economic and military power of our time. These are not people who are silenced by the certainly less visible members of critical race theory. In addition, as I have mentioned in other places, I think the view of the opinions of Professors Carter and Kennedy does not fit a neat, simple structure. So I am not sure it is fair to call them conservatives or pure defenders of the racial status quo.

ance was not content-neutral because it penalized the white teenager who burned a cross on the lawn of a black family for his hate speech. The Court concluded that racial hatred had a right to be protected as speech. The rule in *RAV* appears to be neutral—all hate speech is now free to be uttered—but there are other neutral rules that are rational, neutral and more protective of the lives of black and white citizens of St. Paul, Minnesota. The ordinance that the Court held unconstitutional was content-neutral as to hate speech—the speech of a white racist or a black racist or an Asian racist all potentially would have violated the ordinance. The ordinance is speech-neutral because it does not elevate some kinds of issues to a special place. It is not in that sense black race-sensitive or people of color race-sensitive. The Court held that in order to create free speech we must empower the militias to be able to use hate speech or else the law is no longer content-neutral, but the point is that there are lots of neutral positions that the law can take. It is not that the one chosen is unreasonable, but it is not inevitable, required, or in my view just. It makes our citizens of color subject to a whole host of dangers, including the pure speech of walking onto my property and burning a cross on it. The real issue is whether that speech deserves the opprobrium of this ordinance and hiding behind content-neutrality to figure out racial justice does not do it.

Similar arguments could be made about the Court's jurisprudence in Title VII, where the neutral rule about what is personal does not seem to apply equally to the black employee of a prison system and a white female employee of a school district. The Court in *Hicks* asks whether there is any possible reason for race to not be the rationale for a black male being fired, and the Third Circuit in *Taxman* refuses to see that any reason but race could explain this decision. Race is nowhere in *Hicks* and everywhere in *Taxman* and the Court's rationality and neutrality and objectivity is always in place.⁶⁶

One way to understand the Enlightenment project is as an effort to open the creation of and interrogation of knowledge to people who have ideas to contribute. What critical race theory has demonstrated is that the lives of people of color and our perspectives on the world can alter how knowledge is under-

66. See Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 CAP. U. L. REV. 241 (1994).

stood. The hope that there is some place outside society where the rational, neutral, objective person can stand and evaluate justice does not exist, but in a practical world we can if we choose listen to what people are saying.

The Enlightenment did not mean to provide the power of a small elite to control knowledge or to leave out the real lives of people who do not have power. Some forms of democratic desire are crucial and the heart of the project of critical race theory. We are all children of that part of the light of Enlightenment just as we are all also products of the important truths about representation, language, and power of post-modernism and post-structuralism and deconstructive projects. It is not possible inside this paper to go through that history.⁶⁷ How critical race has adopted other aspects of postmodern and post-structural projects is a very complicated process, but the heart of that project is to put the human lives of people of color into the legal discourse.

It is important to remember that if the heart of Enlightenment is to question, that is exactly what most of what critical race theory has done and, given the opportunity, will continue to do. The Enlightenment project of Farber and Sherry is not one that I would subscribe to or most of the intellectual world does subscribe to outside the political salons of *The New Republic* or the *Manhattan Review*. The power to get their position in the *New York Times* or *The New Republic* or in the words of important federal judges does not make the ideas expressed or the interpretations of law and critical race theory right or just.

Finally, there is in Farber and Sherry's argument a standard response to the post-theoretical criticism of neutrality and objectivity. The argument has two parts. The first part of the response is to say that it is not possible to argue if the fruits of the Enlightenment are not accepted. The second part of the argument is that if neutral rules are not sought law has no purpose and we have collapsed justice and law into pure power. The first part of the argument proves too much. People argued before the Enlightenment and lots of societies have reasoned discussions even if they are not recognized as such outside the West. The argument also avoids the issue raised by the postmodern, deconstruction, and post-structuralist and

67. See Robert Chang, *Critical Race Theory and Problems of Method* (Draft 1997) (on file with the author).

post-colonial movements. If there is no place to stand without a position about power and race, it is not a response to say that if you do not agree with us about what we think it is important to discuss, dialogue disappears. Dialogue based upon coerced agreement is not real dialogue. Agreement about what is important and what matters is difficult, but when there is no consensus about what matters there is no other rational place to begin then to argue about first principles.

EPILOGUE

Our racial past haunts our law and legal scholarship not unlike the baby ghost in *Beloved*. In the law it is represented not by the incorporeal body of disembodied ghosts but instead by unacknowledgeable privileges buried in the law and in our scholarship. These privileges are buried in our supposed neutrality, objectivity, and merit. It is only the privilege of the largely white majority that allows us to see affirmative action as the greatest privilege in admissions to higher education, including law schools. The evidence is quite clear that the mainly white privilege that exists for alumni children is numerically more important than any racially sensitive concern embedded in affirmative action admissions programs. One would think from the rhetoric of Farber and Sherry, the Thernstroms, and Ward Connerly that merit is embedded in the law of the land. The truth is that merit is neither required by law, mandated by customs, nor embedded in our history. Those who have successfully ended affirmative action in California by administrative fiat and state referendum did not require that all decisions for admissions be done based upon merit. Instead merit has become ignoring race and gender in coming to a decision.

It is clear, for example, that some racially sensitive programs have helped employers and colleges and universities be more sensitive to a wide range of people (nonwhite and white) who were ignored by traditional procedures. It is also clear that traditional merit can be used to hide privileges that do not reflect real merit. Despite the claims made by our detractors, critical race theorists believe in merit, truth, and justice. It is impossible to live in a market society and not have to deal with these issues, but we believe those social constructions are easy to use to support—sometimes unknowingly—white supremacy.

Can unacknowledged privilege dwell within the theories of critical race theorists? Of course. To understand that fact does not make the privileges equivalent for traditional scholars and critical race theorists. Anger is always a reactionary response to real or perceived injuries. Anger in that instance does not become the equivalent of the long history of subordination and power embedded in white supremacy, and the claim that it does amounts to another form of privilege. Sometimes anger can be simply an inarticulate cry of unchastened emotion that does not educate, inform or heal.

Is it possible that the anger of critical race theorists—including myself—has availed itself of the privilege of the victim? When the families of the victims of Jeffrey Dahmer—particularly some of the black family members—screamed that they wanted to kill Dahmer, the reaction may have been about simply unfathomable desire to achieve retribution. When Marc Klass says that his daughter's killer should die, it may be that it amounts to a form of atavistic revenge and hurt. When the black parents of the victims of the Atlanta child murders claim that the killing was by white people, they may have fallen victim to the anger of the moment.

Critical race theory has, in my view, missed that trap of victimhood. Though many may see critical race theorists in the role of victims, I never have. What I read in the pages of the long story we are telling about race is a claim of the right to demand change and to highlight problems in a common society. We may have been victims of some racial crimes, but we are not seeking primarily either victim status or an effort to punish an incorporeal devil, but to deal directly with the reality of white supremacy in our midst. We demand the right to participate in the discourse about this society not as the image of us in the white mind, but in all our reality. The question is do we sit and weep about the privileges lost or hide behind protective legal covers from the ghost of our racial past. It is the job of critical race theory to remind us that that is the choice we are making.

