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*Supreme Court of New Jersey*

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# FROM DISCOURSE TO STRUGGLE: A NEW DIRECTION IN CRITICAL RACE THEORY

Megan K. Whyte\*

In 2003, Richard Delgado ignited a firestorm when he published a controversial book review<sup>1</sup> critiquing the current direction of critical race theory. He charged that critical race theory has moved from its realist beginnings—tackling issues such as interest convergence, the Supreme Court’s role in legitimizing racial discrimination, and the forsaking of judicial remedies in lieu of street marches and demonstrations—to an idealist approach—focusing on discourse and theory “at the expense of power, history, and similar material determinants of minority-group fortunes.”<sup>2</sup> Delgado called for critical race theorists to “consider that race is not merely a matter for abstract analysis, but for struggle,”<sup>3</sup> and further suggested a number of avenues for critical race theorists to explore the material components of race, one of which was a more careful examination of the relationship between race and class.<sup>4</sup>

Some scholars hotly dispute Delgado’s contention that today’s critical race theorists ignore material determinants of civil rights progress.<sup>5</sup> Many were already considering the relationship between race, class, and power—for example, developing strategies to build multiracial coalitions with the potential to transform institutions that do not work for all members of society.<sup>6</sup> Others have responded to Delgado’s challenge and begun reexamining the relationship between race and class beyond intersectionality.<sup>7</sup> This new scholarly direction reflects critical race theory’s progressive

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\* Law Clerk to Justice John E. Wallace, Jr., Supreme Court of New Jersey; J.D., University of Michigan Law School; A.B., Harvard College. I would like to thank everyone involved in planning this symposium, especially Jacquelyn Oña Cascarano and Beth Blackwood, Symposium Co-Coordinator; Maureen Bishop, Business Manager; Kavitha Babu, Volume 9 Symposium Coordinator; and Rebecca Giltner, Volume 9 Editor-in-Chief. The *Journal* is indebted to Professor Daria Roithmayr for providing the inspiration for the symposium and for encouraging many of the speakers to attend.

1. Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (reviewing FRANCISCO VALDES, JEROME MCCRYSTAL CULP, & ANGELA P. HARRIS, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)).

2. *Id.* at 122–23.

3. *Id.* at 151.

4. *Id.*

5. See, e.g., Kevin R. Johnson, *Roll Over Beethoven: “A Critical Examination of Recent Writing About Race”*, 82 TEX. L. REV. 717 (2004).

6. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003).

7. Critical race theorists have often used intersectionality analysis to account for multiple grounds of identity. See, e.g., Kimberlé Williams Crenshaw, *Mapping the Margins:*

beginnings and underscores its commitment to the comprehensive examination of race and the law.

To commemorate the *Michigan Journal of Race & Law*'s tenth anniversary, we hosted a symposium in February 2005 that marked this shift within critical race theory. Entitled "Going Back to Class?: The Reemergence of Class in Critical Race Theory," the symposium brought together speakers, students, *Journal* alumni, and members of the community to begin a fuller examination of the relationship between race and class.

To link this symposium with our history, Guy-Uriel E. Charles, our first Editor-in-Chief, delivered an address that described the founding of the *Journal* and discussed the continued importance and viability of specialty journals. Charles noted that the *Michigan Journal of Race & Law* was established because a group of students of color at the University of Michigan Law School felt marginalized and responded to that oppression as any good law students would—by starting a law journal. The founders were people united across race and class lines for a common cause, and they won a hard-fought struggle to create this publication and solidify its place in the Law School. Charles encouraged the audience to be fearless in pushing boundaries, changing guidelines, and reshaping institutions to move the law forward.

Richard Delgado delivered the symposium's opening keynote address, a continued appeal for critical race theorists to engage materialist concerns in their scholarship and teaching. By interspersing rap with the formal language of traditional legal scholarship, the form of Delgado's Essay<sup>8</sup> embodies his call to bring academic discourse more in line with the lives of the people who should be at the center of critical race theory. He urges critical race theorists to employ a realist perspective that considers material outcomes in people's lives, and he encourages scholars to experiment in their own work with more popular forms of communication. Delgado's Essay discusses the history of the movement and challenges critical race theorists to fight the power. Most importantly, he offers concrete suggestions for how critical race theorists can do so: by making their teaching "hotter"; by publishing activist scholarship that considers today's potentials for interest convergence; by pushing the legal profession to allow critique, not just regimentation of thought; and by considering other sources of ideas and theories, such as post-colonial literature.

The first panel, entitled "New Directions: The Future of Critical Race Theory," debated whether critical race theory has overlooked im-

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*Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Rather than viewing race and class as intersecting aspects of identity, this new movement envisions race and class as dynamic institutionalized processes that produce relations of racial and material domination between groups of people.

8. Richard Delgado, *Si Se Puede, but Who Gets the Gravy?*, 11 MICH. J. RACE & L. 9 (2005).

portant issues and proposed topics for further exploration. Emily Houh combined contract law with critical race theory to propose a common law antidiscrimination claim that is grounded doctrinally in the contractually implied obligation of good faith and that has the potential for effecting a public law norm of equality.<sup>9</sup> Kevin Johnson explained that integrating class into critical race theory is an issue not only for scholars but also for activists. Using examples from immigration law, he discussed the centrality of class and economics to racial subordination. Rebecca Tsosie considered the importance of both the materialist and the idealist perspectives for developing a holistic vision of how critical race theory may work toward racial justice and challenge the externally-imposed mechanisms that govern people's lives.

Rebecca Tsosie's Essay<sup>10</sup> examines the potential for critical race theory to compel transformative thought within our jurisprudence. She engages the notion of justice and discusses its relationship to the law as well as to racial healing. After considering the unique position of Native Hawaiians, Tsosie analyzes the debate over political rights in Hawaii to illustrate the complexities and promise of transformational justice. She envisions alternative possibilities for achieving justice and suggests ways the materialist and idealist perspectives within critical race theory can be bridged to bring about racial healing.

The second panel, entitled "Beyond the Law: Interdisciplinary Perspectives on Race and Class," brought together a political scientist, a philosopher, and a sociologist to discuss current research in their disciplines on the interplay between race and class and to offer new tools for critical race theorists to use when examining race, class, and the law. Jennifer Hochschild explained that political scientists recognize that both ideas and material outcomes matter, and that they consider race as a consequence of material concerns. Charles Mills debated whether Marxism should be revived and forced to take race seriously, and whether a distinctively Marxist critical race theory is even possible. E. San Juan, Jr., described class struggle, explaining that academic discourse about race has shifted discourse about class from the Marxist concept of struggle and antagonism to the neo-Weberian notions of status and lifestyle.

Jennifer Hochschild's Essay<sup>11</sup> notes that while critical race theorists do not fully engage the importance of material consequences, most political scientists do not fully consider the importance of ideas. Hochschild

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9. See Emily M.S. Houh, *Critical Race Realism: Re-Claiming the Antidiscrimination Principle Through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. 455 (2005).

10. Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005).

11. Jennifer L. Hochschild, *Race and Class in Political Science*, 11 MICH. J. RACE & L. 99 (2005).

remarks that in her own book, *Facing Up to the American Dream*,<sup>12</sup> “material conditions and political structures of hierarchy set the terms of the research . . . but attitudes and beliefs comprised the content.”<sup>13</sup> Like Delgado, she recognizes that neither ideologies nor structures can be fully analyzed separately or without examining the ways materialist and idealist perspectives intersect.

E. San Juan, Jr.’s, Essay<sup>14</sup> explains that present modes of discourse about race and class no longer suffice due to accelerated domestic and international conflicts. San Juan notes the importance of a materialist critique and contends that racism can only be understood when situated within the context of the capitalist division of labor and its reproduction of inequality. He recognizes that the extraction of surplus labor in a capitalist system always involves conflict and struggle. Finally, San Juan describes the situation of Filipina domestics and calls for future research to explore oppression of women migrant workers, particularly women of color and those from the Third World. He suggests that critical race theory should “begin with the concept of class as an antagonistic relation between labor and capital, and then proceed to analyze how the determinant of ‘race’ is played out historically in the class-conflicted structure of capitalism and its political/ideological processes of class rule.”<sup>15</sup>

The third panel, entitled “Redefining the Movement: Class in Critical Race Theory,” reconceptualized the relationship between race and class beyond the model of intersectionality. These panelists envisioned race and class as dynamic institutionalized processes that produce relations of racial and material domination between groups of people. Paul Butler discussed what students persuaded by critical race theory should do after law school, explaining that Black students who want to help the Black community should not become prosecutors because their presence in the courtroom provides a cloak of legitimacy to the criminal justice system. He also noted that neither litigation nor jobs in corporate law firms will crush White supremacy or bring about a radical redistribution of wealth. Noting that the legal form itself contains everything against which radicals rage, Anthony Farley described accumulation and enclosure and charged that by trying to work within the strictures of the legal system, we merely attempt to reform slavery while we help to build the master’s house.

Also during the third panel, Daria Roithmayr situated this reemergence of class within the history of critical race theory and explained that an identity-based analysis of race and class as intersecting ideas and identi-

12. JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION* (1996).

13. Hochschild, *supra* note 11, at 110.

14. E. San Juan, Jr., *From Race to Class Struggle: Re-Problematising Critical Race Theory*, 11 MICH J. RACE & L. 75 (2005).

15. *Id.* at 97.

ties undertheorizes the relationships between race and class, racism and material exploitation. She described the lock-in model of racial inequality<sup>16</sup>—a model of persistent monopoly that explains the institutional relationships between racism and material exploitation—and noted that we must move toward dismantling those institutional relationships, embedded in capitalism and the rule of law, that reproduce racial inequality. Chantal Thomas then applied critical race theory tools to international law, expanding the discussion into the global context and considering issues of global development and trafficking in persons.

Anthony Farley's Essay<sup>17</sup> contends that the rule of law is the endless unfolding of the primal scene of accumulation. By praying for legal relief rather than dismantling the system, the slave chooses enslavement over freedom. Farley describes ownership as violence and explains that property rights are the means of protecting the master class until everything and everyone comes to be owned. He notes the original accumulation is represented as freedom and exploitative relationships are treated as free exchange in the marketplace, but the rule of law is really only the disguise for the rule of one group over another, White-over-Black.

The fourth panel, entitled "Incorporating Class: Race, Class, and Intersectionality," engaged different methods for analyzing the relationship between race, class, and other grounds of identity. Angela Onwuachi-Willig compared race, class, sex, and status as a former slave, with race, class, sex, and welfare motherhood, and examined how the government has constructed poverty as a private rather than a public problem. She linked the government's proposition of marriage as a cure for poverty with its history of using marriage as a tool for civilizing unruly outsiders.<sup>18</sup> Angela Harris argued that the idea of political economy in the law needs to be reinvented where law and economics meets critical theory; she explained the political economy approach to the law and discussed why it is useful for addressing issues of race and class. Richard Banks contended that marriage can shift hierarchies and considered how increasing the marriage rate among Black women in the United States might positively affect those women and the Black community as a whole. The debate among these panelists regarding the interplay between race, class, and marriage proved particularly spirited.

The Essay by Richard Banks and Su Jin Gatlin<sup>19</sup> starts with the assumption that marriage provides benefits both to the individuals involved in the marriage and to their children and notes that African Americans at

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16. See Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000).

17. Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51 (2005).

18. See Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. (forthcoming 2005).

19. R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115 (2005).

all economic levels are less likely than other groups to marry. A basic premise of the Essay is that the racial gap in marriage is a mechanism of further inequality that translates into racial gaps in other areas, such as health, income, wealth, incarceration, and education. Banks and Gatlin consider the sexual bargaining model and note that African American women are less likely than other groups to marry interracially and more likely to marry a spouse with a lower socioeconomic or educational status. After highlighting the potential effects of low marriage rates, they suggest the promotion of policies that diminish differences in outcomes based on marriage.

Gerald Torres delivered the closing keynote address. He noted that although race and class are analytically separable, they are so empirically and materially linked that one cannot fully articulate a critique of race relations without considering class. He also explained that race can be a diagnostic for analyzing how institutions fail groups of people; when Black people's social positions show an institution is not working for them, most likely that institution is also not working for other people. Determining who those other people are and building coalitions with them can create a politics of resistance, as exemplified by the uniting of poor rural Whites with Mexican-American and Black Texans to save the Texas Ten Percent Plan. Because of the Plan, non-wealthy students of all races, even those from under-resourced high schools, now attend the University of Texas. Torres suggested that in thinking about race, one should consider vertical and horizontal relations to construct a strategy for confronting and engaging power and characterizing race. He then critiqued the idea of marginalization through a discussion of critical race theory discourse regarding the Black-White binary.

Two major tensions within critical race theory and progressive thought pervaded discussions during the symposium. First, what balance should critical race theorists strike between the materialist and idealist perspectives? Has critical race theory strayed too far into discourse analysis or do its proponents still work at the level of activists and everyday people? Can idealist and realist concerns be considered independently, or are they inherently intertwined? And can race ever be examined without at least implicitly recognizing the importance of class?

Second, will the movement accomplish more by working within the system or by using its power to destroy that system and develop a new and inclusive system in its place? Will we achieve progress and gain greater legitimacy by using the established procedures of the legal system to effect change? Or does the availability of legal relief merely cloak a system that perpetuates and further entrenches inequality? And if dismantling the system and starting over is the only way to achieve meaningful equality, to what extent is that possible and practical?

Since hosting its inaugural symposium and publishing its first volume during the 1995–1996 academic year, the *Michigan Journal of Race &*

*Law* has provided a forum for ideas that have been excluded from mainstream legal discourse. It has given a voice to scholars who recognize the centrality of race in the law and has helped to bring critical race theory to the forefront of legal thought and debate. We thank the *Journal* founders and alumni for creating this space, both at the University of Michigan and in the realm of legal scholarship. It is our hope that the articles published in this symposium issue signal a larger shift in the direction of critical race theory that will assist scholars, students, and activists in their quests to achieve justice.