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Jubilee

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Keeping faith
With Mom and Dad
The people on the fringe
And countless family memories

I. INTRODUCTION

This essay chronicles the work and celebrates the achievements of blacks and others who lived in and escaped the thralldom of white supremacy.[1] The work runs down parallel tracks. One is broader than the other. The first track is about tenacious dominant and subordinate relationships and the way vying groups used the law to establish a firm footing for their stance (e.g., integrating the academy, tiffs over classroom strategy, whiteness as property, affirmative action, and so on). The second is about a peripheral people's struggle to overcome ascriptions that dominant parties want to impose upon them (e.g., the "we have got one, too" story).

Many themes run through this text. One is dominant and subordinate relationships and the stance that Washburn has taken against them (the generous use of guest speakers on race-related topics). Another is dominant and subordinate relationships and faculty stances against them in scholarly articles on Islam,[2] mediation, arbitration,[3] and litigation.[4]

Midst a reading about these things, please keep a few words in mind. The first word is schooling. It means gathering knowledge.

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1. Disfranchisement and segregation left colored people vulnerable to white authority. MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 316 (2001); DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT 116-23 (Kermit L. Hall ed., 1991). The law in general and Washburn Law School in particular were a salve for and a haven from the bruising some faced. NIEMAN, *supra*, at 123-39. Twenty-four blacks graduated from the law school between 1903 and 1949. Thirteen blacks graduated from the law school in the 1950s. One hundred and three blacks graduated from the law school between 1977 and 1998. They joined the ranks of private practitioners, won minor elective offices, achieved recognition in business, established a presence in the federal government, and played a role in the development of international law in sub-Saharan Africa. James M. Concannon, Diversity Issues, *in* The Early Years of Washburn Law School (2003) (unpublished manuscript, on file with author).

2. *See generally* Ali Khan, *Islam as Intellectual Property "My Lord! Increase Me in Knowledge,"* 31 CUMB. L. REV. 631 (2001).

3. *See generally* Loretta W. Moore & David E. Pierce, *A Structural Model for Arbitrating Disputes Under the Oil and Gas Lease*, 37 NAT. RESOURCES J. 407 (1997).

4. *See generally* Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479 (1995); Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055 (1999).

The second is knowledge. It means information about how to live, behave, and act. The third word is praxis. It means applying knowledge to one's life. The fourth is theory. It means interventions that force people to see their surroundings in different ways. The fifth is education. It describes the skills-gathering process afforded Washburn students to do praxis in their daily lives.

These words are tools. They were entrusted with some of us by old and farsighted academics[5] to do scholarship, improve the classroom, and build a law school. These words give color, meaning, depth, and dimension to what is to follow—a narrative about classroom perspectives, legal history, philosophy, invention, creativity, and normal fare at Washburn Law School. Let us begin with perspectives. The reader is cautioned to be on guard against preachiness that flowers between passages.

II. PERSPECTIVES

A. *The Academy*

In the early days, faculty parties were normal fare. I remember my attendance at many galas and one gathering in particular. I was unveiled by a law person to some big wigs. The unveiling was accompanied by the claim that "we have one too." This was a racist statement. It was uttered by someone on an important night. Everybody heard it. It created an awkward moment. It left me isolated, self-conscious, and angry. Why did the spokesman or woman do that? What was he or she trying to accomplish? Who was he or she trying to impress? Did the utterer know what he or she was doing? Was he or she aware of the damage being done? Who gave the speaker the right to describe me that way? Let us indulge one person's speculations.

"While each of us can act in racist ways, it is through dominant cultural understanding that white people" (particularly well-educated ones) "act out and reinforce racism."[6] This stuff (customs, traditions, and practices) is a subconscious part of social relations, institutional arrangements, and personal behavior.[7] It is important to recognize that cultural racism (that inbred aversion to difference) causes all

5. Dean and Professor Raymond Spring, Washburn University School of Law, Topeka, Kansas (1965-2000); Clinic Director and Professor Donald Rowland, Washburn University School of Law, Topeka, Kansas (1970-1988); Professor Norman Amaker, Loyola University Chicago School of Law, Chicago, Illinois (1976-2000); Ambassador and Professor Clarence Clyde Ferguson, Harvard Law School, Cambridge, Massachusetts (1975-1983).

6. John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 924 (1997).

7. *Id.*

three manifestations to operate in a synergistic fashion so that the effects are greater than the sum of its parts.[8]

Cultural racism is linked with the dominant group's social control.[9] It awards privileges to whites and those who can imitate them.[10] Institutional racism promotes a property interest in whiteness and those nonwhites who can claim that interest.[11] This racism (let us call it White racism) is a peculiar thing. There is a circularity to it. The three-hundred-and-sixty-degree turn, from social relations to institutional arrangements, ushers in witting and unwitting personal racism.[12]

B. *The Classroom*

To educate people for a diverse and nonracist world, people of color have joined forces with folk who fight those favoring assimilation and monoculturalism as solutions to our problems. They see legal education as an instrument and a salve for the mind.[13] They claim that education can do many things. It can facilitate integration, assimilation, and conformity;[14] or it can grapple with the uncomfortable bits of everybody's reality to transform it.[15]

In the insurgent professor's mind legal education is the pursuit of knowledge for freedom.[16] To that end, to, in effect, teach youngsters about new worlds, words, languages, symbols, and manners of speech that oppressed people use to fight back, professors have used cases in the classroom[17] that evoke emotions to unlock the hearts and minds of students. The professor's mission is straightforward: to explore everybody's fears, aversions, and affinities to reformulate everyone's views.[18]

While the prevailing focus is upon black-and-white relationships, those who are neither black nor white search for a place in the classroom that acknowledges and affirms the fact that they are neither

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 6 (1994); Calmore, *supra* note 6, at 912.
14. Calmore, *supra* note 6, at 908.
15. *Id.* The "Melting Pot Theory" has worked for all ethnics except first nation people and blacks. Their inclusion reminds us of the endless cruelties inflicted upon some people to secure the powers America uses today. *See* E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY & CASTE IN AMERICA 383-87 (1964).
16. *See* HOOKS, *supra* note 13, at 15; Calmore, *supra* note 6, at 912.
17. *See, e.g.*, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Bell v. Maryland, 378 U.S. 226 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); The Civil Rights Cases, 109 U.S. 3 (1883). These cases should be in contract casebooks. They deal with customs, practices, offers, rejections, and modifications of contracts.
18. Calmore, *supra* note 6, at 906.

black nor white.[19] To that end, some instructors have abandoned traditional forms of teaching that reinforce domination. Some have explored emotional freedom—that space in the mind where people are relaxed, creative, and free of other people's pressures.

A few have made bold claims and applied them to their work in the classroom. Here are some examples—(1) law is a background fact that creates a foreground where people are free to do anything; (2) people cannot use power to impose their racial norms upon others; (3) differences between people should be accepted and celebrated by others; (4) dominant and subordinate relationships dot the nation's landscape; (5) dominant and subordinate relationships are realities; (6) for the foreseeable future white culture is dominant; and (7) in the present, and for the foreseeable future, claims to worthwhile things pursued by subordinated parties must be rooted in white culture before the law will recognize the thing and accord it protection.

Others have changed their testing methods so that students are not pitted against one another. A handful have talked about law, literature, the intersection between law and literature,[20] philosophy, economics,[21] and postmodernism.[22]

C. *The Criticism*

While this move away from traditional pedagogy is both necessary and appropriate to produce students for a diverse world, a noted judge and some scholars have challenged what is being done. Paul Carrington, then Dean of the Duke University Law School, chided some of us.[23] He wanted and demanded that we (colleagues) return to a traditional form of legal education—a scheme that melded students to an arrangement that oblige them and us to serve the logic of the existing system. Justice Clarence Thomas weighed in on the sub-

19. *See generally* Allen Ken Easley, *Of Children's Plates, Melting Pots, Tossed Salads and Multiple Consciousness: Tales from a Hapa Haole*, 3 ASIAN PAC. AM. L.J. 75 (1995).

20. *See generally* James Boyd White, *Law and Literature: "No Manifesto,"* 39 MERCER L. REV. 739 (1988); *see also* Ronald C. Griffin, *The Trials of Oscar Wilde: The Intersection Between Law and Literature*, *in* THE IMPORTANCE OF REINVENTING OSCAR: VERSIONS OF WILDE DURING THE LAST 100 YEARS (Uwe Boker et al. eds., 2002).

21. *See generally* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503 (2000); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127 (2000).

22. *See* DAVID LYON, POSTMODERNITY 73-74 (Concepts in Social Thought, Frank Parkin ed., 2d ed. 1999). Postmodernism is a branch of metaphysics. It is a philosophical form of reasoning. It describes men who can not rationalize the world. The players are exhausted beings. Too many people are flooded with too much information. No meaning exists beyond language. It is a time when science and technology have supplanted religion and folk's concern about man as an individual. Life seems meaningless. In a pickle about his surroundings, postmodern man grasps for glitzy ideas and coping mechanisms to solve people's problems.

23. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

ject in a speech delivered at the University of Kansas.[24] In an article, he wrote the following:

> Legal realism produced its own intellectual offspring that—like Zeus destroyed its parent. I am referring here to Critical Legal Theory and its many offshoots, such as Critical Race Theory, Critical Feminist Theory, and so on. These schools of thought have carried the postulates of legal realism to their inevitable conclusion. If judging is simply the exercise of personal discretion by a judge, then cases, legal rules, and, indeed, the law itself, is merely a product of the person and, more importantly, the social structure and class that produced him or her. Thus, the law becomes a means of oppression or of social control by the political, cultural, and economic elites of which the judges are a part.[25]

John Calmore, a professor of law at Vanderbilt University, wrote a tactful response to Justice Thomas's remarks.[26] It appeared in a law review article entitled *Close Encounters of a Racial Kind.* This part of the essay comes to a conclusion with the words the professor penned to paper. He wrote,

> While I am unaware of any claim within Critical Race Theory that judging is simply the exercise of personal discretion by a judge, it is claimed that neither judging nor the law is free from the subordinating features Justice Thomas cites. Racial power . . .[is] not simply . . . a product of biased decision making on the part of judges, but the sum total of the pervasive ways in which law shapes and is shaped by race relations.[27]

III. LEGAL HISTORY

Let us turn to legal history. Cheryl Harris is a remarkable woman. She has commented upon the new pedagogy and written on the subjects Justice Thomas decries. She has lectured in South Africa. She was a moving and insightful lecturer at Washburn Law School.[28] She wrote a stunning article in the *Harvard Law Review* entitled *Whiteness As Property.*[29] Therein she put whiteness in the spotlight. The following is what she wrote.

Property is a preserve that emerges from nothing. It establishes itself as a form after the law has reordered competing regimes of power.[30] In the United States, legalized slavery conflated race and property.[31] If a person bore the wrong color in colonial times, a person with the right color could press him or her into slavery. Whiteness

24. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996).
25. *Id.* at 3.
26. Calmore, *supra* note 6, at 910-11, 924-26.
27. *Id.* at 910.
28. *See* Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225 (1996).
29. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).
30. *Id.* at 1730.
31. *Id.* at 1716.

gave the possessor control over another's conception, autonomy, freedom, intellect, and labor.[32] Complexion was a personal feature, flaunted by the lucky possessor, to prevent others from pressing him or her into servitude.[33]

There was the western frontier. When a man discovered vacant Indian land, conquered, occupied, and settled Indian land, whiteness gave the settler property.[34] Western expansion, the history books tell us, proceeded at a gale's pace. Then, like now, it was fashionable for white men to go west. White men, women, and children poured out of the east to rebuild their lives. Because of a rising demand for labor in the east, problematic control over free white labor moving west, and shorter terms for bonded servitude back east, blackness emerged as a mark for slavery. Nonwhiteness created a presumption of servitude.[35]

Regrettably, in societies built upon racial subordination like the Republic of South Africa[36] and the United States,[37] white privilege emerged as an expectation.[38] Whiteness became the quintessential property for personhood.[39] Over time, memories about whiteness and race replaced legal slavery. All have figured into modern day fratricidal contests about "who gets what."

Whiteness was and is big business[40] in the United States. It has both social and pecuniary value. On the social front, W.E.B. Du Bois put it this way,

> They [whites] were given public deference . . . because they were white. They were admitted freely with all classes of white people, to public functions, to public parks . . . . The police were drawn from their ranks, and the courts, dependent on their votes, treated them with . . . leniency . . . . Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect on their personal treatment . . . . White schoolhouses were the best in the community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools.[41]

Then, like now, Harris said, whiteness determined whether a person could vote, travel freely, attend a good school, obtain work, and define on his own terms the structure of his relationship with every-

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32. *Id.* at 1717.
33. *Id.* at 1720-21.
34. *Id.*
35. *Id.* at 1717.
36. ALLISTER SPARKS, THE MIND OF SOUTH AFRICA 149-50 (1990); *see* Harris, *supra* note 29, at 1789-90.
37. Harris, *supra* note 29, at 1720.
38. *Id.* at 1730.
39. *Id.*
40. *Id.* at 1741. *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 157-60 (2d ed. 1957).
41. Harris, *supra* note 29, at 1741-42 (quoting W.E.B. DU BOIS, BLACK RECONSTRUCTION 700-01 (1935)) (alteration in original).

body.[42] Under the law then, like now, a white person could not defame another white person without paying damages.[43] Then, like now, whiteness was alienable. (Men and women could pass it on to children.) Whiteness was usable. (Men and women could use it to procure things others coveted.) Whiteness was an emblem. (It performed the function of a high school hall pass—giving the bearer a reputable nature, a favorable public reputation, and neighborly entreaties.) Lastly, whiteness was and remained an instrument of power. Men and women used it to prevent nonwhites from poaching items like media licenses,[44] law school deanships, and higher educational opportunities[45] on white reserves.[46]

The United States Supreme Court altered the white landscape somewhat in the 1950s. In *Brown v. Board of Education*,[47] the Justices said that states could not make laws to perpetuate "the property reserves" set aside for whites—e.g., public schools,[48] city pools, hospitals, theaters, highways, airports, libraries, restaurants, and so on.[49] But having said that, white privilege not mandated by state law survived the *Brown* decision.[50] Whites could capitalize upon the countless inequalities created by segregation to maintain their white privileges.[51] In *Brown II*,[52] the Justices recognized (albeit reluctantly) the property interest in whiteness, by leaving intact the ability of whites to control, manage, postpone, and thwart change.[53] In *Milliken v. Bradley*,[54] the Justices caved into whiteness, white pressure, and politics, by relieving states of any duty whatsoever to tackle public school inequalities created by state and private practices of segregation.[55]

In the 1960s and 1970s when idealism was on the move, social protest was all the rage, and being white was unfashionable, whiteness went into hiding. Political institutions around the country granted

42. *Id.*
43. Plessy v. Ferguson, 163 U.S. 537, 549 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
44. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990), *overruled on other grounds by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
45. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).
46. *See* Harris, *supra* note 29, at 1715.
47. 347 U.S. 483 (1954).
48. *Id.* at 495.
49. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 444 (1968) (Douglas, J., concurring); United States v. Guest, 383 U.S. 745 (1966); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
50. Harris, *supra* note 29, at 1753.
51. *Id.*
52. Brown v. Bd. of Educ., 349 U.S. 294 (1955).
53. Harris, *supra* note 29, at 1754.
54. 418 U.S. 717 (1974).
55. Harris, *supra* note 29, at 1756-57.

whiteness time, with its champions, to revise and reconstitute itself as a property interest. In the 1980s, whiteness had a vengeful coming-out party. In case law decisions, whiteness (the idea) and its champions took a defiant stance.[56] On a hopeful landscape, dotted with dominant and subordinate relationships, white people (armed with whiteness) came out with fearsome claims and propositions.[57] Here is a sample:

(1) White privilege is an expectation.
(2) White privilege is a legally protected right.
(3) White privilege is a reality.
(4) White privilege is valid.
(5) The question is—how much infringement upon white privilege must a white man or woman accept?

The answer was immediate—not much. Race-based schemes that infringed upon the prerogatives of white men were suspect.[58] All were subject to the strict scrutiny test.[59] Schemers could not sacrifice innocent white men, or intensify competition between them, to rectify an inequality with blacks.[60] Schemers could not use history to rescue affirmative action plans that sacrificed innocent white men.[61] Schemers could not sacrifice innocent white men or women to remediate past discrimination.[62]

Government-inspired affirmative action plans at all levels—no matter how morally uplifting they might be—could not sacrifice, maim, or harm innocent white people.[63] From now on, rights were shields from nonwhite interference; equality meant formal equality between men and women; property meant settled expectations (to include bad ones); neutrality meant existing distributions of societal goodies no matter how unequal that might be; power meant law; law meant any and all mechanisms to preserve the status quo.[64]

According to Harris, the battle for nonwhite freedom and nonwhite equality had shifted to a new terrain.[65] At all levels legal institutions had fallen into the clutches of less adventuresome white men. Equal treatment (the white institutional mantra and the judges' legal tool of choice) covered individuals and excluded all groups.[66] By dismissing the country's ignominious past in its judicial decisions; ignor-

56. *See generally* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003); Johnson v. Bd. of Regents, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).
57. *See* Harris, *supra* note 29, at 1757-77.
58. *Id.* at 1769-70.
59. *Id.* at 1774.
60. *Id.*
61. *Id.*
62. *Id.* at 1776.
63. *Id.*
64. *Id.* at 1778.
65. *Id.* at 1761-66.
66. *Id.* at 1761-62.

ing group identity; and denying the correlation between deprivation, inequality, group identity, and so on; the courts' approach to group claims to genuine freedom and equality reproduced the subordinations it was asked to overturn.[67]

IV. PHILOSOPHY

A. *The Lecture*

Derrick Bell lectured on this subject at Washburn University School of Law.[68] The *Washburn Law Journal* published his article.[69] In an article published in another noteworthy law review, Bell made some eye-catching remarks.[70] What did he say?

> Basic measures of poverty, unemployment, and income suggest that the slow racial advances of the 1960s and 1970s have ended and that regression is under way. Statistics, however, cannot begin to detail the havoc that joblessness and poverty have caused: broken homes, anarchy in communities, and futility in the public schools.
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> All are the unhappy harvest of race-related joblessness in a society in which work provides sustenance, status, and the all-important sense of self-worth. [What does all this mean?] Incidents of random and organized violence are rising. Hostility to African-American progress, translated into political and judicial enmity, threatens the gains of the last four decades.[71]

These manifestations portend the end of an era. They suggest that the time has come to consider the options open to nonwhites to reverse the tide and confront whether "people of color will ever enjoy real racial equality in this country."[72]

Having said all that, some of us have drawn inspiration from the words of James Baldwin and Martin Luther King. Baldwin wrote,

> I have begun this letter five times and torn it up five times. I keep seeing your face, which is also the face of your father and my brother.
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> . . . .
>
> . . . You were born where you were born and faced the future that you faced because you were black and *for no other reason.* The limits of your ambition were, thus, expected to be set forever. . . . You were not expected to aspire to excellence: you were expected to make peace with mediocrity. Wherever you have turned in . . . your short time on earth, you have been told where you could go and what you could do (and *how* you could do it) and where you

67. *Id.* at 1762-66. Professor Harris described a consequence of this shift in an article published in the *Washburn Law Journal.* Harris, *supra* note 28, at 230-35.

68. Derrick Bell delivered the 1996 Foulston & Siefkin Lecture at the Washburn University School of Law. Derrick Bell, *Racial Libel as American Ritual*, 36 WASHBURN L.J. 1 (1996).

69. *Id. Cf.* Kenneth Lasson, *The Tintinnabulation of Bell's Letters*, 36 WASHBURN L.J. 18 (1996).

70. *See* Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1038 (1990).

71. *Id.*

72. *Id.* at 1038.

> could live and whom you could marry. . . . Please try to be clear . . . about the reality which lies behind the words *acceptance* and *integration*. There is no reason for you to try to become like white people and there is no basis whatever for their impertinent assumption that *they* must accept *you*. The really terrible thing, old buddy, is that *you* must accept *them*.[73]

On August 5, 1962, Dr. King wrote this bit. It appeared in a work entitled *A Testament to Hope*. He said,

> The most superficial look at history shows that no social advance rolls in on the wheels of inevitability. It comes through the tireless efforts and persistent work of dedicated individuals.
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> . . . .
>
> The Negroes' goal is freedom. . . . Yet we are not passively waiting for deliverance to come from others out of pity. Our destiny is bound up with the destiny of America—we built it for two centuries without wages; we made cotton king; we built our homes and homes for our masters and suffered injustice and humiliation. But out of a bottomless vitality we continue to live and grow.
>
> If the inexpressible cruelties of slavery could not extinguish our existence, the opposition we now face will surely fail. We feel that we are the conscience of America—we are its troubled soul. We will continue to insist that right be done because both God's will and the heritage of our nation speak through our echoing demands.[74]

Midst all these words we (law professors) have mined America's landscape for a vocabulary and strategies to fight oppression and deliver justice to the oppressed.[75] What do we know?

B. *The Nightmare*

America was an invention.[76] The founders cleared a space for white men to do business.[77] The clearing was ruled by white elites.[78] Their deliberations about pride, progress, prosperity, peril, god, beauty, and good, excluded nonwhites.[79] When the aspirations of whites and nonwhites diverged, whites won the aspiration contests.[80]

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73. JAMES BALDWIN, THE FIRE NEXT TIME 17, 21-22 (1963).

74. Martin Luther King, Jr., *The Case Against "Tokenism,"* N.Y. TIMES MAG., Aug. 5, 1962, at 11ff, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR., 106, 111 (James Melvin Washington ed., 1986).

75. *See* Calmore, *supra* note 6, at 912; *see also* ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 59-67 (1957).

76. *See generally* GORE VIDAL, INVENTING A NATION: WASHINGTON, ADAMS, JEFFERSON (2003); *see also* W.J. CASH, THE MIND OF THE SOUTH 3-10 (1941).

77. *See* ROGER WILKINS, JEFFERSON'S PILLOW: THE FOUNDING FATHERS AND THE DILEMMA OF BLACK PATRIOTISM 30-33 (2001).

78. SHELDON S. WOLIN, TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE 70-71 (2001).

79. *See* WILKINS, *supra* note 77, at 30-31; Derrick Bell, *Brown v. Board of Education* at Fifty: What Are We Doing with What We Have Learned, Lecture at Cleveland State University, Cleveland-Marshall College of Law (Oct. 9, 2003).

80. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 55-56 (1992). In *Brown*, it was painful to read about a United States Supreme Court Justice's

When the aspirations of nonwhites intersected with the needs of the nation, nonwhites reaped the benefits.[81]

From a black perspective America was a dreadful place.[82] Things had fallen apart.[83] The virtues people professed to follow had lost their hold on us. Profit, celebrity, and fear had supplanted discovery, scruples, and criticism. Professing one's existence and place in the world as a black,[84] an Asian,[85] or some other nonwhite status was reason enough to have a white wreck a nonwhite's freedom. Justice was a commodity that the nation's dispensers sold to the highest bidders. Violence was a way of life. Liberty—the option to use the privileges bestowed by the common law—was a captive of bigotry.

C. *The New Age*

Mercifully, the world made peace with its past. Social crises around the world, the tides of history, and the people's will to do the right thing salved social slights and bound wounds. The pain of a family acquaintance's murder (the Klan killing of Lieutenant Colonel Lemuel Penn, United States Army, on Interstate Highway 95 in Georgia)[86] and the social slights leveled against one's heroes (e.g., Jackie Robinson)[87] faded away. Passing the torch from one generation to the next, adding new citizens to the nation's mix, and fitting them to the food chain forced social change. Justice took on new meanings.[88] Building an equitable society emerged as a goal subscribed to by everybody. People took pride in being called an American.

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predisposition to keep legal segregation in place because the legal alternative would offend white sensibilities. RICHARD KLUGER, SIMPLE JUSTICE 589 (1976).

81. BELL, *supra* note 80, at 53-54.

82. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 87-91 (1996); KLUGER, *supra* note 80, at 117. American history is replete with examples of white men getting swept away by bad habits and woeful practices that disabled blacks. There was slavery, codes to perpetuate slavery, corporal punishment; black codes to restore indentured servitude after the civil war; terrorism and lynching (over 2000 people lost their lives between 1880 and 1910); state-sponsored segregation; underfunded integrated public schools (forced to scratch for money to stay afloat); and last, but not least, the media habit of making clowns out of poorly educated blacks in politics. Roger Wilkins, Race, Law and the American Creed: Examining the Social and Legal Impact of *Brown v. Board of Education*, Lecture at University of Kansas, Robert J. Dole Institute of Politics (Sept. 18, 2003).

83. HIGGINBOTHAM, *supra* note 82, at 90-92.

84. *See, e.g.*, United States v. Cruikshank, 92 U.S. 542 (1875).

85. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943).

86. United States v. Guest, 383 U.S. 745, 748 (1966).

87. BETTYE COLLIER-THOMAS & V.P. FRANKLIN, MY SOUL IS A WITNESS: A CHRONOLOGY OF THE CIVIL RIGHTS ERA, 1954-1965, at 112 (2000).

88. *See* FELIX S. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS, 1-8, 93-101, 291-92 (1933), *reprinted in* THE AMERICAN JURISPRUDENCE READER 30-41 (Docket Series, Vol. 8, Thomas A. Cowan ed., 6th prtg. 1956).

D. *The Jurisprudence*

How does a lawyer-academic, civil rights guy, student politician, showing his age, configure these observations? What is the jurisprudence? Let us try this. The law is what people permit, what the nation wants, and what the government commands.[89] The interstitial spaces between categories, indeed, the spaces within these categories, are filled with the aspirations of moral philosophers.[90] Justice takes root in these spaces. It is a three-sided figure. One side is retributive.[91] A second is distributive.[92] The third is adjective.[93] One side of justice restores what has been wrongfully taken from somebody (retributive justice). Another rations the nation's commonwealth so that everybody gets his allotment of social materials to make it through the day (distributive justice). A third side promotes peace. It aids stability, tackles violence, salves harms, and describes the law's positive effect upon people's conduct.

What has come from all this? Here are some of the achievements on the short list. The law has become a haven for the weak and helpless victims of prejudice. Though bias has not been stamped out in this country, we have arrested discrimination in public accommodations,[94] transportation,[95] and housing.[96] What does the short list remind people of color to do? The short answer is "to fight back."

We must always fight back.[97] We must find a vocabulary to fight back. We must not give in to intimidation or bend to oppression. We

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89. *See id.*
90. *Id.* at 39.
91. *Id.* at 37-38.
92. *Id.* at 37.
93. *Id.* at 36.
94. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
95. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454 (1960).
96. *See, e.g.*, Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
97. I read excerpts from a book (*Washington, D.C.* by Gore Vidal), watched a movie (*The Road to Perdition*), listened to music (The O'Jays), and reviewed my notes from a speech by Judge Greg Mathis entitled Living the Dream: 2004 Dr. Martin Luther King, Jr. Birthday Celebration at the Ramada Inn, Topeka, Kansas, on January 17, 2004, to find the inspiration to write this theme. The stories, poetry, and song brought an old story to mind. My father said reality is divided into two bits. One part is civilization. The other part is nature. Nature is indifferent to the antics of man. Men have to accept nature's offerings to insure the survival of man. When man employs civilization's tools against nature, nature wins. By contrast, he said, civilization is an artifice. It checks man's worst instincts. It accommodates life (the stuff that animates objects), society (places where men congregate), norms (what people ought to do), and law (background facts that illuminate a foreground where people are free to do anything). Some people, he said, revel in societies that reward greed, brutality, and violence. Some profit from greed. Others endeavor to supplant greed with generosity. A few strive to win bits of justice for all. *See* COHEN, *supra* note 88, at 30-41. For ten years or so Professors Moore, Lasso, and Ramirez labored for justice. Moore wanted antagonists to face each other (and not hide behind lawyers) in mediation and arbitration. *See* Moore & Pierce, *supra* note 3. Lasso wanted them to submit to full disclosure in complex litigation. *See* Lasso, *supra* note 4. Ramirez wanted them to cut the cost of litigation in stockholder derivative suits to level the quest for justice. *See* Ramirez, *supra* note 4.

must get bright youngsters of color into universities.[98] We must add people of color to the legal academy. We must do these things soon. We must use them to replenish professional ranks decimated by age, illness, and death. We must support scholars using critical race theory.[99] We must find affinities between all people. We must pursue claims for rights imbedded in white culture.[100] We must fight for integrated housing to break the back of de facto racial segregation. We must abandon civil rights laws for human rights law when the going gets rough.[101]

V. NORMAL FARE

A. *Reminiscences*

I am a war baby and a baby boomer. I spent my formative years in Virginia. When I was a child the world was divided into parts. One part (socialist) had states that constrained the behavior of individuals and markets. The other part (capitalist) had states that freed individuals and markets to sort out the winners and the losers. The first part hired a few people, paid them grand salaries, and imposed high taxes upon affluent workers to help the unemployed. The second part hired lots of people but had no compunction about employers firing people. Flexible labor markets would sort out work for the unemployed.

Thereafter, the vying parts scrummed and the second part won. The second part's vision is on offer and is taking form around the world. Its vision has sparked pain, exasperation, cultural confusion, counter visions, counter ideologies, and, finally, appeals to religion and violence.

B. *Modernity*

Let us construct the current scene. People live on a vast, deregulated, and polyphonic (noisy) plane.[102] It is dotted with dominant and subordinate relationships. People are presented with differences, told to cope with them, and forced to accept their permanence. All dwellers have a life task—to find his or her place in the world. To that end people have to earn something, conquer somebody, and defend their holdings against those who would take their stuff from them.[103]

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98. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).
99. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 129-35 (2001).
100. *Id.* at 18-20. *See generally* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).
101. Ali Khan, *Lessons from Malcolm X: Freedom by Any Means Necessary*, 38 HOW. L.J. 79, 127 (1994).
102. ZYGMUNT BAUMAN, POSTMODERNITY AND ITS DISCONTENTS 120 (1997).
103. *Id.* at 122.

Dwellers are playing a deadly game—"a series of finite . . . games, with no definite sequence" that offers the winner no assurance that the consequences of the present game is binding on the next.[104] In this game the world is a major player. It is neither a lawgiver nor an umpire. It plays the game like everybody else—to win.[105]

Everybody is free in the game. But the price for freedom is fear, insecurity, and anxiety.[106] A game goal is to destroy differences to make way for order and the end of fear.[107] But that goal is not easily attained by players. Social encounters with unusual people, and, if you will, weird encounters of all sorts are too fluid, confusing, difficult to pinpoint in conventional terms, to draw concrete lessons.

When people are both confused and perplexed by their environment, players invariably do the human thing. They flee from the big mysteries to embrace what is intelligible in their comfort zone and what is readily available to them.[108] They use their language and their beliefs to collect stuff to make truth out of their surroundings. What they discarded (as it turns out) is invariably collected by other people, with their language and their beliefs, to construct a competing truth.[109]

C. *Truth*

This "truth versus truth business" is man's postmodern condition.[110] It is born of freedom rather than oppression. Winning something in a game, like prevailing on one player's version of the truth, can come in an instant. It can come from one move that is a display of skill and cunning; some player's ability to simplify a complexity; or a player's ability to select a finite set of acts and characters out of a multitude of things so she can cut "reality" down to comprehendible and logical bits to make the next move in the game with less fear.[111]

Try this truth on for size. Thriving societies depend upon thriving economic systems. Thriving economic systems depend upon the people who own the instruments of production. These folks are shadowy figures.[112] Some call them demons behind the scenes. Others call them the ruling class. Whatever you call them, they have clout. They have the wherewithal to utilize the law, dabble in politics, eschew the

104. *Id.* at 123.
105. *Id.*
106. *Id.* at 124.
107. *Id.* at 121-22.
108. *Id.* at 115.
109. *Id.* at 117.
110. *See id.* at 116.
111. *Id.* at 123-24.
112. 2 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 120 (5th ed., rev. 1966).

work of the media, and manipulate the state to impose their views upon everybody.[113]

For the moment, liberalism is the veil of choice for this group. It furnishes everybody with a handy explanation of their social situation—e.g., freedom, autonomy, markets, equal and free competition, equality before the law, and justice. Of course, these are formal rights allotted to all people. Regrettably, what happens to blokes on the ground is quite different. They are bullied, exploited, robbed, cheated, put upon, and done with unfairly. There are dominant and subordinate relationships that the ruling classes impose upon the weak everywhere (on all too many occasions) to make their lives quite different.

For those in the know, the results are horrifying. The bullied are forced to live in psychological cages of their own making or somebody else's contrived structures to cope with their environment. It is a strange situation that leaves people with mounds of anxiety. Forced into "order[ed] passion, neat divisions, and taut discipline," these gamers have trouble getting through the day.[114]

Everybody lives in a haze. Nothing stays the same. The world (as the gamer sees it) is impermanent, fast-paced, and zany. Social visions of all sorts are replaced with new ones every minute. Zygmunt Bauman, at Leeds University, wrote about this. In a published lecture delivered at the University of Amsterdam, he said,

> Few of us remember . . . that the Welfare State was originally conceived as a state-wielded tool to groom back the *temporarily* unfit into fitness and to encourage those who were fit to try harder . . . Welfare provisions were seen then as a safety net, drawn by the community as a whole, under every one of its members—giving everyone the courage to face the challenge of life . . . . The community took it upon itself to make sure that the unemployed would have enough health and skills to become employed again . . . . The Welfare State was conceived not as *charity*, but a citizen's *right*, and not as the provision of individual handouts, but a form of *collective insurance*. . . .
>
> This was the case . . . in those times when *industry* provided work, living and the insurance, for [a] majority of the population. The Welfare State had to reach where industry did not . . . [and] bear the marginal costs of capital's race for profit . . . . Today, with a growing sector of the population never likely to enter production again, and thus being of no present or prospective interest to those who run the economy, the "margin" is no longer marginal . . . . This new perspective is expressed in the fashionable phrase: "Welfare State? We can no longer afford it" . . . .[115]

113. *Id.* at 121-22.
114. BAUMAN, *supra* note 102, at 119.
115. *Id.* at 36-38.

Put another way, the robbed, cheated, and bullied are angry, disappointed, confused, and perplexed by things. They do not like being told that they are redundant; or that being poor is a sin; or that self-assertion has taken the place of collective cures for class privation. Blokes like this—fretting about the angry people and the crazed minds around them—are doing what they can to escape the straitjackets of their society.[116]

If this scene, vision, and truth hold up under scrutiny, we have a context for appraising people of color contributions to scholarship, legal reform, and the fight against oppression. Calmore,[117] Moore, Lasso, and Ramirez's articles[118] were aimed at the ruling class. They chided establishment folks. Three of the writers propounded reform of the litigation process (let us call it gaming) and sensible alternatives to promote cheap justice and fair treatment. Regarding the school's lecturers, the ruling class was the audience. Derrick Bell and Cheryl Harris tried to reach those who sympathize with the down-and-out to improve their lot in life.

In Professor Khan's articles the target audience was the ruling class. He briefed them on the "truth versus truth business" and the dangers facing postmodern men.[119] Finally, the anecdote about a faculty member's introduction at a law school gala was presented to point out what dominant folk subconsciously do, more often than not, when a subordinated-group person of equal status is in their presence. The disconcerting anecdote reminds all about the stupid things, needless misery, and untold damage the thought or the utterance of race can do.

VI. Conclusion

Let me close this narrative with the following remarks. Congratulations, Washburn Law School. People of color have contributed to your history. May you have a long institutional life; and as a war-weary old man of sixty years might say on the occasion—may your accomplishments be noteworthy, your economic path both promising and straight, your name cheered everywhere, and your graduates treated with respect.

116. *See id.* at 24-30.
117. *See* Calmore, *supra* note 6.
118. Lasso, *supra* note 4; Moore & Pierce, *supra* note 3; Ramirez, *supra* note 4.
119. Khan, *supra* note 2.