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# The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars

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*Through a series of letters, Professors Robert Chang and Adrienne Davis examine the politics of positionality in law and literary criticism. They use the scholarly debates and conversations around Critical Race Theory and feminist legal theory as a starting point to formulate some thoughts about Critical Race Feminism (“CRF”) and its future. The authors use the epistolary form as a literary device to allow them to collaborate on this project while maintaining their own voices. Thus, the letters are not dated.*

*The letters pay particular attention to various border crossings: male attempts to engage in feminist literary criticism, white attempts to engage in African American literary criticism, and attempts to engage in black male, black feminist criticism.<sup>1</sup> The racial politics of identity, boundaries, and theory are ones that the late Professors Jerome Culp, Trina Grillo, and Marilyn Yarbrough dedicated much of their lives to pursuing. This is reflected in their scholarship, which challenged existing modes of legal reasoning about race, gender, and*

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<sup>\*\*</sup> Reef C. Ivey II Professor of Law, University of North Carolina School of Law; B.A., J.D., Yale University. We dedicate these letters to the memory of our mentors, Jerome Culp, Trina Grillo, and Marilyn Yarbrough, who paved the way for us and without whom we would not be in the legal academy. We would like to thank Professor Angela Onwuachi-Willig for her vision in organizing the U.C. Davis Law Review Symposium: The Future of Critical Race Feminism and for inviting us to participate. We would also like to thank Kaaryn Gustafson for her encouragement in developing this project long ago. Thanks go to the editors, especially Irene Yang, of the U.C. Davis Law Review for their work on this project. Finally, thanks to Brian Hogan at the University of North Carolina Law School for his excellent research assistance and Megan Garton at the UNC Law Library for all of her support.

<sup>1</sup> The letters adopt different conventions with regard to capitalizing or not capitalizing “Black” and “White.” See *infra* note 4.

*theories of justice, and thus effected paradigm shifts in all areas. Moreover, Professors Culp, Grillo, and Yarbrough encouraged progressive legal scholars of color to think about the issues raised over the meaning and politics of black feminism, the role of theory in reasoning about race and the law, the fluidity of racial identity and its political implications, the transcendence of binary legal models, the importance of community and collaboration, and above all, an abiding disrespect for boundaries.*

*The letters are wide-ranging with regard to the texts that they engage, moving from Toni Morrison's *Song of Solomon* to monuments to the film *Monster's Ball*. The letters examine some contentious academic debates, such as those between "race men" and black feminists and between critical race theorists and their critics. In all of this, the central questions relate to who speaks and, as corollaries, who is allowed to speak and what is remembered. These questions may be methodological entry points for those doing *Critical Race Feminism*.*

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## LETTER 1

Dear Adrienne,

I was excited when you agreed to collaborate with me on this project. It's hard to believe that we began this project nearly ten years ago. It started out as a review of Michael Awkward's book, *Negotiating Difference: Race, Gender, and the Politics of Positionality* ("Negotiating Difference"). Back then, when we began as baby law professors (as you have described us),<sup>2</sup> we were worried about this collaboration. As junior scholars, more senior scholars warned us against collaborative projects.<sup>3</sup> While the warning may be necessary to survive within one's institution, it is a shame that it taught us that collective effort can be dangerous. Furthermore, it may instill a disinclination in junior scholars to collaborate that is difficult to overcome, even after tenure.

For minority scholars, the danger of collaboration may be greater than it is for White junior scholars.<sup>4</sup> My understanding is that scholars discourage collaboration for junior scholars because we may not get full credit for our scholarship, especially if we work with someone more established or more senior. As minority scholars, we already face skepticism about whether we belong — we might talk a good game, but will we write?

I am reminded of the Black/White, speech/writing opposition that comes up often in Afro American literary criticism. Awkward discusses this when he analyzes the work of a White critic, Donald Wesling's *Writing as Power in the Slave Narrative of the Early Republic*: "Wesling argues that slave narrators such as [Frederick] Douglass write

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<sup>2</sup> Adrienne D. Davis, *Three Jeromes: A Tribute to Professor Jerome McCristal Culp, Jr.*, 50 VILL. L. REV. 777 (2005).

<sup>3</sup> John Calmore, Panel: Getting Tenure: Balancing the Demands of Teaching, Scholarship, and Service, Remarks at 1997 Joint Western and Southwestern/Southeastern Law Teachers of Color Conference in Albuquerque, N.M. (Mar. 7, 1997).

<sup>4</sup> I have chosen to capitalize racial designations such as "Black" and "White" throughout this exchange. Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("When using "Black," I shall use an upper-case "B" to reflect my view that Blacks, like Asians, Latinos, and other "minorities," constitute a specific cultural group and, as such, require denotation as a proper noun."). I extend this reasoning to "Whites" to emphasize that "Whiteness" is itself a social construct and not a natural phenomenon. See IAN HANEY-LÓPEZ, *WHITE Y LAW: THE LEGAL CONSTRUCTION OF RACE*, at xiii-xiv (1996) (discussing "Whiteness" as specific social group even though it is "contingent, changeable, partial, inconstant"). I know that we disagree on this, but will save that discussion for another time.

themselves into being as acts of 'empowerment,' as efforts to counter extant notions of black inhumanity and cognitive inferiority."<sup>5</sup> I wonder if life in the academy today is much different. Should we hear the question "Will we write?" as "Can we write?" These questions are perhaps justified by the numbers. Attrition rates for minority law professors, before tenure, are much greater than they are for White law professors.<sup>6</sup> From 1979 to 1989, the resignation rates for professors eligible for tenure, prior to tenure, were "16 percent for whites, 29 percent for blacks, and 40 percent for 'other minorities.'"<sup>7</sup> And a new preliminary report by the Association of American Law Schools indicates that while differences in tenure rates for White women and White men appear to be disappearing, the racial tenure gap nevertheless appears to be increasing.<sup>8</sup> What do those numbers mean?

With this racial tenure gap in mind, what happens if a minority scholar teams up with someone who is White? Is this the danger that Richard Delgado poses in *Rodrigo's Sixth Chronicle* when he warns of the danger of working with Whites?<sup>9</sup> I think his warning extends beyond a fear of not getting full credit.<sup>10</sup> I think he warns against the project becoming corrupted because minority scholars might become domesticated and complicit in the very structures of oppression.<sup>11</sup> Perhaps some Whites strategically seek out minorities as co-authors or cite to them in order to provide credibility to their projects, or worse, to

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<sup>5</sup> MICHAEL AWKWARD, NEGOTIATING DIFFERENCE: RACE, GENDER, AND THE POLITICS OF POSITIONALITY 71-72 (1995) (discussing Donald Wesling, *Writing as Power in the Slave Narrative of the Early Republic*, 26 MICH. Q. REV. 459, 471-72 (1987)).

<sup>6</sup> See Report of the AALS Special Committee on Tenure and the Tenuring Process, 42 J. LEGAL EDUC. 477, 486 (1992).

<sup>7</sup> *Id.* For those who were considered for tenure, the denial rates were 12% for Whites, 14% for Blacks, and 5.7% for non-Black minorities. *Id.* The low denial rate for non-Black minorities is in large part explained by the fact that "so many resigned before being considered." *Id.*; see Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 801-02 (1988); Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538-39 (1988); Donna Young, *Two Steps Removed: The Paradox of Diversity Discourse for Women of Color in Law Teaching*, 11 BERKELEY WOMEN'S L.J. 270, 289 n.5 (1996).

<sup>8</sup> See COMM. ON THE RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, THE RACIAL GAP IN THE PROMOTION TO TENURE OF LAW PROFESSORS, available at [http://www.aals.org/services\\_specialreports.php](http://www.aals.org/services_specialreports.php) (last visited Jan. 21, 2006).

<sup>9</sup> Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 647-58 (1993).

<sup>10</sup> See *id.* at 652-53.

<sup>11</sup> *Id.*

deflect charges that what they say might be racist.<sup>12</sup> When, exactly, does Richard Posner cite Thomas Sowell?<sup>13</sup>

Before I go on, perhaps I should interrogate my own motives. When the *Berkeley Women's Law Journal* and the *African American Law and Policy Report* asked me to contribute a piece to their joint issue, I must admit that I was hesitant at first; I'm neither a woman nor an African American.<sup>14</sup> Although we didn't finish the project in time for that joint issue, what does it mean that I felt more comfortable about my participation when you, an African American woman, agreed to work with me on this project?

It turns out that the root of my hesitation is the very subject of Awkward's book. In part I of his book, Awkward discusses the possibility of male participation in feminism, a Black man's place in Black feminist criticism, and White participation in Afro American literary criticism.<sup>15</sup> Perhaps we might discern, then, the place of a "yellow" man in this discussion generated by the U.C. Davis Law Review Symposium on Critical Race Feminism.

I'm glad that we're getting a chance to revisit our discussion of Awkward through this symposium. I think his book remains relevant and provides a nice starting point for our exchange.

Bob

#### LETTER 2

Dear Bob,

I am excited about our endeavor as well. Like you, I had some trepidations about the collaborative effort. Although legal practice is highly collaborative on many levels, the canon of legal scholarship is much closer to the liberal arts paradigm of the single, isolated scholar working alone. In addition, I was tentative about the subject matter. We planned to engage black feminist literary criticism, a somewhat

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<sup>12</sup> Sumi Cho's discussion of the "racial mascotting" of Asian Americans by neo-conservatives in their attacks on affirmative action is instructive. Sumi Cho, Remarks at the First Annual Asian Pacific American Law Professors Conference: A Theory of Racial Mascotting (Oct. 14, 1994) (discussing how Asian Pacific Americans have been relegated to role of "racial mascot" for conservatives in contemporary political battles), cited in Gabriel J. Chin et al., *Beyond Self Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 161, n.161 (1996).

<sup>13</sup> RICHARD POSNER, *OVERCOMING LAW passim* (1995).

<sup>14</sup> See 2 AFR.-AM. L. & POL'Y REP. (1995); 11 BERKELEY WOMEN'S L.J. (1996).

<sup>15</sup> AWKWARD, *supra* note 5, at 23-91.

unconventional object of inquiry in legal scholarship.<sup>16</sup> However, a central tenet of black feminist thought is the interrogation of boundaries and the politics of their transgression. Thus, I decided that writing an “epistolary review” that purposely negotiates close to various boundaries of scholarship and identity would prove provocative. Like you, when we revisited this idea, I was struck by how timely Michael Awkward’s insights continue to be to my thinking and my work about identity, law, and feminism. In writing about black men’s relationship to black feminism, Awkward said: “The act of interpretive border crossing signals forms of transgression in which existing borders forged in domination can be challenged and redefined.”<sup>17</sup>

Discussing black feminist thought with you, Bob, makes sense. Like bell hooks, Angela Davis, and Toni Morrison, your work has influenced my thinking about the borders in my academic, political, and personal lives. Your scholarship on law and borders in the context of immigration has prompted me to consider the various ways in which the lives of African Americans and, in particular, black women, are circumscribed and thus defined.<sup>18</sup> I was initially tentative about this review because our subject matter engages unconventional topics in legal scholarship. But this is a real opportunity to have a conversation about and examine scholarly methodologies that stem from explicit political or identity commitments, including critical feminist theory. (Something I would like us to talk about later is how it differs from black feminism.)

For me, as for many black women, boundaries play a pivotal role in daily life. We started this exchange at the first conference on Latino Critical Theory (“LatCrit”), held in Puerto Rico. That was an intellectual and geographic place in which, as a non-Latina, I already felt vaguely out of bounds, both figuratively and literally. Several yards out in the ocean, a rope marked off the area beyond which we should not swim. My own negotiation of that border was very different from other swimmers, who casually grasped it to stabilize their inner tubes or swam

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<sup>16</sup> Some legal scholars have discussed African American authored fiction and/or autobiography, but none to my knowledge have considered the criticism separately. See, e.g., Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

<sup>17</sup> AWKWARD, *supra* note 5, at 9 (1995) (quoting HENRY GIROUX, BORDER CROSSINGS: CULTURAL WORKERS AND THE POLITICS OF EDUCATION 28 (1992) (citation omitted)).

<sup>18</sup> Robert Chang, *A Meditation on Borders*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 244 (Juan Perea ed., 1997).

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just inside it. No one transgressed it, yet they all played just inside it. I stayed clear of the boundary, swimming to within ten yards of it again and again, anxious about pursuing my path any closer. I wondered if there was an actual barrier with netting extending below to catch me should a wave attempt to sweep me past or if it was a mere line, marking but not barring. To me, the boundary symbolized safety, the guarantee of which I would desert if I strayed beyond.

I thought about the boundaries and borders in my own life. How could I feel so shy and intimidated by borders when I grew up with a mother who made a point of eliminating them? In her work to desegregate our neighborhood and my school, her race and gender enfranchisement work, and her efforts to establish a Head Start program, she challenged and transcended racial, class, gender, and public and private borders on a daily basis. She was always careful to inscribe the inside of them as safe to me and then cross them herself. I think sometimes my mother now cannot understand why I have so little understanding of norms and conventions or why I celebrate the small rituals of defiance. It is very much my memory of her pointing to the wall, warning me to avoid it, and then setting me down at a safe distance while she took the bricks out.

I approach our collaboration from this personal background, which I suspect many black women who self-identify as feminists share. You asked where the position of a "yellow" man might be in a conversation about black feminism. My positioning is the converse of yours. I am sort of the "triple object," if you will, of our discussion in that I am black, female, and a feminist and thus arguably more certainly positioned. Yet, I am interested in the significance of our mutually situated identities on this collaborative effort. Our discussion itself transgresses some of the most policed and yet invisible boundaries of identity. In what contexts do Asian men and black women interact academically, intellectually, politically, socially, or sexually? We represent two groups that never seem to meet in socially sanctioned spaces.

In academe, black women are concentrated in the liberal arts and social sciences, particularly in education. Asian men still are disproportionately represented in the sciences. The opportunity for scholarly collaborations is thus highly limited. Politically, black women and Asian women, particularly Korean women, increasingly encounter each other in women of color identity groups or in broader feminist

enclaves.<sup>19</sup> Yet, identity politics drawn along lines of race and gender preclude coalitions between you and me. Romantically, I can only recall one black female/Asian male liaison, fictional or real, and it was not from an American-generated text.<sup>20</sup>

I find amusing, then, the spectacle of a yellow man and a black woman engaged in dialogue. It implicates the stereotypes of both of us: me as hyper-oral and yet Ebonically inarticulate; you as accented and incomprehensible. Neither of us is historically associated with literary criticism (or legal theory for that matter). Awkward posits a framework for interactions that are inherently transgressive and thereby perceived as threatening at worst or “spectacular” at best. He initially embeds the notion of transgression of defined identities within a larger context of racial geography:

The sense of risk in such [academic] transgressions is made no less significant by the fact that interpretive journeys are not nearly as dangerous as the literal crossing of geographical boundaries between communities can be. References to places like Central Park, South Central L.A., Detroit, Crown Heights, Bensonhurst, and urban America have come to symbolize for many the danger of interterritorial travel . . . .<sup>21</sup>

In raising the connection between physical and academic geography, Awkward suggests that boundaries of race play a major role in defining quadrants for proper encounters. Thus, I look forward to this exchange as a possibility for not only the transgression but also the renegotiation of many boundaries.

Adrienne

### LETTER 3

Dear Adrienne,

In your letter, you point out an interaction that is missing in social and political space: that between Black women and Asian men. You

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<sup>19</sup> The 1991 riots in Los Angeles brought home how black/Korean economic, political, and cultural conflicts were products of shifts in urban and immigration demographics.

<sup>20</sup> *RUMBLE IN THE BRONX* (New Line Cinema 1996). Jackie Chan’s uncle, who lives in the Bronx in New York, is married to an African American woman. The rendering is fascinating. Not only is the viewer taken by complete surprise at the interracial marriage, but the woman is consciously depicted as a minstrel type character. The sincere mutual affection between her and Chan’s uncle, though, disrupts the standard readings of minstrelsy.

<sup>21</sup> *AWKWARD*, *supra* note 5, at 4.



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mentioned that Black women and Asian men may be the two most overdetermined groups, which results in our infrequent encounters. I would like to hear more about this at some point.

Like your mother in your life, my mother plays an important role in my life. I get my strength from her, but there remains much that I don't know. Is it that I didn't ask enough questions about her life, or is it that I didn't hear her? Amy Tan in *The Joy Luck Club* draws a distinction between listening and hearing.<sup>22</sup> Perhaps I listened but did not hear. Instead, I have memories of playing the little tyrant, forbidding her from embarrassing me by speaking Korean in public. This is a painful memory when I recall that she knew no English when she made the journey from Korea to the United States with my brother and me in tow. Later, when I was in high school, my mother took courses at the local college where my father was a librarian. I helped her with the technical aspects of her papers, but all the time that I thought I was teaching her, I was actually the one who was learning. She was always a better writer than I was.

Both of our stories show that our successes do not occur in a vacuum. We are who we are because of our friends, families, and communities. I sometimes forget this. I feel the most alone whenever I graduate from an institution, with each degree moving me further away from my family and my (imagined) community. I used to be jealous of my Black friends during graduation because they had many people beyond their immediate families present. It seemed like their communities turned out not just to celebrate, but also to share in their successes. I remember reading a story about a young Black man who graduated from law school and was approached by an unrelated older Black man who said: "I'm proud of you." I used to hear: "Your parents must be so proud of you." Those two statements are very different.

Even though I sometimes forget, I try to remember that I exist as a collaboration — the product of communal effort. Thus, as attractive as the myth of the Romantic author might be, even my work as the sole author is the product of collaboration. I might ask, borrowing from Foucault, what is an author? In an essay by that title, Foucault asks us to "imagine a culture where discourse would circulate without any need for an author" such that the old questions "Who is the real author?" and "Have we proof of his authenticity and originality?" would be replaced by the new formulations "What are the modes of existence of this

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<sup>22</sup> AMY TAN, *JOY LUCK CLUB* (1989).

discourse?" and "Where does it come from; how is it circulated; who controls it?"<sup>23</sup> Foucault concludes by telling us that "[b]ehind all these questions we would hear little more than the murmur of indifference: 'What matter who's speaking?'" and thus tolling the death of the Romantic author as such.<sup>24</sup>

It is interesting to juxtapose this question alongside Michael Awkward's project that interrogates the positionality of the critic. One should not think, though, that Foucault's formulation means that it does not matter who is speaking, nor should one think that it is not necessary to investigate the positionality of the critic. Indeed, the indifference with which one murmurs "What matter who's speaking?" is sensible only in the context of the preceding questions "What are the modes of existence of this discourse?" and "Where does it come from; how is it circulated; who controls it?" These questions seem to underlie Awkward's reading of the various turf wars that have taken place in various discourses.

In "Race, Gender, and the Politics of Reading," the first chapter of *Negotiating Differences*, Awkward recounts two conversations.<sup>25</sup> One takes place in the context of Afro American literary criticism. The second takes place in the context of feminist criticism. Both involve "insiders" accusing other "insiders" of some form of treachery. In the first conversation, the Black critic, Joyce A. Joyce, accuses two Black critics, Houston Baker, Jr. and Henry Louis Gates, Jr., of having relinquished their allegiance to Black people through their poststructuralist readings of Black texts.<sup>26</sup> The second conversation involves a similar accusation that is found in "Elaine Showalter's view that Annette Kolodny's suggestion that feminist readings constitute a 'learned activity' is 'politically suspect.'"<sup>27</sup> From both of these moments, we learn that:

the status of those under scrutiny as racial or gendered "insiders" fails to offer protection from allegations of treachery. They are unprotected precisely because "black" and "woman" are being employed as figures that define not the biological but the ideological self. In other words, black and female adventures in Western culture do not necessarily lead to what others would deem sufficiently afrocentric and/or feminist acts of reading . . . . If Baker

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<sup>23</sup> Michel Foucault, *What Is an Author?*, in *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS* 113, 138 (Donald F. Bouchard ed., 1977).

<sup>24</sup> *Id.*

<sup>25</sup> AWKWARD, *supra* note 5, at 23-41.

<sup>26</sup> *Id.* at 29.

<sup>27</sup> *Id.* at 31.

and Gates are judged . . . not black enough for Joyce, if Kolodny is not woman enough for Showalter, such lack results not from biology but from perceptions of insufficient ideological commitment.<sup>28</sup>

If these “internal divisions” weren’t difficult enough to negotiate, Awkward then complexifies things by examining “forays by men into feminism and by whites into Afro-American literary criticism.”<sup>29</sup>

These discussions are informed by an acute awareness of the stakes involved. Questions about the positionality of the critic are really questions about who can speak or who is allowed to speak. Returning to Foucault, “What are the modes of existence of this discourse?” and “Where does it come from; how is it circulated; who controls it?”<sup>30</sup> We can see these questions echoed in one of Awkward’s opening epigrams, in which he quotes Vera Kutzinski: “What is involved in the project of rescinding borders is a critical awareness of how borders have been (and continue to be) systematically policed and for whose ideological benefit and material profit.”<sup>31</sup>

I want to focus on the critical awareness that Kutzinski brings up. Kutzinski’s statement contains a methodology that we can use to examine some of the current debates in legal scholarship surrounding Critical Race Theory. We might ask the participants in *The Racial Critiques Debate*,<sup>32</sup> sparked by Randall Kennedy’s essay,<sup>33</sup> how their work operates to set up and police borders. Who gains, ideologically and/or materially, from that work? The same questions would of course be posed to Daniel Farber and Suzanna Sherry of their critique of narrative scholarship.<sup>34</sup> Who gains? Who loses? Although their article ostensibly criticizes the use of narrative by critical race and feminist legal scholars, what does it mean when their primary targets are critical race scholars?

None of this is to say that Whites can’t engage in critical race scholarship or that men can’t engage in feminist theory. Awkward

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 41.

<sup>30</sup> Foucault, *supra* note 23, at 138.

<sup>31</sup> AWKWARD, *supra* note 5, at 2. The epigram comes from Vera Kutzinski, *American Literary History as Spatial Practice*, 4 AM. LIT. HIST. 550, 555 (1992).

<sup>32</sup> Colloquy, *The Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990).

<sup>33</sup> Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

<sup>34</sup> Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

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reaches parallel conclusions in the context of literary criticism.<sup>35</sup> But, like our own efforts, theirs should be subject to interrogation.<sup>36</sup> I suggest approaching the work with Kutzinski's critical awareness of how borders have been (and continue to be) systematically policed and for whose ideological benefit and material profit. This critical awareness should be informed by an antiracist, antisexist, antihomophobic, and antisubordination stance or ideology.

In the university setting, borders are policed to determine which bodies populate the faculties or the student bodies, and to determine who gets to set the curriculum or define legitimate scholarship. Critical Race Feminism importantly intervenes here. The answer to Foucault's question of who speaks makes a tremendous difference. In the midst of this struggle over race, as we strive to find our place in our universities and communities, I hope we don't forget that we are the product of collaboration. We must remember our responsibility to resist the allure of the ideology of meritocratic individualism.

Toni Morrison's *Song of Solomon*, in which she subverts a traditional myth of flying Africans, helps illustrate this responsibility.<sup>37</sup> In one version of the traditional myth, Julius Lester's *People Who Could Fly*, an African witch doctor uses his power to aid field slaves, weak from work and the heat, to raise their arms and fly back to Africa.<sup>38</sup> Morrison also tells a tale of flying Africans, but with a twist. In her version, a sole African male flies away. Escape, then, is individual rather than communal. Morrison's subversion of the traditional myth opens up space for a rich discussion of gender dynamics in African American communities. Flying away is of course a metaphor for the African American men who leave their communities.

It seems, though, that a broader reading of Morrison's book is possible. Flying away could also serve as a metaphor for upward class mobility. As we progress ever upward, what happens to our (former) families and communities? Or, as Mari Matsuda might ask, as Asian Americans progress, will we remember our broader racial communities?<sup>39</sup> And for those of us who are better able to "pass" as

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<sup>35</sup> AWKWARD, *supra* note 5, at 43-57.

<sup>36</sup> For one interesting self-interrogation, see Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J. L. & FEM. 1, 25-28 (1995).

<sup>37</sup> TONI MORRISON, *SONG OF SOLOMON* (1977).

<sup>38</sup> JULIUS LESTER, *BLACK FOLKTALES* 99 (1969).

<sup>39</sup> Mari Matsuda, *We Will Not Be Used*, 1 ASIAN AM. PAC. IS. L.J. 79, 81-82 (1993).

American through our accents and education, will we remember our brothers and sisters? Will we remember the recent immigrants and those waiting on the other side of the border?

Bob

LETTER 4

Dear Bob,

Your discussion of policing boundaries — who does it and for whose profit — raises an important shift in feminist identity wars. In the 1990s, black feminism identified a troubling trend in racial criticism: condemnations of black women for making gender-based critiques of the black community. The trend started with boos and hisses against Alice Walker's *The Color Purple*, peaked with the vilification of Anita Hill and Desiree Washington for publicly accusing Justice Thomas and Mike Tyson, respectively, of sexual misconduct, and declined with a whiny whimper when some argued that Toni Morrison's Nobel Prize was a politically correct capitulation by whites to the black feminist oppression of black men.<sup>40</sup> A clear boundary marked these identity wars: black community could be understood solely through racial, or racial plus class, critiques. Gender had no place since it involved an internal critique of "the people." The only exceptions were to demarcate black women's oppression at the hands of non-black, specifically white, men and black men's subordination through being labeled as hypersexual predators of white women. Intersectionality and anti-essentialism offered us the tools to combat this identity war.<sup>41</sup> Yet, today, black

<sup>40</sup> Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997 (discussing black men's construction of Tyson as victim and skepticism of Washington's motives); Kimberlé Crenshaw, *Whose Story Is It, Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDER-ING POWER 402, 433 (Toni Morrison ed., 1992) ("That black people across a political and class spectrum were willing to condemn Anita Hill for breaking ranks is a telling testament to how deep gender conflicts are tightly contained by the expectation of racial solidarity."); Deborah McDowell, *Reading Family Matters*, in CHANGING OUR OWN WORDS: ESSAYS ON CRITICISM, THEORY, AND WRITING BY BLACK WOMEN 75 (Cheryl A. Wall ed., 1989) (discussing Alice Walker's criticism by black male critics); Courtland Milloy, *For Morrison, A Song of Sour Grapes*, WASH. POST, Oct. 10, 1993, at B1 (quoting black male novelist and critic Charles Johnson that Morrison's Nobel Prize "was a triumph of political correctness"); see also Marilyn Yarbrough with Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 641-50, 652-54 (2000) (using Hill and Washington to describe how public discredits black women as victims of sexual violence).

<sup>41</sup> See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U.

women are on a new front in identity wars, this time, one waged using tools of gender and sexuality, in addition to race. I think here of the sexual critiques of the artist Kara Walker's charged depictions of interracial sex between black women and white men under slavery and actress Halle Berry's role in the film *Monster's Ball*.<sup>42</sup>

These two aesthetic productions are obviously very different. Walker's art hangs in the most swish museums and commands tens of thousands of dollars, while Berry's performance can be consumed for the price of Internet access. Yet, they share some convergences as well. Walker's receipt of a MacArthur "genius" award in 1997 and Berry's winning the Best Actress Oscar in 2002 each generated anger and fervent attack — from other black women committed to feminist ideology and principles. Senior artist Betye Saar and senior actress Angela Bassett are both black women who have dedicated their professional lives to representational productions foregrounding the politics of race and sex. Yet, they joined others committed to intersectional and anti-essentialist methods to condemn Walker and Berry for trading on popular and subordinating fantasies of black female sexuality as lascivious Jezebels, seductresses, and succubi of innocent white men.<sup>43</sup> In this reading,

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CHI. LEGAL F. 139 (1989); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>42</sup> MONSTER'S BALL (Lion's Gate, Inc. 2001). For those unfamiliar with it, Walker's art is done in close to life-size silhouettes and has multiple representations of black women and girls in sexual and scatological contexts, often combining the two, situated on antebellum plantations. Interracial relations comprise one of several sexual taboos in her work, which also include bestiality, sodomy, and incest. For discussions of her work and the controversy it has generated, see, for example, MICHAEL D. HARRIS, COLORED PICTURES: RACE AND VISUAL REPRESENTATION 210-23 (2003); Juliette Bowles, *Extreme Times Call for Extreme Heroes*, 14 INT'L REV. AFR. AM. ART 3 (1997); *Reading Black Through White in the Work of Kara Walker: A Discussion Between Michael Corris and Robert Hobbs*, 26 ART HIST. 423 (2003) [hereinafter *Reading Black Through White in the Work of Kara Walker*].

<sup>43</sup> In a *Newsweek* interview after the Oscars, Bassett, who reportedly turned down the role, said, "I wasn't going to be a prostitute on film. I couldn't do that because it's such a stereotype about black women and sexuality." Allison Samuels, *Angela's Fire*, NEWSWEEK, July 1, 2002, at 54; see also MICHAEL ERIC DYSON, WHY I LOVE BLACK WOMEN 230 (2003) [hereinafter DYSON, WHY I LOVE BLACK WOMEN] ("Many blacks were torn when Berry won the Oscar for her powerful portrayal: they were rooting for her to be acknowledged for her superior skill, but reluctant to praise a part that even indirectly suggested that her character's sexual liaison was a reward for hating black people and executing her husband . . ."). Meanwhile, Betye Saar launched a letter-writing campaign urging the MacArthur Foundation to rescind Walker's prestigious grant. Saar queried the letter's recipients: "Do you find these images racist? Do you find these images sexist? Are they disturbing?" Shawn-Marie Garrett, *The Return of the Repressed*, 32 THEATER 26, 28 (2002). She also argued: "Men are not as upset by Kara Walker's images, because mostly they're of women and children." Christine Temin, *Recasting Racism or Renewing It?*, BOSTON GLOBE, Mar. 13, 1998,

Walker and Berry are dually condemned — not just for inhabiting these roles, or, in Walker’s case, producing them, but also for commodifying these images for personal profit and prominence.<sup>44</sup> Significantly, Walker and Berry’s critics themselves, unlike what I call the “race-onlies” of the 1990s, cared deeply about and took seriously black feminism’s injunction to intersectional and anti-essentialist methodology.

What interests me is how this new identity war straddles two dominant narratives of sexuality and subordination. One is what I call the “juridical account”: interracial intimacy between black women and white men has followed, and must always follow, a top-down exercise of power. This power is held by men and wielded against black women who may only futilely resist victimization. The emphasis is on the distribution of power between the dyad. The problem with Walker’s and Berry’s representations is that they violate the juridical imperative and offend black women’s sexual history as read through this lens.<sup>45</sup> On

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at D1.

Bassett is well-known for portraying independent, confident black women and was herself nominated for an Oscar in 1994. Meanwhile, Saar has been widely acclaimed for her own path-breaking art that self-consciously complicates and subverts race and gender. *Id.* at D1. In the 1970s, Saar created the now classic *The Liberation of Aunt Jemima* series that consciously turned the “motherly character into a warrior heroine.” *Id.* More recently, Saar created her own series about race, gender, and sexuality under slavery, *Colored: Consider the Rainbow*.

<sup>44</sup> In an interview with a scholarly art criticism journal, Saar said of Walker and another artist: “The goal [today] is to be rich and famous. There is no personal integrity.” Bowles, *supra* note 42, at 4. The same article quoted influential artist and scholar Howardena Pindell: “In other words, artists are flattered, encouraged and rewarded for having mercenary instincts, selling out to sell out (their work).” *Id.* at 12 (citation omitted). More cryptically, Bassett told *Newsweek*, “It’s about putting something out there you can be proud of ten years later. I mean, Meryl Streep won Oscars without all that.” Samuels, *supra* note 43.

<sup>45</sup> In a telling critique, the art director of a university collection drew comparisons to other historic moral horrors to explain the offensiveness of Walker’s wedding brutality and sex between perpetrators and victims:

If Walker is so committed along the lines of turning historical atrocities into racial parody and burlesque, then we should soon be seeing scenes like injuns and white folks fornicating along the misnamed Trail of Tears; Nazi storm troopers sodomizing emaciated Jewish children near the ovens at Auschwitz; and a traditionally dressed Japanese woman licking the nipple of another while her derriere is pressed tight against a California detention camp fence as a U.S. G.I. penetrates her.

Bowles, *supra* note 42, at 10. Similarly, the author of the article argues that many of Walker’s images depict little black girls being sodomized or engaging in hypersexual acts or bestiality with adults, other children, and animals or involved in sexualized excretory functions in ways that little white girls are not. “It is young black girls that get and give the

the other hand, there is a critique made by some thoughtful legal scholars urging pleasure under domination or subordination.<sup>46</sup> Their critique would read Berry's graphic and angry sex scene and Walker's linotype figures as exercises of agency by black women to secure pleasure and power from their captors or dominators.<sup>47</sup>

To break through these new, more complex, identity wars, black feminist theory must find a third way. We cannot ourselves employ censorious essentialism under the guise of authenticity or political correctness. We should shift from judgment and indictment of identity to analysis and critique of narrative and discursive productions of identity — again, following your injunctions to Foucault, Bob.<sup>48</sup> Personal

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heavy duty sexual abuse." *Id.* at 15. One doctoral student introduced her study group of professional black women in Detroit to Walker's work. "[W]hen they realized what was going on, they were very shocked by the sexuality and the violence." The group then undertook to ensure Walker's art was not shown in their community. Walker Skirmish, *Paper Trail*, ART ON PAPER, Nov./Dec. 1999, at 22.

<sup>46</sup> Most recently, in a provocative series of essays, legal scholar Janet Halley has urged that one productive result of "taking a break from feminism" in favor of queer analysis of sex and law is that it allows us to theorize pleasure through abjection and shame. See, e.g., Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7 (2004); Brenda Cossman et al., *Gender, Sexuality and Power — Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 604-617, 635-637 (2003); Janet Halley, *Subversive Legal Moments?*, 12 TEX. J. WOM. & L. 197, 224-46 (2003). Two classic texts on abjection include JULIA KRISTEVA, POWERS OF HORROR: AN ESSAY ON ABJECTION (Leon S. Roudiez trans. 1982), and Leo Bersani, *Is the Rectum a Grave?*, in AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197 (Douglas Crimp ed., 1988).

<sup>47</sup> Both Walker and some art critics seem to urge precisely such a reading of her work. Invoking the classic meaning of abjection, one art scholar said of Walker's work: "The body is opened to the social order, a more permeable world that experiences flows from the inside as well as from the outside." *Reading Black Through White in the Work of Kara Walker*, *supra* note 42, at 425. "[A]bjection represents the midnight of existence that Walker portrays as a insubstantial domain of vacancy lying beneath the surface of stereotypes." *Id.* Michael Harris quotes Walker as saying: "[T]he Negress' is a 'star player in this version of history, seducing her masters as much as being molested by them' and as 'concentrating a lot on the body of black woman as exotic seductress — purveyor of failed seductions particularly — desire, miscegenation, and all the complexities and historicity of all these things.'" HARRIS, *supra* note 42, at 213 (citations omitted). Walker also said: "Everything about black women revolves around being conscripted to sexual servitude, but it is also a source of power." Edgar Allen Beem, *On the Cutting Edge or over the Line? Kara Walker Is Gifted, Angry, and Subjected to Criticism for Exploiting Racial Stereotypes in Her Art. The Maine Resident Is Also Soft-Spoken and Unsettled by Her Own Success*, BOSTON GLOBE, Dec. 30, 2001, at 16.

<sup>48</sup> bell hooks and Michael Eric Dyson are both contemporary masters of this shift. See, e.g., MICHAEL ERIC DYSON, I MAY NOT GET THERE WITH YOU: THE TRUE MARTIN LUTHER KING, JR. (2000); MICHAEL ERIC DYSON, RACE RULES: NAVIGATING THE COLOR LINE (1996); MICHAEL ERIC DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM (1993); BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992); BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM (1994); BELL HOOKS, YEARNING: RACE, GENDER, AND CULTURAL POLITICS (1990) [hereinafter HOOKS, YEARNING].



attacks on Berry and Walker for embodying or producing such images miss the need for the Foucauldian move to question how borders and identity are produced and policed and for whose benefit and profit.<sup>49</sup>

For instance, as emerging black feminist theorist Rebecca Wanzo incisively notes, the images Berry and Walker inhabit are valued and reflected in their high currency value. However, Wanzo's analysis effectively shifts the critique away from ad hominem condemnations of Berry and Walker's artistic choices to precisely such a discursive focus. Similarly, our critique of *Monster's Ball* might question the narrative of interracial intimacy driving the plot. The transformation of Billy Bob Thornton's racist prison guard persona urges the transformative potential of interracial intimacy. It illustrates an increasingly popular narrative in our culture: interracial sex as the best antidote to racism.<sup>50</sup> The logic follows Foucault's repression hypothesis closely: the historical injury of legal regulation of interracial sex resulted from the prohibition and repression of interracial relationships.<sup>51</sup> The solution is to permit these relations and to interpret them as subversive of the historic racial

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<sup>49</sup> The distinction here is a subtle one. Both Bassett and Saar claimed they were not criticizing either Berry or Walker personally. Yet, Bassett said to *Newsweek*, "It's about character, darling," which certainly seems to focus on Berry's acceptance of the part and the nature of her performance. Samuels, *supra* note 43, at 54. Even more bluntly, Saar responded to publicity over her letter: "I have been accused of trying to censor another artist. It's not about that. My main thrust was to say that the art world is very manipulative. Currently, the thrust is for sensationalism, and it has been for four or five years. She fits right into that." Beem, *supra* note 47, at 16. Yet, Saar also said of Walker, "My reaction is that it comes down to self-hatred. Maybe she can use some of the MacArthur grant to get some help." *Id.*

<sup>50</sup> Or, closely related, it signifies white male rebellion, "transgressing social boundaries including the proverbial 'color line.'" Mia Mask, *Monster's Ball*, 58 *FILM Q.* 44, 45 (2004).

<sup>51</sup> Hubert Dreyfus and Paul Rabinow offer a helpful description of Michel Foucault's repression hypothesis:

The repressive hypothesis is anchored in a tradition which sees power only as constraint, negativity, and coercion. As a systematic refusal to accept reality, as a repressive instrument, as a ban on truth, the forces of power prevent or at least distort the formation of knowledge. Power does this by suppressing desire, fostering false consciousness, promoting ignorance, and using a host of other dodges. Since it fears the truth, power must suppress it. It follows that power as repression is best opposed by the truth of discourse. When the truth is spoken, when the transgressive voice of liberation is raised, then, supposedly, repressive power is challenged. Truth itself would not be totally devoid of power, but its power is at the service of clarity, nondistortion, and one form or another of higher good, even if the higher good is nothing more substantive than clarity.

HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 128 (1982).

order. Hence, we have two opposite readings of the relationship between Berry and Thornton. Following the repression hypothesis, such relationships are subversive. Following the juridical imperative, they are always subordinating. While raising distinct questions, Walker's representations too may fall hostage to this binary analysis.

Both of these frameworks fail to derive the social meaning of interracial intimacy from the broader political economic orderings. Film scholar Mia Mask's review of *Monster's Ball* offers an excellent exploration of the film's representation of interracial sex as troubling, while avoiding both the juridical imperative and the repression hypothesis. First, she notes the absence of community in Berry's character's life.<sup>52</sup> The character's economic vulnerability and social and cultural isolation normalize Billy Bob as her savior, her complete vulnerability to him, and her willingness to ignore the evidence of his lies and deceit at the end of the film. In the black vernacular, where are her people?<sup>53</sup> Relatedly, Mask urges that "the sex scenes between Hank and Leticia cannot be extricated from the historic and economic conditions which make the relationship possible in the first place."<sup>54</sup> These include the very penal system that has executed Berry's husband, thereby producing her grief and personal vulnerability and contributing to her economic vulnerability.<sup>55</sup> A similar analysis applies

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The notion that a black woman living in the Deep South would have no extended family, community, or network upon which to rely for support is implausible. Even more improbable is the notion that in the absence of such a network she would find solace in the arms of an older white man whose paternal guilt has expediently overturned his racist conditioning. Many black spectators were appalled by this portrayal of black sexuality.

Mask, *supra* note 50, at 51. Comparing Berry's Oscar to Sidney Poitier's for *Lilies of the Field* in 1963 and Hattie McDaniel's for *Gone with the Wind* in 1939, Mask also notes that "the roles for which blacks have won Oscars have something in common: all depict isolated African-American characters as beholden to the beneficence of white philanthropy, or, at least, humbled by the moral rectitude of white paternalism. In all three cases, white paternalism exists alongside black isolationism." *Id.* at 44.

<sup>53</sup> Pamela Bridgewater asks a related question about a similarly situated woman in her article about Norplant and reproductive freedom. See Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 402 (2000).

<sup>54</sup> Mask, *supra* note 50, at 51. Mask similarly urges attention to how the film may "exploit[] (without contextualizing) the growing gender divide between black men and women." *Id.* at 49. In this sense, we can interpret responses to *interracial* intimacy as proxies for *intra*racial gender relations.

<sup>55</sup> *Id.* at 48, 51. Mask also locates the dysfunction of white patriarchy, which ultimately

to Walker's representations of interracial intimacy. While one art critic suggested Walker's silhouettes live in her "personal cosmology of plantation life," there is no evidence in her artwork of the conditions of production, life, or labor, including sexual labor, that comprised slavery.<sup>56</sup> Of *Monster's Ball*, Mask then concludes,

[it] makes an insidious ideological maneuver by allowing its protagonist to atone for his racism (and parental neglect) through the charitable assistance he gives to his black girlfriend. The film neatly absolves Hank of his racism, thereby allowing the white theater audience to feel resolution with the denouement. But it's a resolution that's more difficult — perhaps impossible — for African-American audiences.<sup>57</sup>

Finally, without condemning either Berry or Walker for failing to adhere to a pre-authorized canon in their productions, we might also question the role of those who create or inhabit these roles. Walker and Berry have very different "extra-textual statuses."<sup>58</sup> In other words, they have quite distinct relations to their productions. As Mask notes, Berry's extra-textual status as a biracial former beauty queen affects audience perception of her film characters.<sup>59</sup> Perhaps conscious of this, Berry used her Oscar speech to firmly align herself with quintessentially "black"

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leads to the son's suicide, against the backdrop of the penitentiary that employs the father and the son. *Id.* at 46-48. bell hooks agrees:

No other contemporary film exposes the evil of patriarchy as masterfully as *Monster's Ball*. The path to redemption requires the repudiation of white-male patriarchal rule. Yet as in many of the films that portray men resisting patriarchy, in the end the shift is merely a move from violent dominator patriarchy to benevolent nice-guy patriarch. . . . In *Monster's Ball* the male who is really different, who is humanistic, feeling, antiracist, and longing to move past patriarchal pornographic objectification to genuine intimacy is a victim. He kills himself.

BELL HOOKS, *THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE* 133-34 (2004).

<sup>56</sup> Michael Harris makes a similar point: "Yet it seems that Walker's efforts to implicate slave women in antebellum miscegenation are overdetermined by late twentieth-century sensibilities — and perhaps, her own desires — and they do not account for the brutality or the threat of raw power behind sexual demands during the time of slavery." HARRIS, *supra* note 42, at 213.

<sup>57</sup> Mask, *supra* note 50, at 52. She continues: "I also view it as ultimately redeeming Southern white masculinity through the symbolic reparations Hank makes in Leticia's name (e.g., the gas station)." *Id.*

<sup>58</sup> *Id.* at 49.

<sup>59</sup> *Id.* at 46, 49.

actresses and as someone devoted to racial progress more generally.<sup>60</sup> In contrast, Walker disassociates herself from the racial establishment, which she has derogatorily termed “the niggerati,” and proclaims herself as bored with conventional notions of racial history and progress.<sup>61</sup> Film and literary critics spend a great deal of time examining the role of the “author” in interpreting a text. Likewise, those interested in critical thought, gender, and law might spend more time dissecting whether representations have a life independent of their authors and, if not, what role the author’s politics and identity should play, particularly where the author inserts herself into the representation, as Walker does.<sup>62</sup> Does Berry’s endorsement of race pride alter our perception of *Monster’s Ball*? Does Walker’s derision of conventional black identity or her embrace of racial abjection through a parody of the juridical imperative shift our reading of her art?

This relates to your points about the politics of theory and identity. As you have said Bob, we must integrate and reshape identity politics into a

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Berry electrified her audience, speaking with splendid intelligence and rousing emotion of how her Oscar was made possible by the legendary likes of Dorothy Dandridge, Lena Horne, and Diahann Carroll. And in a stunning display of sorority in a profession riven by infighting and narcissism, Berry acknowledged the efforts of contemporary black actresses Angela Bassett, Jada Pinkett Smith and Vivica Fox. But it was when Berry moved from ancestors and peers to the future that she spoke directly to her award’s symbolic meaning. She gave the millions who watched around the globe not only a sorely needed history lesson but a lesson in courageous identification with the masses. Berry tearfully declared that her award was for “every nameless, faceless woman of color” who now has a chance, since “this door has been opened.”

Michael Eric Dyson, *Oscar Opens the Door*, THE NATION, Apr. 15, 2002; see also DYSON, WHY I LOVE BLACK WOMEN, *supra* note 43, at 231 (“In her acceptance speech, Berry challenged the stereotypes of how a black woman who has been honored by the powers-that-be should behave. Instead of being safe, Berry was bravely political.”).

<sup>61</sup> Db-art.info, *I Hate Being Lion Fodder: A Conversation Between Darius James and Kara Walker*, DEUTSCHE BANK MAG. (“Harvard and Henry Louis Gates, Jr. also put on a kind of *niggerati* circus in 1998 that I failed to attend — probably to my detriment, but I hate being lion fodder.”), [www.deutsche-bank-kunst.com/art/02/e/magazin-interview-walker.php](http://www.deutsche-bank-kunst.com/art/02/e/magazin-interview-walker.php) (last visited Nov. 29, 2005). While expressing impatience with and derision of the civil rights generation and its cultural and historical icons, perhaps Walker’s most controversial statement has been: “All black people in America want to be slaves just a little bit. It gives people heaping teaspoons of dignity and pride.” HARRIS, *supra* note 42, at 216; see also Bowles, *supra* note 42, at 8 (quoting Walker on black need for racism and oppression).

<sup>62</sup> Walker herself complicates these questions. As Michael Harris aptly puts it, unlike Berry, Walker “implicates herself in the imagery, and she often casts herself as a ‘Negress’ in her constructions; on occasion she has been ‘Nigger Wench’ or the ‘Free Negress.’” HARRIS, *supra* note 42, at 212.

politics of identity.<sup>63</sup> All of these debates share a question of the politics of authenticity. Awkward uses Elaine Showalter's vivid phrase that these debates occur in "the wild zone of gendered and racial differences."<sup>64</sup> As you discuss, Awkward pays particular attention to the debate within black literary criticism between Joyce Joyce and Henry Louis Gates, Jr. and Houston Baker.<sup>65</sup> Joyce criticizes both men as suspect because of their uses of critical theory, which does not have an explicit political orientation.<sup>66</sup> She argues that the central role of the black critic is to take the black reader to literacy or political self-realization through the author.<sup>67</sup>

Joyce's criticisms resonate with many of the foundational works in Critical Race Theory. In these key texts, progressive scholars of color demanded that critical legal theory incorporate a political agenda to enable actual forward movement and articulation of the concerns of marginalized people.<sup>68</sup> Yet, I would argue the converse as well. There is

<sup>63</sup> Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687, 688 (1996).

<sup>64</sup> AWKWARD, *supra* note 5, at 33 (quoting Elaine Showalter, *Feminist Criticism in the Wilderness*, in THE NEW FEMINIST CRITICISM 262-64 (Elaine Showalter ed., 1985)).

<sup>65</sup> AWKWARD, *supra* note 5, at 28-41; Joyce A. Joyce, *The Black Canon: Reconstructing Black American Literary Criticism*, 18 NEW LITERARY HIST. 335 (1987) [hereinafter Joyce, *The Black Canon*]; Henry Louis Gates, Jr., "What's Love Got to Do with It?": *Critical Theory, Integrity, and the Black Idiom*, 18 NEW LITERARY HIST. 345 (1987); Houston A. Baker, Jr., *In Dubious Battle*, 18 NEW LITERARY HIST. 363 (1987); Joyce A. Joyce, "Who the Cap Fit": *Unconsciousness and Unconscionableness in the Criticism of Houston A. Baker, Jr. and Henry Louis Gates, Jr.*, 18 NEW LITERARY HIST. 371 (1987) [hereinafter Joyce, "Who the Cap Fit"].

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Neither should literary critical involvement be free of, commitment, especially in the case of the Black critic. The poststructuralist sensibility in its claim that to acquire knowledge is impossible, its emphases on fragmentation, plurality of meaning, selflessness, and indeterminacy only exacerbate the Black critic's estrangement from the important social, political, economic, and, maybe most importantly, the psychological forces that shape Black culture and that are responsible for . . . a collective psyche.

Joyce, "Who the Cap Fit," *supra* note 65, at 378; see also Joyce, *The Black Canon*, *supra* note 65, at 342 ("Pushed to its extreme, poststructuralist thinking perhaps helps to explain why it has become increasingly difficult for members of contemporary society to sustain commitments, to assume responsibility, to admit to a clear right and an obvious wrong.").

<sup>67</sup> Saying plainly, "the central issue here is identity," Joyce argues, "[i]t should be the job of the Black literary critic to force ideas to the surface, to give them force in order to affect, to guide, to animate, and to arouse the minds and emotions of Black people." Joyce, "Who the Cap Fit," *supra* note 65, at 380; Joyce, *The Black Canon*, *supra* note 65, at 343.

<sup>68</sup> See, e.g., Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (revealing critical race theorists dissatisfied with theoretical and political elitism and abstraction of critical legal studies).

no neutrality, nor is there any inherent political orientation to a specific methodology or theory. Even methodologies generated by explicitly activist movements, such as feminism and black nationalism, can lead to oppressive results without constant interrogation of the ideology they are promoting.

One of the many boundaries black feminists have tried to elide is the one segregating methodology and ideology. For instance, part of the insight of black feminism is that white feminist methodology has historically often failed to employ an explicitly anti-racist ideology. Moreover, some black nationalist struggles against racial oppression model black liberation on, as bell hooks says, a 1950s model of heterosexual interaction.<sup>69</sup> Thus, for black feminist women, all too often the borders we must cross are within our own communities of identity: black liberationist and feminist struggle. So while Joyce courageously insists on foregrounding political effects and consequences, in the end she gets it backwards. The paramount question is not the politics of theory employed by the critic or author, but the politics of the author employing the theory.

This failure to adequately interrogate political orientation and distinguish methodology from ideology leads Awkward to misread August Wilson's article, *I Want a Black Director*.<sup>70</sup> Wilson argued publicly to Paramount that he wanted them to employ a black director for the filming of *Fences*.<sup>71</sup> Awkward reads this as a possibly essentialist moment in which Wilson's perspectives "demonstrate the continuing impact of a belief that the cultural manifestations of race or its performative dimensions remain ideally the province, the possession, if you will, of the group that has produced them."<sup>72</sup> Yet, a fairer reading would use Awkward's own earlier discussion of Henry Louis Gates and Houston Baker's germinal introduction of code reading into African American literary criticism.<sup>73</sup> Gates argues that embedded within black literature are a series of cultural codes, signifiers of common pasts and themes, that must be tripped and examined within a range of

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<sup>69</sup> BELL HOOKS, *AIN'T I A WOMAN? BLACK WOMEN AND FEMINISM* 116 (1981) [hereinafter, *HOOKS, AIN'T I A WOMAN?*]; see also HOOKS, *YEARNING*, *supra* note 48, at 181 (discussing Spike Lee's film, *Do the Right Thing*).

<sup>70</sup> Wilson passed away as we were finishing our edits on these letters. Given his influence on not only theater but also American culture more generally, this was a great loss.

<sup>71</sup> August Wilson, *I Want a Black Director*, *N.Y. TIMES*, Sept. 26, 1990, at A25.

<sup>72</sup> 2 AWKWARD, *supra* note 5, at 157.

<sup>73</sup> *Id.* at 35.

interpretation.<sup>74</sup> Gates's formulation recognizes the distinct cultural production of black art but does not privilege race in its criticism. Anyone could learn to read the codes, and in fact, as Awkward notes, many white critics of black literature have done so.<sup>75</sup> Many, though not all, black critics may be more familiar with the cultural codes, having grown up with them.<sup>76</sup> Also, given the diasporic nature of blackness — the multiplicity of generations, homelands, and exposures among black Americans — many might not catch the codes. Moreover, a white critic could, by study or immersion, learn to catch the very same codes.<sup>77</sup> Wilson's experience in theater may have taught him that few white directors can, or want to, catch the codes. This is an important distinction. So, it makes sense that Wilson would have wanted a black director. It is a stand-in for reading codes embedded in his play.

On the other hand, he may have been making a separate, political point about the need for affirmative action and inclusion in Hollywood of black directors. Wilson eschewed this stance, saying: "I am not carrying a banner for black directors. I think they should carry their own. I am not trying to get work for black directors."<sup>78</sup> Yet, he also

<sup>74</sup> *Id.* at 23-25.

<sup>75</sup> *Id.* at 36, 61.

<sup>76</sup> Wilson said: "We share certain mythologies. A history. We share political and economic systems and a rapidly developing, if suspect, ethos. Within these commonalities are specifics. Specific ideas and attitudes that are not shared on the common cultural ground." Wilson, *supra* note 71, at A25. While this article was rooted in cultural differences, Wilson expanded his vision into an explicitly pro-nationalist, anti-integration critique of theater and casting practices. See, e.g., Richard Goldstein, *Extreme Fighting: The Grudge Match at Kulturkampf*, VILLAGE VOICE, Jan. 28, 1997, at 46 (Wilson argues against integration of black playwrights into white institutions at expense of black theaters); Sheila Simmons, *The Great Debate: Issue of Colorblind Casting Divides Theater Community*, PLAIN DEALER, Jan. 26, 1997, at 61 (quoting Wilson as saying: "Colorblind casting is an aberrant idea that has never had any validity other than as a tool of the Cultural Imperialist.").

<sup>77</sup> Awkward paraphrases critic Larry Neal:

[C]ritical competence with respect to Afro-American expressivity is determined not by tribal connections into which one is born; rather, it is gained by academic activity — by "studying" — in the same way that one achieves comprehension of the cultural matrices that inform the work of writers like Joyce, Yeats, and e.e. cummings.

AWKWARD, *supra* note 5, at 61. The flipside of this is the minimization or invisibility of the intellectual work it takes to access these codes. When I taught students in contracts about early 20th century peonage, one of my research interests, a student later insisted to me I was drawing on my "ancestral memory." I continue to find our exchange odd and for several reasons, not the least of which was the student's refusal or inability to acknowledge the many hours I had logged to acquire the information that I was then able to teach to him.

<sup>78</sup> Wilson, *supra* note 71, at A25.

noted:

In the film industry, the prevailing attitude is that a black director couldn't do the job, and to insist upon one is to make the film "unmakeable," partly because no one is going to turn a budget of \$15 million over to a black director. That this is routinely done for novice white directors is beside the point.<sup>79</sup>

This takes note of the history of exclusion and racism against black filmmakers in the movie industry. Together, code literacy and resisting a legacy of differential standards make the request for a black director comprehensible and logical.

Such an argument also is not subject to appropriation by racist whites. As DuBois pointed out long ago, white cultural codes are comprehensible to many people of color.<sup>80</sup> Hence, literacy in mainstream white culture does not pose the same dilemma. Nor do we confront historical exclusion of whites from theater and Hollywood that would

justify an identity-based, affirmative action move, such as Wilson's arguably was.

Adrienne

#### LETTER 5

Dear Adrienne,

I like your reading of Wilson — that he might have had two agendas: to find a director who could read the cultural "codes" embedded in his work and to address the exclusionary hiring practices in the entertainment industry.

I also found your discussion useful in understanding the controversy that took place at Harvard Law School in the early 1980s over the teaching of a civil rights class by Jack Greenberg and Julius Chambers. Greenberg was a White civil rights attorney, then the Director/Counsel of the NAACP LDF,<sup>81</sup> and Chambers was a Black civil rights attorney.<sup>82</sup> A number of students were unhappy with Harvard's inability (refusal?) to find or recruit people of color to its permanent faculty. It is one thing

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<sup>79</sup> *Id.*

<sup>80</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 2-3 (1989) (1953).

<sup>81</sup> "NAACP LDF" stands for "National Association for the Advancement of Colored People Legal Education and Defense Fund."

<sup>82</sup> Kennedy, *supra* note 33, at 1756-58.



to hire adjunct professors or visiting professors for a course such as this; it is another to devote the institution's resources by recruiting and making a tenure-track hire for an important course such as this. It should be noted that Chambers was not interested in pursuing a full-time academic position. This course was the straw that broke the camel's back. Harvard's Black Law Students Association, Third World Coalition, and La Alianza called for a boycott of the course, a move that was derided in the national press as reverse racism of the worst kind.<sup>83</sup> This incident, like the controversy surrounding August Wilson, highlights the treacherous path one treads when one raises as an issue the matter of who teaches, who speaks, who writes.

I was reminded of this Harvard incident by the more recent controversy surrounding a slavery seminar that was to be offered this past summer in the D.C. area. A professor on the AALS Minority law professor listserv asked if the slavery seminar taught by various professors included any professors of color.<sup>84</sup> Another professor questioned the inclusion of Mark Tushnet as a faculty member in the seminar because of Tushnet's hostility to Critical Race Theory.<sup>85</sup> You told me that this debate was informed by a conflation of slavery with race — that with regard to scholarship on race, positionality is important to interrogate, but that Blacks do not have a special positionality with regard to slavery scholarship. You reminded me about your ongoing complaint about bookstores putting books on slavery in African American Studies instead of in American History. Your complaint, though, was not based on a special positionality that Blacks have with regard to slavery. Instead, it was that Black scholars have generated quite a bit of slavery scholarship, and their exclusion then raises the same set of questions that arise with regard to the politics of citation.

All of this demonstrates some of the pathologies surrounding the hiring (or nonhiring) of minorities in the legal academy. You correctly

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<sup>83</sup> For a detailed chronicle, see Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 60-66 (2002).

<sup>84</sup> The e-mail that started the conversation was the innocuous question: "Any people of color, particularly African Americans, invited to teach in this seminar?" posted by a member of the listserv. Posting of Odeana Neal to AALSMIN-L@lists.ubalt.edu (Apr. 19, 2005) (e-mail on file with Professor Chang).

<sup>85</sup> This e-mail was posted the next day by another listserv member. Posting of Pedro Malavet to AALSMIN-L@lists.ubalt.edu (Apr. 20, 2005) (e-mail on file with Professor Chang). As for Tushnet's hostility to Critical Race Theory, see Mark V. Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 259-271 (1992) (critiquing Critical Race Theory, in particular its use of narrative jurisprudence).

point out that this is driven by the scarcity of positions available to minority candidates. But I want to emphasize your point that any pathologies that exist surrounding efforts to hire minorities is directly attributable to the legal academy's exclusionary hiring practices.<sup>86</sup> We did not create the problem, just as August Wilson did not create the exclusionary practices that resulted in the relative lack of blacks behind the cameras. But we are the ones who are blamed when we question or attempt to remedy these exclusionary practices.

Your discussion of narrative jurisprudence and Critical Race Theory made me wonder why the critics have chosen to go after narrative.<sup>87</sup> The use of personal narrative is based in part on a belief that personal experiences can illuminate limitations of legal doctrine. The use of personal narrative may also show how lived experience informs (every)one's legal scholarship. The latter is a meta-critique that seems to threaten legal scholars from all walks of life, left, center, and right. Most critiques, though, focus on the former belief. Thus, narrative is criticized as too particular or as only useful insofar as it is "typical" (read: universal).<sup>88</sup> Further, one's lived experience is supposed to be irrelevant because scholarship is supposed to be from a bird's eye view or, rather, the view from nowhere. This approach ignores, of course, the reality that the view from nowhere is a view of nothing.

If we take this last point a little further, doesn't it weaken the diversity rationale for affirmative action? If the opposite of this is true — that lived experience really does inform the production of legal scholarship — the diversity rationale for affirmative action is strengthened. Understood in this way, is the critique of narrative linked at some level to an attack on affirmative action? Does the critique of critical race scholars' use of narrative serve the political purpose of weakening the diversity rationale for affirmative action? Perhaps we should not be surprised, then, that Daniel Farber and Suzanna Sherry's next collaboration, after their attack on narrative, targets affirmative action

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<sup>86</sup> See, e.g., Jerome M. Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 244-261 (1993) (critiquing Paul Carrington's history of American legal education for failing to account for historical and ongoing racially exclusionary policies of many law schools with regard to student admissions and faculty hiring, with particular attention to Duke Law School's institutional history).

<sup>87</sup> See Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); Farber & Sherry, *supra* note 34, at 807; Tushnet, *supra* note 85.

<sup>88</sup> See Farber & Sherry, *supra* note 34, at 831-40.

proponents who criticize current conceptions of merit.<sup>89</sup> Paraphrasing Vera Kutzinski, who gains, ideologically and/or materially?

I am reminded of Anne Coughlin's critique of the use of personal narrative in legal scholarship.<sup>90</sup> In part of the article, she takes issue with Jerome Culp's reading of Frederick Douglass's first autobiography.<sup>91</sup> Culp argues that Douglass included the words, "written by himself," in the subtitle because he "felt compelled" because he, "like [Phillis] Wheatley, wanted to claim a legitimacy that black people in his era could not claim."<sup>92</sup> Coughlin argues that this is a misreading based on Culp's failure to place Douglass's autobiography within the larger context of the [white] autobiographical genre.<sup>93</sup> Instead, she argues that the words, "written by himself," constitute a code phrase to identify an author's autobiographical intention at a time when the term "autobiography" was not widely known or used.<sup>94</sup> Further, she argues that this choice of words signaled an act of authorial defiance and regards Culp's limited reading of those words as "self-justification" as a "blunder."<sup>95</sup>

I was troubled by Coughlin's reading of both Culp and Douglass, and I fail to see how her arguments contradict Culp's interpretation. Her second point about authorial defiance seems totally consistent with Culp's — that Douglass's claiming "a legitimacy that black people in his era could not claim" was obviously an act of defiance.<sup>96</sup> And her first point, while demonstrating one "coded" meaning, fails to grapple with other "codes." In order to make her point and center Douglass's work in the nascent autobiographical tradition, Coughlin ignores the context of writings by Blacks. She ignores the story of Phillis Wheatley, a Black poet whose published work included attestations by leading citizens of Boston that she had indeed written the poems herself.<sup>97</sup> She ignores the fact that, in that era, most slave autobiographies were ghostwritten by White abolitionist writers.<sup>98</sup> In this context, we see that the words

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<sup>89</sup> Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853 (1995).

<sup>90</sup> See Coughlin, *supra* note 87.

<sup>91</sup> *Id.* at 1263-68 (discussing Culp, *supra* note 16).

<sup>92</sup> Culp, *supra* note 16, at 542.

<sup>93</sup> Coughlin, *supra* note 87, at 1263-68.

<sup>94</sup> *Id.* at 1265.

<sup>95</sup> *Id.* at 1267-68.

<sup>96</sup> Culp, *supra* note 16, at 542.

<sup>97</sup> *Id.* at 541 (discussing Wheatley).

<sup>98</sup> *Id.* at 541, 542 n.10.

“written by himself” contain other meanings. These are points that Culp, a Black critic, raises. We see that Coughlin, a White critic, read certain codes in Douglass’s words but failed to see others.

Is this why Wilson wanted a Black director?

Bob  
(written by himself,  
sort of)

#### LETTER 6

Dear Bob,

One of the things I have long cherished about our intellectual engagements is the minimalist precision of your critiques of difficult and confusing moments of cultural production. They represent the heart of critical race practice. The debate on the AALS Minority listserv interested me because I have long been intrigued about the politics of identity with regard to slavery. As you mentioned, one of my pet projects is going into bookstores, academic and popular, and asking for a recent book on slavery. Inevitably, they are filed in the African American section beside books about contemporary racial issues, such as affirmative action or cultural criticism. Rarely do I find these books in the American History section, as though slavery is the history of black people, but not of America. Alternatively, it is as if the history of slavery’s primary purpose is to shed light on race rather than on history.

This unconscious, reflexive conflation of slavery with race is reminiscent of Ira Berlin’s presidential address at the Organization of American Historians meeting several years ago. Berlin, a leading historian of slavery, observes:

The confluence of the history of slavery and the politics of race . . . suggest that slavery has become a language, a way to talk about race in a society in which race is difficult to discuss . . . . The renaissance in the interest in slavery . . . has become an emblem, sign, and metaphor for the failure to deal directly with the question of race and the long legacy of chattel bondage.<sup>99</sup>

Berlin argues that contemporary discussions of slavery are plagued by two competing discourses. The first confronts slavery as a fascinating

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<sup>99</sup> Ira Berlin, *American Slavery in History and Memory and the Search for Social Justice*, 90 J. AM. HIST. 1251, 1259 (2004). Berlin’s essay catalogs the “movies, TV docudramas, books, museum exhibitions, monuments, and living history reenactments” about slavery that have flooded academic and popular culture in recent years. *Id.*

object of academic inquiry in which formal historians invoke their axiom “that the past is a foreign country and that it must not be studied with an eye on the present . . . .”<sup>100</sup> The search is skeptical and its conclusions guarded, tentative, comparative, and cautious. But as Berlin cautions, “[s]uch an understanding puts slavery’s history on a collision course with popular understanding, which is prone to fix institutions in time and place and to see events marching inevitably forward to the present thus accentuating aspects of the past that shape contemporary life.”<sup>101</sup> This is the “memory” of slavery. It passes a much-needed moral judgment on slavery in our country: “memory becomes the driving force in the search for social justice, the mortar that bonds the violations of the past to the grievances of the present.”<sup>102</sup> Not surprisingly, Berlin urges “the time has come to join the two. . . . Indeed, only by testing memory against history’s truths and infusing history into memory’s passions can such a collective past be embraced, legitimized, and sustained.”<sup>103</sup> Berlin’s injunction manifests a Foucauldian analysis, one attentive to the politics embedded in the production of knowledge, history, and memory.

Berlin also predicted the AALS Minority listserv discussion: “Wherever the issue of slavery has appeared — whether in books, museums, monuments, classroom discussions — there have been tense debates over how to present the topic . . . .”<sup>104</sup> The discussion correctly took note of the much-needed racial critique to be made of the production of knowledge in slavery. To be clear, it is not that slavery is solely about black people or that blacks have a special claim to slavery or its representation. Rather, it is that slavery has become a way of talking about race and contemporary social justice issues. It then is odd and biased to exclude black voices from such a discussion. In addition, following Foucault, consider the politics surrounding the production of knowledge about slavery. Black historians have generated a disproportionate amount of the best and most insightful scholarship on slavery.

Feminism offers an interesting analog. The most interesting

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<sup>100</sup> *Id.* at 1262. Berlin continued: “The past must be reconstructed on its own terms, with care not to weigh it down with anachronisms or to confuse it with the present.” *Id.* at 1262-63.

<sup>101</sup> *Id.* at 1263.

<sup>102</sup> *Id.* at 1266.

<sup>103</sup> *Id.* at 1268.

<sup>104</sup> *Id.* at 1260.

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contemporary feminist scholarship attends itself to the production of gender systems and their effects on women and men. Men have long figured in feminist scholarship and thought, obviously. Yet, it would be odd if there was a seminar on feminist theory and no women were invited to present their work or lead discussion. Our critique would not be, or should not be, that women “own” feminism or even that all women agree. But rather, given the vast amounts of path-breaking, paradigm-shifting work produced by feminist women, with some emphasis on the gendered aspects of the production of knowledge, excluding women from such an event would reinforce the very frameworks of analysis and political and pedagogical ideology feminism has sought to undermine. What would a parallel analysis of a seminar on slavery look like?

This attention to the politics of memory and history implicates the origins of our discussion, Bob. Part of what motivated this exchange was a desire to commemorate the life and work of Trina Grillo, a professor of law at the University of San Francisco, who died of Hodgkin’s disease in 1996 before she was fifty. Her death affected both of us very much, and we wanted to honor her spirit and intellectual contributions to both Feminist and Critical Race Theory.

Unfortunately, in the intervening years, we have witnessed more premature deaths of black legal scholars. Last year, Marilyn Yarbrough and Jerome Culp, who taught at the University of North Carolina (“UNC”) School of Law and Duke University School of Law, respectively, died within weeks of each other before either reached the age of sixty. Marilyn and Jerome were contemporaries who taught at leading law schools located in the South, and both had significant accomplishments. Yet, they had very different racial and academic biographies.

Marilyn was a product of the South. She grew up in Raleigh and was a path-breaker in teaching law and later the highest levels of university and professional administration.<sup>105</sup> In addition, she was widely respected in several cultural and legal spaces outside the university. She served on the boards of the Pulitzer Prize committee, the NCAA Committee on Infractions, and the Public Review Board of the United Auto Workers. She was a consummate activist, disciplining and diversifying institutions through charm, irony, and, when necessary,

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<sup>105</sup> Our colleague, Charles Daye, offers a beautiful tribute to and biography of Marilyn Yarbrough in the *University of North Carolina Law Review*. Charles E. Daye, In Memoriam, *Marilyn V. Yarbrough “She Was a Great Woman,”* 83 N.C. L. REV. 323 (2005).

compelling straight talk. She was an early and devoted disciple of intersectionality and black legal feminist thought, making particular contributions to the interplay of race and gender with sports law and culture.<sup>106</sup>

Jerome's biography was quite different. He was a product of a Pittsburgh coal mining family, and his primary identity was as a critical race scholar and proud institutional provocateur. His efforts to implement critical race precepts at Duke exhausted him, and yet he relished the struggle. He also devoted his energy to institution-building beyond the law school, emerging as a driving force in both Critical Race Theory and, more recently, LatCrit.<sup>107</sup> When I would take a problem to Marilyn and then five miles down the road to Jerome, I could be assured of agreement in result, but rarely in strategy. They were my Martin and my Malcolm, my Mandela and my Lumumba, and I treasured them both.

A very different legacy from theirs is that of Cornelia Phillips Spencer, a white woman from a modest slaveholding family who died in 1908. Spencer was in many ways a gender rebel for her time. Widowed in Alabama at thirty-six, she returned with her daughter to her family home in Chapel Hill, NC, where she wrote to support herself and her daughter.<sup>108</sup> A fierce and outspoken advocate of Reconstruction and post-Reconstruction reform causes, like many of her peers, Spencer was also a white supremacist, not of the rabid Klan-hooded ilk, but of the paternalistic sort.<sup>109</sup> After the state's Reconstruction Congress took over

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<sup>106</sup> See Barbara Osborne & Marilyn V. Yarbrough, *Pay Equity for Coaches and Athletic Administrators: An Element of Title IX?*, 34 U. MICH. J. L. REFORM 231 (2000); Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996); Marilyn V. Yarbrough, *Law and Value: A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029 (1997); see also Yarbrough with Bennett, *supra* note 40, at 625 (discussing how black women lose credibility in legal system).

<sup>107</sup> The Villanova Law Review Symposium on Latino Critical Theory published tributes to Professor Culp by both authors. Robert Chang, *A Call from Jerome*, 50 VILL. L. REV. 785 (2005); Davis, *supra* note 2.

<sup>108</sup> See, e.g., Annette C. Wright, "The Grown-up Daughter": *The Case of North Carolina's Cornelia Phillips Spencer*, 3 N.C. HIST. REV. 260, 262, 272-80 (1997) (discussing Spencer's writings and efforts to support her family).

<sup>109</sup> By today's standards, Spencer was complicated. She did not believe in racial equality. As historian Harry Watson describes it, "Spencer's racial views are more precisely described as paternalist. She could never accept the principle of black equality, but she insisted that 'the very first and prime requisite in dealing with the emancipated negro is kindness.'" Harry L. Watson, *Remembering Cornelia Phillips Spencer, Remembering Reconstruction at Carolina* (Oct. 2, 2004), <http://www.unc.edu/depts/csas/Conferences/remembering%20reconstruction%20Watson.html>; see also Wright, *supra* note 108. In

UNC, Spencer used her pen to become an unrelenting force against this progressive, antiracist, and anti-elitist turn in the University's history.<sup>110</sup> She celebrated when opponents of Reconstruction succeeded and the new University was closed and again when it re-opened, under the new racist and anti-egalitarian political regime. Her role in the re-opening is now part of UNC lore: she gathered friends on the campus "where she vigorously rang the school's bell in a victory celebration."<sup>111</sup> Much honored by the University for her political support and personal devotion, in 1895, she became the first woman to receive an honorary degree and became part of the University hardscape in 1924, when a campus dormitory for women was named in her honor.<sup>112</sup> In 1993, as part of the University's bicentennial, the chancellor convened a committee to make recommendations on ways to honor women at UNC. The committee recommended an annual award honoring a woman for contributions to the University community. They named it "The Bell Award," in honor of the woman who, as one of the committee members explained, they most respected, most identified with, and who to them best embodied the spirit of the University of North Carolina: Cornelia Phillips Spencer.<sup>113</sup>

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addition, her white paternalism, while favoring education and opportunities for women, opposed co-education and formal public rights, such as the vote, for women. *See id.* at 262, 277-80.

<sup>110</sup> Wright, *supra* note 108, at 273-74.

<sup>111</sup> *Id.* at 274. She is still known as "the woman who rang the bell." *Id.* at 262.

<sup>112</sup> Earlier, in 1904 and 1907, the University of North Carolina at Greensboro had included Spencer in its landscape with two dormitories, North and South Spencer Hall, named in her honor. Later, a World War II Liberty ship, the "Cornelia P. Spencer," was named for her.

<sup>113</sup> According to Mary Turner Lane, a respected and honored emerita faculty and a member of the Bicentennial Committee,

[s]ince women played no role in earlier history of Carolina, we comfortably turned to Cornelia Phillips Spencer, an acknowledged patriot of the university. We all knew her story, and we easily accepted her as a female worthy of celebration. Her passion to open her beloved University of North Carolina, which was closed in a time of war and depression, was quite remarkable for any woman. I did not question her politics because I knew she was a woman of her time. I am a native of this state, so I know from history what those times were. Our committee easily accepted her as an exemplary female model.

Mary Turner Lane, Letter to the Editor, *Spencer Criticisms Begin to Sound Sexist*, CHAPEL HILL NEWS & OBSERVER, Feb. 1, 2005, <http://www.chapelhillnews.com/opinion/story/2081738p-8460645c.html>. Of course, Professor Lane had either a particular "role" or particular "women" in mind when she said "women played no role," as the University enslaved many black women who provided essential labor and services and employed poorer white women in similar service positions. *Id.*



Obviously, Cornelia Phillips Spencer's biography is different from those of both Marilyn Yarbrough and Jerome Culp. Yet, taken together, their lives and legacies and how we honor them go to the heart of Ira Berlin's argument about history and memory, or, what we might call the politics of commemoration. By that I mean the need to be attentive to the ongoing and changing meanings of the past and what our interpretations and memorialization of the past say about us today. As Ed Linenthal, a scholar and consultant on memorials and monuments, has said:

Memorials certainly do sacralize space and try to freeze in time the meaning of the event for the generation that is putting the memorial up. And memorials tell us an awful lot about the people who shape them — usually more than they tell us about the event or the person being memorialized.<sup>114</sup>

Similarly, historian Thomas Holt cues us to how memorials and monuments influence our “built environments.”<sup>115</sup> Despite accusations to the contrary, this is not “political correctness”; this is sociology, anthropology, psychology, and history. Monuments do not commemorate people. In this sense, civic and institutional memorials are distinct from tombstones or gravesites, whose central cultural purpose is to honor the dead. Rather, monuments commemorate accomplishments, deeds, ideals, and ideas that we, the living, find noteworthy. Memorialization and monument-building reflect institutional identity. Educational institutions discover and proclaim their mission and their identity in concrete, bronze, and awards as symbols, not just on websites and in glossy catalogs. Like a mirror, they reflect — those who are members of a community and those valued by

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<sup>114</sup> Religion & Ethics, *Interview with Edward T. Linenthal*, RELIGION & ETHICS NEWSWEEKLY (Aug. 30, 2002), <http://www.pbs.org/wnet/religionandethics/week552/linenthal.html> (episode number 552).

<sup>115</sup>

[T]he institutionalization of the tragic “Lost Cause” and the elision of black southerners was not simply a function of popular culture, fiction, and film. It became embedded into the very built environment of the South, in public monuments to Confederate heroes (some literally carved into mountain sides), in the names engraved into public spaces, streets, buildings, and parks.

Thomas Holt, *To Make the World Anew: The Black Role in Reconstruction, Remembering Reconstruction at Carolina*, (Oct. 1, 2004), <http://www.unc.edu/depts/csas/Conferences/remembering%20reconstruction%20holt.html>.

that community at the time of commemoration.<sup>116</sup> Hence, taken together, monuments and memorials reflect changing culture, identity, and ideology.

Consider in this light the conflict that arose at the University of North Carolina over the Bell Award. The campus chancellor was under increasing pressure to reconsider the annual award made in Cornelia Phillips Spencer's honor.<sup>117</sup> Passions ran high on all sides, prompting the chancellor to fund UNC's Center for the Study of the American South to convene a national conference to investigate and reflect on the University's own history and role in Reconstruction and race and how Spencer fit into that.<sup>118</sup> It is a hallmark of UNC's intellectual leadership in southern studies and political leadership in educational reform that, instead of responding with typical academic administrative tropes of outrage, denial, or arrogant and snide accusations of a "political correctness conspiracy," the chancellor acknowledged this was a difficult and real issue, one situated at the cusp of Berlin's idea of history and memory.<sup>119</sup> Following the conference, the chancellor welcomed proposals from different groups, finally deciding to retire the award. Not surprisingly, this sparked further controversy and anger, most notably from Spencer's family, leading local academics and

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<sup>116</sup> "[M]emorialization has become a significant form of cultural expression. Much more than a gesture of remembrance, memorialization was a way to stake one's claim to a visible presence in the culture." EDWARD T. LINENTHAL, *THE UNFINISHED BOMBING: OKLAHOMA CITY IN AMERICAN MEMORY* 4 (2001).

<sup>117</sup> Graduate student Yonni Chapman played a significant role in the protest. His remarks at a campus conference, see *infra* note 118, can be found at John K. Chapman, *Seeking Historical Truth at UNC: Taking the Next Step Toward Becoming the "University of the People," Remembering Reconstruction at Carolina* (Oct. 2, 2004), <http://www.unc.edu/depts/csas/Conferences/remembering%20reconstruction%20chapman.html> (criticizing university for failing to recognize Spencer's role in perpetuating and encouraging slavery).

<sup>118</sup> See generally Symposium, *Remembering Reconstruction at Carolina* (Oct. 1-2, 2004), <http://www.unc.edu/depts/csas/Conferences/remembering%20reconstruction%20announcement.html>.

<sup>119</sup> Compare the disturbing reception at the University of Alabama to faculty member Professor Alfred Brophy's urging the school to consider an apology and other measures for its role in promoting and perpetuating slavery. Brian Leiter summarizes some of the more astounding reactions, which included threats of physical violence. Brian Leiter, *Leiter Reports* (May 11, 2004), [http://leiterreports.typepad.com/blog/2004/05/slavery\\_and\\_the.html](http://leiterreports.typepad.com/blog/2004/05/slavery_and_the.html) (One student urged: "[S]end Brophy to my house. I'll teach him about slavery.").

Public southern universities appear to be emerging as particularly "volatile sites" of contestation over memory and history. EDWARD T. LINENTHAL, *Healing and History: The Dilemmas of Interpretation*, in *RALLY ON THE HIGH GROUND: THE NATIONAL PARK SERVICE SYMPOSIUM ON THE CIVIL WAR* (Robert K. Salthon ed., 2000), available at [http://www.cr.nps.gov/history/online\\_books/rthg/chap3b.htm](http://www.cr.nps.gov/history/online_books/rthg/chap3b.htm).

philanthropists who have been very generous to the University and the Center for the Study of American South. They became extremely upset, threatening to withdraw a generous gift to renovate the Center's new home and demanding that Spencer's name be removed from the campus buildings it graces.<sup>120</sup> Renowned race historian, progressive intellectual, and great-granddaughter of Cornelia Phillips Spencer, Spencie Love spoke publicly for the family, defending her namesake from "denigration."<sup>121</sup> Love argued: "A plucky Southern widow and single mother who gave unstintingly to the university throughout her life, Cornelia Phillips Spencer today is being doubly discriminated against."<sup>122</sup>

Spencie Love's response struck me as odd, given that she is a well-regarded historian. I wondered how she would respond to Berlin's essay about the politics of history and memory. With two dormitories, an honorary degree, and a World War II liberty ship to her name, Love's great-grandmother is hardly a woman who time or the University has forgotten. The process of memorialization moves from history to memory. The analysis moves from careful study of the past, which suspends judgment and dedicates itself to context, circumstance, and nuance, to the study of ourselves. Arguing that many University buildings and awards are named for men who held views that would be deemed racist today, Love said: "My basic feeling is, it's wrong to single her out and make her a scapegoat for racist policies that were held by many. It just feels like she's been turned into a sacrificial lamb or scapegoat to appease a few."<sup>123</sup>

This misses the point. If we take seriously Linenthal's argument that monuments commemorate deeply-held ideas and deeds, not people, it makes complete sense to me that Cornelia Phillips Spencer would embody the ideals of a woman's contributions to the University as

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<sup>120</sup> The house was originally Cornelia Phillips Spencer's home. The Love Foundation did not completely revoke its gift to the University, but specified that it be redirected to other uses outside of the Center for the Study of the American South and the renovation project. Anne Blythe & Jane Stancill, *Demise of Bell Award Anger's Spencer's Kin*, NEWS & OBSERVER.COM, Jan. 7, 2005, <http://www.mobile.newsobserver.com/news/orange/story/1990853p-8376026c.html>.

<sup>121</sup> See SPENCIE LOVE, *ONE BLOOD: THE CHARLES R. DREW: THE DEATH AND RESURRECTION OF CHARLES R. DREW* (1996). Spencie Love's name was changed to Cornelia Spencer Love when she was four years old.

<sup>122</sup> Spencie Love, Opinion, *UNC Denigrates Campus Champion's Memory*, CHAPEL HILL NEWS, Dec. 21, 2004, available at <http://www.chapelhillnews.com/opinion/story/1950196p-8313426c.html>.

<sup>123</sup> Blythe & Stancill, *supra* note 120.

Reconstruction ended. It also makes sense, then, that the University would name the first women's dormitory in her honor in 1904 or that in 1943 a warship would be named in her honor. Had the Bell Award been created even in 1963, UNC might still have continued to proclaim her to be an icon of women's roles, given the racial and gender politics of the era and region. But what does it say about the University and its gender ideology and commitments that in 1993, the school took the position that Cornelia Phillips Spencer still embodied the greatest contributions of women to the university? Certainly, given her intriguing biography, diverse writings, and public achievements, she demands further attention by historians. But, having been honored in 1875, 1904, 1907, 1924, and 1943, does she require additional *honoring* in 2005? Are there no other women who deserve our honor in the University's history?

We are poised here, trapped perhaps, on the cusp of history and memory. Berlin reminds us that "unlike history, [memory] rejects a skeptical, detached reconstruction of the past."<sup>124</sup> If history is "tentative, distant, contingent, [and] dispassionate," memories "demand loyalty, not skepticism."<sup>125</sup> We must move beyond a century of honoring Spencer to confronting and configuring her legacy, following Berlin's injunction to combine the nuances of history with the passions of memory. The highly successful conference sponsored by the Center for the Study of the American South last fall points the way toward such a reconciliation: establishing a "Cornelia Phillips Spencer Day," in which the University would facilitate annual discussions and events about its own complex and rich history of race, sex, class, and social progress. As part of this event, ongoing historical attention to Spencer herself could be encouraged and even funded. Combining history and memory in such a fashion would properly honor this enigmatic woman in 2005.

One much-discussed resolution of the controversy was counter-memorialization. For instance, what if UNC raised the funds for a Marilyn Yarbrough Dormitory, perhaps kitty-corner to or, even more interestingly, in the analogous spot to the Spencer Dormitory on the new planned campus? This would be a powerful statement about how the University's identity has changed over the last 100 years, with regard not only to race, but also to gender. It would send a clear message that the University now permits, invites, and honors women for contributions within the University, instead of without.

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<sup>124</sup> Berlin, *supra* note 99, at 1264.

<sup>125</sup> *Id.* at 1265.

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This debate over the politics of commemoration and the concomitant politics of commodification colors the discussion of ways to honor black faculty's legacies, including Marilyn's and Jerome's. The numbers of black names that grace university (or any) hardscapes are minimal. And for obvious reasons. Few black families have the personal wealth to transform hardscapes. Of those that do, many are community-minded in different sorts of ways, funding scholarships rather than buildings. In academic currency, named chairs are powerful memorials. But how many chairs are named in honor of black academics? This is a question distinct from, but related to, the numbers of blacks who hold them. For instance, UNC has perhaps the largest number of black faculty who hold chaired professorships, a tribute to the opportunities for African American scholars at UNC. Yet, to my knowledge, the University is only now considering its first chair named for a black individual. What would it mean, then, to honor Marilyn and Jerome in such a fashion? In such a currency?

A second option might be a lecture series honoring them. In fact, given Marilyn's and Jerome's unswerving commitments to diversity in hiring and scholarship, each would most likely embrace wholeheartedly an institutional commitment to bringing scholars committed to their research agendas. And yet, institutions might not comprehend the impact of their scholarship. While loving and respecting them as colleagues, it is entirely possible for institutions to miss the politics of their scholarship. Hence, while both Marilyn and Jerome embraced torts, which they both taught, and professional responsibility and law and economics, respectively, each would probably be severely disappointed by an institutional determination that this was their largest and most significant intellectual contribution. Or, that in the end, they were honored principally through curricular assessments rather than intellectual ones. What does it mean when institutions honor black faculty primarily for our identities as teachers versus as scholars or as activists in race and gender? Without demeaning the significance of teaching — indeed, the Teacher can be viewed as an icon in black history and culture — the identity of scholar has been far more elusive, as it demands recognition and respect for both our fields and our work within those fields. In the end, the politics of commemoration — of reconciling history and memory — go to the heart of all of these

controversies, from activist southern widows, to path-breaking black academics, to deciding who gets to lead seminars.

Adrienne

## LETTER 7

Dear Adrienne,

Your discussion of the politics of commemoration, memory, and history, especially the way that you located it within the specificity of your home institution, was remarkable. It reminded me of Jerome Culp's work that challenged his home institution, Duke, to remember its racist past in order to resist "neutral" policies that would only perpetuate the status quo racial order.<sup>126</sup>

Your discussion of the failure of institutions to honor the scholarly achievements of Black academics made me think about Duke's choice to create and solicit donations for a scholarship fund in Jerome's name rather than something like a lecture series, an idea raised by his friends from other academic institutions but which was rejected by the dean of the law school. Maybe the law school misunderstood one of Jerome's better known articles, *Toward a Black Legal Scholarship*, forgetting what came after the colon, *Race and Original Understandings*, along with its content. Don't get me wrong. Scholarships for students are important. And if the Jerome McCristal Culp, Jr. Memorial Scholarship Fund actually created opportunities for students who otherwise would not have attended Duke to go to Duke to study and combat White heteropatriarchy, then maybe the scholarship fund is actually a brilliant idea that would have been endorsed by Jerome. But a partial scholarship given to one student a year is something that does little to foster Jerome's memory at the school. It is nothing like a named lecture series, which would have honored Jerome the scholar and would have constituted a living presence at the school. I just received my fall issue of the *Duke Law Magazine*.<sup>127</sup> On the inside of the back cover is an announcement of the Fourth Annual Herbert L. Bernstein Memorial Lecture. Professor Bernstein taught me contracts, a course that I teach now. Like many of his former students, I mourned his passing. But I wonder what led to the creation of a lecture series in his name and the rejection of a similar series in Jerome's name.

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<sup>126</sup> Culp, *supra* note 86, at 244-61 (critiquing Paul Carrington's history of American legal education for failing to account for historical and ongoing racially exclusionary policies of many law schools with regard to student admissions and faculty hiring, with particular attention to Duke School of Law's institutional history).

<sup>127</sup> 23 DUKE L. MAG. (Fall 2005).

If the *Duke Law Magazine* follows its usual course, the next issue will have photographs and a story about the event. Professor Bernstein, who passed away in 2001, lives on at Duke School of Law. I found nothing in the Fall 2005 issue about Jerome, who passed away in February of 2004. The commemoration of Herbert Bernstein and the noncommemoration of Jerome Culp will be an annual ritual at Duke School of Law and in the *Duke Law Magazine*. If there is a positive postscript to this story, it is that LatCrit has chosen to honor Jerome through its Jerome McCristal Culp, Jr., Memorial LatCrit Lecture to be given each year at its annual conference. I am happy to report that its inaugural lecture was delivered brilliantly by Professor Patricia Williams.<sup>128</sup>

Your discussion of the politics of commemoration, memory, and history has helped me in my work on iconic images of war and the question of national belonging. I've been thinking about these issues with regard to a proposed monument to fallen firefighters following 9/11.<sup>129</sup> September 11 and its aftermath are marked by moments of inclusion and exclusion. One such moment involves a now famous photograph of three White male firefighters and the controversy over a proposed but now scuttled memorial.<sup>130</sup> For the most part, the race of the fallen firefighters did not become an issue until a controversy occurred over a proposed monument to recognize the firefighters who perished when the World Trade Center Towers came crashing down.<sup>131</sup> On 9/11, during the search for survivors, three firemen were photographed raising a flag over the site.<sup>132</sup> This image became etched in people's minds.<sup>133</sup> It appeared everywhere and became an important

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<sup>128</sup> Inaugural Jerome McCristal Culp, Jr., Memorial Latcrit Lecture, LatCrit X, San Juan, Puerto Rico, (Oct. 8, 2005), available at <http://personal.law.miami.edu/~fvaldes/latcrit/latcrit/documents/LATCRITXPROGRAM.pdf>.

<sup>129</sup> E.g., Robert S. Chang, *(Racial) Profiles in Courage, or Can We Be Heroes, Too?*, 66 ALBANY L. REV. 349, 364-65 (2003).

<sup>130</sup> Tom Franklin, *The After-Life of a Photo that Touched a Nation*, COLUM. JOURNALISM REV., Mar./Apr. 2002, at 64, available at <http://www.cjr.or/issues/2002/2/voice-franklin.asp>.

<sup>131</sup> Rod Dreher, *The Bravest Speak*, NAT'L REV. ONLINE, Jan. 16, 2002, <http://www.nationalreview.com/dreher/dreher011602.shtml> (quoting fireman in New York firehouse who blamed New York Fire Department leadership for making "a race issue out of it").

<sup>132</sup> Franklin, *supra* note 130 (discussing how he came to photograph firemen raising flag on September 11).

<sup>133</sup> See Leonard Pitts, *Politically Correct Version of Sept. 11 Insults Firefighters*, L.A. BUS. J., Jan. 28, 2002, at 47 (noting that Franklin's photograph is "among the most famous photographs that awful day produced").

symbol of American courage in the face of darkness.<sup>134</sup> There had been an attack by a foreign enemy. At the site of attack, the flag was raised in the midst of the rubble, proclaiming that America was not yet beaten. Instead of being seen in the rocket's red glare as in our national anthem, it was seen above the dust and smoke to give heart to all of America about the resilience of the American will.

The photograph became the basis for a monument to be erected at the New York City Fire Department's Brooklyn headquarters.<sup>135</sup> The men in the photograph are White.<sup>136</sup> The monument was to depict one White, one Black, and one Hispanic firefighter.<sup>137</sup> This decision caused an immediate controversy.<sup>138</sup> The monument was not intended to honor the individual men who happened to raise the flag.<sup>139</sup> Instead, it was meant to honor all the slain firefighters. Why should the race of the men in the monument matter if the individuals depicted are not modeled on real men? If the three firemen have a claim, it should be that their individual features have been erased, not that their race has been altered.

This design of the monument might be understood to be an inclusionary gesture. But what would it mean if Blacks and Hispanics accepted this symbol? First, who is excluded by this inclusionary gesture? The organization of the three racialized bodies around the symbol of America represents a vision of who is American. Second, to have one White, one Black, and one Hispanic fireman in no way comports with reality. Of the 343 firefighters who died there, an estimated 319 were non-Hispanic Whites.<sup>140</sup> This 93% White figure is actually quite close to the demographic background of the New York City Fire Department, where Black firefighters constitute 2.7% and Hispanic firefighters constitute 3.2% of the force.<sup>141</sup> It is, however,

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<sup>134</sup> See Franklin, *supra* note 130, (discussing thousands of letters, e-mails, and phone calls he received and noting hope it gave to many, and noting that many "called it a symbol of strength and courage, a reminder that Americans were united and strong").

<sup>135</sup> John Leo, *Color Me Confounded*, U.S. NEWS & WORLD REP., Jan. 28-Feb. 4, 2002, at 31.

<sup>136</sup> Franklin, *supra* note 130.

<sup>137</sup> *Id.*

<sup>138</sup> See generally Franklin, *supra* note 130 (discussing controversy over photograph and proposed monument); Leo, *supra* note 135 (expressing columnist's view that doctoring image for sake of inclusiveness makes mockery of history); Pitts, *supra* note 133 (criticizing alteration of race of the firemen from photograph to proposed monument); Dreher, *supra* note 131 (interviewing New York City firemen upset over racial alterations in proposed monument).

<sup>139</sup> See Leo, *supra* note 135, at 31.

<sup>140</sup> *Id.*

<sup>141</sup> Pitts, *supra* note 133.



nowhere near the actual demographic composition of the general population, which is 35% White, 27% Hispanic, 24.5% Black, 9.8% Asian American, and 0.2% Native American.<sup>142</sup>

To have one White, one Black, and one Hispanic fireman might be somewhat close to the demographics of the general population. But, it speaks a lie to the largely failed efforts to desegregate the fire department. In a 1973 lawsuit, Black and Hispanic plaintiffs won section 1981 and 1983 claims based on a violation of the Equal Protection Clause of the Fourteenth Amendment against the New York City Fire Department.<sup>143</sup> The department was ordered to change its application procedures and examinations.<sup>144</sup> At the time, racial minorities constituted 5% of the fire department and 30% of the general population.<sup>145</sup> Almost thirty years later, the racial minority composition of the department is now somewhere between 6 and 7% in a city that has become even more racially diverse.<sup>146</sup>

Unasked in the debate about the monument is how the racial composition of the fire department was achieved and maintained. The struggle over the racial composition of the men to be depicted in the monument echoes the struggle over the racial composition of the New York City Fire Department. The New York City Fire Department looks the way it does now because race has continued to be a factor in hiring, promotion, and work environment.<sup>147</sup>

Also unasked in this controversy, and in my discussion thus far, is the question of gender. Why is it that when we talk about race, it becomes so easy to forget about gender? And why is it that when we talk about

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<sup>142</sup> U.S. CENSUS BUREAU, TOTAL POPULATION BY MUTUALLY EXCLUSIVE RACE AND HISPANIC ORIGIN, NEW YORK CITY AND BOROUGH, 1990 AND 2000, 2000 CENSUS, 2000 CENSUS PUB. L. NO. 94-171 FILE AND 1990 STF1, POPULATION DIVISION-NEW YORK CITY DEPARTMENT OF CITY PLANNING, available at <http://www.ci.nyc.ny.us/html/dcp/html/census/popdiv.shtml> (last visited Dec. 15, 2005).

<sup>143</sup> See *Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n of N.Y.*, 490 F.2d 387 (2d Cir. 1973).

<sup>144</sup> *Id.*

<sup>145</sup> See *Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n of N.Y.*, 360 F. Supp. 1265, 1269 (S.D.N.Y. 1973), *aff'd in part, remanded in part*, *Vulcan Soc'y of N.Y. City Fire Dep't*, 490 F.2d 387.

<sup>146</sup> See Pitts, *supra* note 133 (comparing racial composition of New York City — 26.6% Black and 27% Hispanic — to racial composition of New York City Fire Department — 2.7% Black and 3.2% Hispanic).

<sup>147</sup> Commentators after 9/11 have noted the racism in the New York City Fire Department. See Sheryl McCarthy, *There Are Ways to Fight FDNY's Racism*, NEWSDAY, Jan. 31, 2002, at A34; Les Payne, *FDNY Puts out No Welcome Mat for Blacks*, NEWSDAY, Jan. 27, 2002, at B6.

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gender that it becomes so easy to forget race? These questions animated much of Black feminist writings.<sup>148</sup> Black feminism's insistence upon interrogating the relationship between race and gender — not in an additive sense (race + gender) and beyond the intersectional sense — to try to understand the way that race and gender are always already mutually constitutive of each is one of the lessons that I try to remember, though not always successfully, in my work.

I think it is important, though, not to conflate Black feminism with Critical Race Feminism (“CRF”).<sup>149</sup> While there is likely to be overlap, in what ways do you think that CRF is different? I am hoping to get your insights on this.

Bob

LETTER 8

Dear Bob,

I would like to end by discussing the topic that organizes this symposium, Critical Race Feminism (“CRF”). You and I started this exchange years ago, as part of our now ongoing dialogues about our work and our lives and how both fit into the legal profession. When we started, CRF did not exist or, at least, had not yet been named. Rather, the topic of our discussion then was black feminist thought. While I have long been a fan of Critical Race Feminism and, indeed, have been honored to have had some of my work included in anthologies, courses, and lecture series categorized as such, I have not, to be honest, given very much thought to how CRF might differ from or distinguish itself from black feminist thought.

Critical Race Feminism might be merely the sum total of other methodologies committed to the specificity of race and gender or antiracism and antisexism, that is, black, Latina, and Asian American feminist thought. Or, instead, CRF's main contribution might be pedagogic in nature, producing anthologies collecting key texts that create and circulate a canon.<sup>150</sup> I have met several students deeply

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<sup>148</sup> See generally HOOKS, *AIN'T I A WOMAN?*, *supra* note 69; ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria Hull et al. eds., 1982).

<sup>149</sup> For an introduction to CRF, see generally CRITICAL RACE FEMINISM: A READER (Adrien K. Wing ed., 2d ed. 2003).

<sup>150</sup> Legal scholar Adrien Wing is in many ways the founder of Critical Race Feminism. She has anthologized germinal texts in this area, as well as devoted substantial intellectual and political energy to defining and refining CRF. See *supra* note 149; see also GLOBAL CRITICAL RACE FEMINISM (Adrien K. Wing ed., 2000).

influenced by courses they have taken on Critical Race Feminism. Like

early courses on feminist thought and sex equality, this inserts curricular space for students.

But, I suspect that by Critical Race Feminism we mean something more. Genealogical references here might be significant and suggestive. Critical Race Feminism is a methodology that incorporates not only the tenets of other racialized feminisms, but also the central tenets of Critical Race Theory, including the latter's commitments to Marxist and poststructuralist insights. And, if the heyday of black feminist thought was in the 1970s and 1980s, then CRF would also be a product of its time, with commitments to theorizing mass rapes that afflict continents from Europe to Asia to Africa, economic imperialism that manifests itself in political dislocations creating new diasporic patterns, the post-Cold War political dynamic, and the imperative to, in the words of Giorgio Agamben, manage bare life.<sup>151</sup> This is not to say that CRF replaces other racialized feminisms, of particular interest to me, black feminism. But, perhaps CRF foregrounds other methodological and political commitments that black feminist thought might or might not welcome.

In legal feminism, many seem to have heard the anti-essentialist call for specificity and nuanced analysis as a demand for silence and a tolling of the production of feminist theory.<sup>152</sup> But scholarly critiques that disable progressive theorizing and organizing are suspect. As Gayatri Spivak noted in a now-classic text, one cannot talk about gender oppression without talking about women, nor white supremacy without talking about people of color. Spivak warns against decontextualizing and depoliticizing moves in critical theory. Sometimes, to confront oppression, one must be "strategically essentialist."<sup>153</sup> Distinguishing strategic essentialism from regular old essentialism is difficult and may not always be possible. I hope that we will soon find ourselves in a postessentialist moment that takes seriously the anti-essentialist feminist injunction to reject monolithic articulations of womanhood that remain unspecified and disabling to feminist work.<sup>154</sup> Oppression,

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<sup>151</sup> GIORGIO AGAMBEN, *HOMO SACER* 1-12 (1998) (arguing that modern political state founds itself on separation and management of "bare life," or biological life, from political life).

<sup>152</sup> See e.g., Susan Gubar, *What Ails Feminist Criticism?*, 24 *CRITICAL INQUIRY* 878 (1998).

<sup>153</sup> GAYATRI C. SPIVAK, *THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES* 45, 51, 109, 117-19 (Sarah Harasym ed., 1990).

<sup>154</sup> Examples of adopting an anti-essentialist stance and method in the context of active theorizing against oppression of black women include CATHARINE A. MACKINNON,

subordination, and privileging operate syncretically, and it is difficult to segregate dynamics of race, gender, class, and sexuality. Yet, feminists and other pro-liberationists must continue to theorize, analyze, and combat subordination by focusing on how power itself is deployed to generate such “essentialist conflicts.” We are still stuck in hierarchies of oppression rather than producing and utilizing integrated analyses that demand simultaneous antiracist, antisexist, and antihomophobic critiques. In any given conflict, we must ask how power is being deployed to construct and naturalize categories, establish dyadic or oppositional pairings, and then erase its own presence to naturalize hierarchy. In a postessentialist critique, the main goals are not to divide and thereby disable, but to try to reveal suppressive moves and to attempt to recover efforts at insurgency and resistance by marginalized and disfranchised people whose actions have been dismissed by mainstream civil rights scholarship. With the vocabulary and insights offered by the essentialist critique, the focus must return to the task of unravelling subordination, focusing in particular on the role of law in creating and ending subordination.

One opportunity for employing a self-consciously postessentialist critique is in the politics of theory. You drew parallels between Michael Awkward’s discussion of literary debates over theory and contestations of Critical Race Theory in legal scholarship. The politics of theory is something that Trina Grillo was always extremely mindful of, and my own thinking about theory has been deeply influenced by her questions and critique. Awkward notes that many American feminists have criticized feminist theory that originates in Freud and Lacan as hopelessly embedded in misogyny.<sup>155</sup> Awkward draws an important parallel between this skepticism and some Afrocentric critiques of Eurocentric theory.<sup>156</sup>

I teach a course, Critical Race Theory, which grapples with the role of

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FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 81 (1987) (rape and pornography); Crenshaw, *supra* note 41 (anti-discrimination law); Evelyn Brooks Higginbotham, *African-American Women’s History and the Metalanguage of Race*, 17 *SIGNS* 251 (1992) (historiography); THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN (Stanlie M. James & Abena P. A. Busia eds., 1993) (black feminist method); *see also* MARI MATSUDA, *WHERE IS YOUR BODY?* (1996) (collection of germinal legal feminist texts that embody anti-essentialism while grappling with concrete crises). Each of these authors operates in a post-essentialist context in which they utilize strategic essentialism, yet they remain focused on the syncretic nature of domestic structures of oppression.

<sup>155</sup> AWKWARD, *supra* note 5, at 39.

<sup>156</sup> *Id.* at 28-39.

power in the production, circulation, and acknowledgment of knowledge. Paradoxically, but not surprisingly, students are frustrated and disabled by some of the pieces we read, which employ theory that is difficult to understand without a background in French- or German-generated theory. In their anger, they echo many of the criticisms I hear from conservative or anti-intellectual academics who are wary of a theory that so easily lends itself to the study and analysis of social power. The students remind me sometimes of Awkward's important insight: "[T]he powerful and less powerful alike engage in border policing."<sup>157</sup>

I try to adopt a postessentialist stance to shift the discussion away from frustration and toward the authors whose work is potentially very liberatory. Instead, we ask why the American system of education teaches physics, sewing, and democracy, but not hegemony, discourse, and desire. What is at stake? Who benefits? Who loses? Inevitably, the students agree that these frameworks describe their material lives and political hopes and aspirations.<sup>158</sup> They then begin to wonder why these frameworks are excluded from standard education. Reframing the question proves ultimately far more helpful and productive than debating the dilemma as one posed by the theory itself. This ability to identify and interrogate a framework may prove crucial in legal organizing and negotiation.

On the other hand, highlighting the politics of education does not resolve the other questions about the politics of the theory. Power is implicated in several ways. How do theory and its producers get labeled? How are distinctions drawn between Critical Race Theory, feminist theory, critical legal studies, and "conventional scholarship"? Who gets to draw them? What is the power implicit in drawing these distinctions? In Awkward's terms, what are the borders that are being policed here?

Critics have largely insisted on making the methodological selection of narrative jurisprudence the sum total of Critical Race Theory.<sup>159</sup> In fact,

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<sup>157</sup> *Id.* at 15.

<sup>158</sup> For instance, many students find that French feminism resonates with them more than American-generated theory does, once they get past the vocabulary barriers. The project of challenging sexual oppression and repression and also interrogating language itself is one they frequently embrace. For a discussion of the distinctions between French and American feminist theory, see Arleen B. Dalley, *The Politics of Writing (the) Body: Ecriture Feminine*, in *GENDER/BODY/KNOWLEDGE* 52-67 (Alison M. Jaggar & Susan R. Bordo eds., 1989).

<sup>159</sup> See, e.g., DANIEL FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL*

Critical Race Theory is an expansive genre that, as Professor Kimberlé Crenshaw has said, was born of a need to make a simultaneous left intervention into scholarship about race and a racial intervention into leftist critical scholarship.<sup>160</sup> With that as the common ground, Critical Race Theory includes Gerald Torres's work on pluralism, Kendall Thomas's work on historiographic practices, Lani Guinier's transformation of voting rights scholarship, Regina Austin's revision of outlawry and underground economies, Richard Delgado's and Charles Lawrence's work on hate speech, as well as Derrick Bell's parables about civil rights tensions, Mari Matsuda's recovery of litigant histories, and Patricia Williams's descriptions of personally negotiating structures of law.<sup>161</sup>

Clearly, narrative jurisprudence is one methodology and mode of analysis among many employed by critical race theorists. To make this one method the sum total of the scholarship erases the work of many who utilize different, or combined, methodologies in their scholarship. Moreover, as you said earlier, why not focus on narrative jurisprudence and include white feminist texts? Many of the foundational narrative texts associated with Critical Race Theory grapple with sexism and patriarchy as much as they do with racism and white supremacy. To label them as Critical Race Theory and disassociate them from feminism, which has been excluded from critique, does two things. First, it racializes feminist theory as produced solely by white women. This paradoxically categorizes scholarship based on identity, which is exactly what the critics say should not matter. Equating narrative solely with

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ASSAULT ON TRUTH IN AMERICAN LAW 48, 87-94 (1997); Farber & Sherry, *supra* note 34.

<sup>160</sup> Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 9 (Francisco Valdes et al. eds., 2002) ("a distinctively progressive intervention within liberal race theory and a race intervention with CLS").

<sup>161</sup> See, e.g., Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599 (1992); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991); Regina Austin, *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119 (1994); Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737 (1993); Charles R. Lawrence III, *Frontiers of Legal Thought II The New First Amendment: If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; DERRICK A. BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

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Critical Race Theory and excluding antipatriarchal women of color scholars from feminist theory suggests a need to conduct a larger inquiry into the benefits of misrepresenting and assaulting the canon of critical race scholarship, while leaving white feminism unsullied and intact. Enlarging the picture to take account of the politics is helpful. It is reminiscent of the politics of the affirmative action debate, which, as you have described, offers a powerful seduction to white women to ignore their own material benefits and interests, embrace patriarchal norms of entitlement, adopt the rhetoric of merit, and distance themselves from affirmative action, which their abandonment then taints as hopelessly colored.<sup>162</sup>

Critical Race Feminism is in a unique position to grapple with the next iteration of essentialism and anti-essentialism. It can clarify and articulate the relationship of women of color to feminist legal theory and various methodologies more generally. CRF should continue to refine its relationships to other feminisms and, in the process, clarify and publicize its own genealogy and theoretical commitments. It is also poised to intervene in stalled-out debates over essentialism and identity and continue innovation in pedagogy. In the end, Bob, I am cautiously optimistic about the intellectual future, as more and more promising young scholars of diverse races, genders, and orientations are drawn to the practice and the promise of Critical Race Feminism.

Adrienne

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<sup>162</sup> Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that Is America*, 23 HASTINGS CONST. L.Q. 1115, 1132-33 (1996).