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CULTURAL STUDIES, CRITICAL RACE THEORY AND SOME REFLECTIONS ON METHODS

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FOR scholars, *method* is paramount. Outside of choosing the subject of inquiry, how one asks the question and pursues the answer are perhaps the two greatest choices to be made. Before I was a legal academic, I was a student and scholar of cultural studies. Because I was trained by professors educated in the Birmingham School,¹ the tastes, politics, challenges and products of communities of peoples, defined by class, race, nationality, region and the like, provided the methodological roughage for my intellectual development. And when I, through my experience as a law student of color and later as a legal academic, was introduced to Critical Race Theory and LatCrit, I immediately began to envision new possibilities for my methodology.² This methodology was the examination of race in the law that understood both (race and law) as part of the fabric of culture, subject to the kinds of cultural inquiry pursued in the cultural studies method.

In this piece I will reflect upon the usefulness of cultural studies to studies of race and the law, and then make several methodological arguments about how to approach such work. The parallels between the movements, cultural studies, Critical Race Theory and LatCrit, are suggestive of their appropriateness for interdisciplinary sharing. All emerged as scholarly movements out of political movement. These scholarly movements encourage scholars to reflect upon the significance of their work with respect to the material conditions of people's lives. These movements are

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1. The Birmingham School is the designation given to British Cultural Studies, so named for its foundation at the University of Birmingham (UK) Centre for Cultural Studies. The Birmingham School has made significant to major contributions in a wide range of academic fields including: literary theory, historical theory, anthropology and ethnography, popular culture studies, media studies, women's studies, area studies and ethnic studies. The school, with a Marxian foundation, responded to the social movements of the 1960s and developed a set of critical approaches for the interpretation of cultural artifacts.

2. There are numerous legal scholars doing interdisciplinary work in law and culture, many of whom also do work that falls within or is sympathetic to Critical Race Theory. So while I do not mean to suggest that I am doing something new in the field of Critical Race Theory, I am arguing for a more central role for cultural studies work within the movement.

penetrating, concerned with critiquing the ideological underpinnings of injustice and marginalization, and interpreting the relationship between belief and how people live.

In cultural studies, interpreting the relationship between belief and the material conditions of people's lives is best exemplified by the theoretical canonization of Antonio Gramsci³ and his notion of hegemony.⁴ It is in fact through Gramsci that we find one of the most powerful early unions of cultural studies and law. Further, in Eugene Genovese's classic work, *Roll, Jordan, Roll*,⁵ Chapter 22: The Hegemonic Function of the Law, Genovese is one of the earliest scholars to bring Gramsci to bear on United States race and culture. Genovese exposes how race and racism were codified in ante-bellum slave law, and how racism dizzily echoed back and forth between law and the popular culture. The ideology crafted by the planter class evolved into a set of hegemonic structures (law, family culture, religious institutions) which reinforced the belief in black and slave inferiority. For me, as an undergraduate, reading this chapter opened my eyes to the application of cultural studies to law for the first time, something that would become a professional fixation. My dedication to such issues is demonstrated in my dissertation, *Dusky Justice: Race in U.S. Law and Literature 1878-1914*, and in my first book, *Prophets of the Hood: Politics and Poetics in Hip Hop*, that includes a chapter on the Glorious Outlaw, and on to the present moment with articles and a forthcoming book on metanarratives of race in law and culture. Law, as I have come to understand it, is not simply a set of rules through which power is exercised, but a cultural and epistemological institution.

But let us begin with the cultural studies method. In cultural studies, the world is read as a series of texts. Every piece of cultural production, a song, a film, a ditty, a style of dress, is a text. We read these texts, not simply alone, but in context, in relationship with other texts. We also read them intertextually, that is to say, we are concerned with how texts "speak" to each other. What is the cultural conversation being had between and within different sorts of texts?

Amongst the myriad subjects of inquiry for cultural studies scholars, there is law. Law is but one, particularly powerful, arm of cultural produc-

3. Antonio Gramsci (1891-1937) was a leading Italian Marxist scholar and activist. He was an intellectual, journalist and theorist who died in one of Mussolini's prisons. His most famous work, *Prison Notebooks*, was written during his imprisonment. ANTONIO GRAMSCI, *PRISON NOTEBOOKS* (Valentino Gerratana ed., 1975).

4. Gramsci's notion of hegemony holds that dominant groups in a society maintain their dominance by the persuasion and consent of subordinated groups. This consent is garnered through the persuasion of nonmembers of the dominant class into the moral, political and cultural values of the ruling class. These ideas may dominate as powerfully as physical force and operate as a kind of normative cultural universe in which the dominant ideology is practiced and taught.

5. See EUGENE GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 25-49 (Vintage Books 1976) (1974) (discussing race and racism in laws created by slaveholders).

tion and life. For legal scholars, to adopt the cultural studies method is almost to step outside one's field to see it with fresh eyes, and in broader context. The Working Group on Law, Culture and the Humanities, a collective of academics, has fostered such an understanding of how law operates. In this vein, one way we legal academics can continue to use textual analysis and social theory, effectively, is to read social practices and forms of consumption (television, church, film, games) as they relate to the structural power of law, and the underlying ideologies of constitutional and private law.

Importantly, in reading social practices we must not simply read them anecdotally, but systematically. This is necessary in order to understand what values and messages have been transmitted through these social practices and forms of consumption and how these impact the ideology present in law (opinions and legislation), or shaped by it. Reading social practices in this fashion marks a departure from the legal academic proclivity in recent years of adopting literary theory's close reading practice, in favor of readings of broad practice. I am not advocating an absolute departure from close reading per se, but rather relegating close reading to spaces in which a legitimate case can be made, on a scholarly level, for generality, or evidence of systemic truth, at least with respect to making broad claims about race.⁶

For example, one of my interests is in television talk shows. In particular, I am fascinated by the "paternity test" shows. On these shows, a woman, often young, poor and of color, will invite men on the program and have these men take DNA tests in order to determine whether one of these men is the father to the woman's children. At times, there are women who test eight or more men, without ever finding "the father." My interpretation of the cultural work of these shows is that, as a discourse about the sexuality of young women of color, it argues that their plight as impoverished single women is justified because "women like that" are licentious and promiscuous.

Moreover, the shows argue that women in such circumstances are "bad mothers," in a way that reinforces the racist ideas of maternal deficit we see within the family law system.⁷ I only come to these conclusions,

6. Of course, it is often useful to do close readings of an individual case that may have racial implications. However, in order to abstract from the individual case an observation about how race works or manifests, demonstration of some broader evidence may be required.

7. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (discussing race, gender and law); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*] (same); DOROTHY ROBERTS ET AL., *WOMAN AND THE LAW* (2004) (same); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991) (same); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (same); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996) (book review) (same).

however, through repeated watching of shows with this format within the context of a larger cultural framework of media and law. The individual show is no more than a personal saga, interesting, heartbreaking, compelling. But, it is with repeated watching, alongside the grotesquely painful parade of neglected brown and black children on the evening news, that the narrative emerges (widespread promiscuity, insanity, irresponsibility). And, as the show format is copycatted by more and more talk shows competing for sensational popularity, we learn that this show topic, and the picture of young women of color it shows, attracts vast numbers of people. It is in the systematic observation, in the cultural fabric, that we see how the shows affirm and recodify stereotypes already existing in American culture. Likewise, it is through the kind of empirical work done by Dorothy Roberts that we understand the racial bias as evidenced in the family law system, which is rooted in the same ideological framework as the paternity test shows.⁸

We must be cognizant of judiciously balancing the qualitative and the quantitative. The empirical process of collecting all cases on a given topic, which includes knowing what happens and with what frequency, whether it be before a given judge, in a state or in the nation, in a short span or over a long one, is important. Such information is also inextricably linked to the qualitative processes of interpretation and analyses of these materials.

But the project of race, law and cultural studies is more than empirical, although the empirical is often the most immediately dramatic. If we are to conduct a kind of structural analysis in which we attempt to understand patterns present in law and culture that are part of a web, which communicates values and ideas, then we need theory too. The norms of law, articulated in our jurisprudence and our economic structure, must be revealed to see how race operates and cooperates with them. Social theorists whose work animates cultural studies also provide useful means of interrogating norms that provide bases for the structure of power.

And so, we can turn to Raymond Williams⁹ to assist us in understanding how culture is a site of contestation as well as power. We can read Antonio Gramsci to consider how the lawyer may be an intellectual, but also

8. See generally ROBERTS, SHATTERED BONDS, *supra* note 7.

9. Raymond Williams (1921-1988)—critic, theorist, historian and journalist—“was an early pioneer” in, and prime consolidator of, the field of cultural studies. See *Definitions & Discussions of Culture*, available at <http://www.wsu.edu:8001/vcwsu/commons/topics/culture/culture-definitions/raymond-williams.html> (last visited Feb. 18, 2005). Williams is said to have generated the first important shift into a new way of thinking about the symbolic dimensions of our lives. See *id.* He argued that culture was not simply the world of arts, “high culture,” but also the everyday. He deconstructed the boundaries between literature, culture and politics and used the concept of culture to critique mechanization. See RAYMOND WILLIAMS, *CULTURE AND SOCIETY* (1958).

how to think about the intellectual work of public lawyering. Stuart Hall¹⁰ and Charles Mills¹¹ may be used to expose the operation of white supremacy within democratic theory through police power. Paulo Friere¹² challenges the dominant epistemology that forms our ideas about education and its policies and disservices oppressed communities. We turn to John Dewey¹³ for thinking about political engagement, public life and democracy. We refer to Ferdinand Di Saussure¹⁴ and Noam Chomsky¹⁵ for the ideology embedded in language as minute as the simple phrase or individual word. Lastly, Pierre Bourdieu¹⁶ (without whom any conversa-

10. Stuart Hall, leader of the Birmingham School from the mid-1960s, brought questions of race and ethnicity to cultural studies, and further theorized how language use operates within institutional structures, politics and economics. He also explored the role of media in the maintenance of structures of power. A collection of Hall's essays and essays on Hall can be found in *STUART HALL, CRITICAL DIALOGUES IN CULTURAL STUDIES* (Kuan-Hsing Chen & David Morley eds., 1996).

11. Charles Mills, while a philosopher rather than a cultural studies scholar, has written work that resonates with the field, blending philosophy and race theory. See *CHARLES W. MILLS, BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* (1998); *CHARLES W. MILLS, FROM CLASS TO RACE: ESSAYS IN WHITE MARXISM AND BLACK RADICALISM* (2003); *CHARLES W. MILLS, THE RACIAL CONTRACT* (1997).

12. Brazilian Paulo Friere (1921-1997) was perhaps the most influential thinker about education in the late twentieth century. He has been extremely influential on critical pedagogues with his centralization of the cause of the oppressed as his focus in dialogic process. See *PAULO FRIERE PEDAGOGY OF THE OPPRESSED* (30th ed. 2000).

13. For a brief history on John Dewey, see the Technology Studies in Education website, <http://lrs.ed.uiuc.edu/students/janicke/Dewey.html> (last visited Feb. 18, 2005).

John Dewey (1859-1952) was an American philosopher and educator whose writings and teachings have had profound influences on education in the United States. Dewey's philosophy of education, instrumentalism (also called pragmatism), focused on [learning via practice and experience rather than memorization and repetition].

Id.

14. Swiss linguist Ferdinand de Saussure (1857-1913) was the founder of modern linguistics. His work described the structure of language rather than the history of particular languages and forms. The method of structuralism in literary theory is rooted in Saussure's work as well as the strategies of poststructuralism. See *RONALD SCHLEIFER, FERDINAND DE SAUSSURE, THE JOHNS HOPKINS GUIDE TO LITERARY THEORY & CRITICISM* (Michael Groden & Martin Kreiswirth eds., 1997).

15. Noam Chomsky is the most celebrated contemporary linguist who has combined a career of brilliant structural analyses of language with a political critique of the social power accorded to languages of dominant nations. His role as a leftist political critic is more widely known than his linguistics scholarship; however, they are deeply intertwined. *NOAM CHOMSKY, THE CHOMSKY READER* (1987).

16. Pierre-Félix Bourdieu (1930-2002) was a renowned French sociologist. His empirically based work was a form of cultural sociology. He importantly argued that taste and preferences were deeply aligned with social position and operate as a kind of cultural capital upon which a person can trade for social access. See *PIERRE BOURDIEU DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (1987); *DAVID SWARTZ, CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* (1998).

tion on affirmative action¹⁷ should be considered incomplete) contributes an understanding of the power of normativity and the status quo for replicating the status quo.

When we read the abundant texts before us, it must be with an awareness of how we are measuring the social significance of what we read. The popular is what we live, and mass culture is what we are inundated with. And so something like a Maury Povich show may have as much, if not more, usefulness for race scholars as literature. In the life of the intellectual, a great pitfall is to discredit the pedestrian, the mundane and the pulse of life. The quotidian and “low brow” are instructive, particularly when we are making arguments about how people live. So, we must put aside arrogance with respect to the texts we consider. When we read them, we ask not simply what does it say, but to whom and to what end? And, moreover, is what is heard the same as what has been said?

Even the oft discredited, postmodern moment in cultural studies offers something profound to us, as it is concerned with audience. When we, legal academics and lawyers, think of how law is produced, we often discuss judicial decision-making or the roles of practitioners (their texts), or plaintiffs/defendants (their stories). However, we often fail to adequately consider jurors, or even more so, the complicity of the public with the actions of courts, the consent of the governed and the discontent of the governed. We must critically engage the practices of the audience to law, the citizens who live under it, and see how their ideological assumptions serve to further marginalize people of color. Furthermore, we must discern how power is dispersed in such a way as to make it the case that that audience advocating our (read “people of color”) oppression is sometimes us. Incidentally, that comment is said in homage to Michel Foucault,¹⁸ who understood the disparate nature of power. It is a particularly important recognition now because it is abundantly apparent to those of us who study race in the law that we have a desperate need to complicate how racial discrimination is determined to exist (rarely intraracially, rarely accepted when there is a counter example of another person of color who is not being victimized).¹⁹

Simply put, this means that we are called to see how forms of knowing, ideology and dominant epistemologies about race are spread far broader and deeper than negative intent towards someone who looks different from you. Charles Lawrence’s landmark article, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*,²⁰ heralded this move-

17. See generally Imani Perry, *Holistic Integration: An Anniversary Reflection on the Goals of Brown v. Board of Education*, in LEGACIES OF BROWN: MULTIRACIAL EQUITY IN AMERICAN EDUCATION (Dorinda Carter et al. eds., 2004).

18. See MICHEL FOUCAULT, THE FOUCAULT READER (1984).

19. See the work of Rutgers-Newark law professor Tanya K. Hernandez for a brilliant discussion of some of these issues.

20. See, e.g., Tanya K. Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of AntiDiscrimination Law, A U.S. Latin America Comparison*, 87 COR-

ment for us. We must further map the patterns and structures of unconscious racism by, amongst other things, reading cultural texts of various sorts alongside each other. For example, we should analyze film next to cases, family courts next to talk shows or music next to senate hearings.

Admittedly, I have made broadly drawn calls to the kind of work I believe should be pursued in race, law and cultural studies. Delving more specifically is perhaps best left to the actual particular inquiries. Painstakingly, I attempt to do work that meets my own methodological calls. But now, I want to very briefly turn to several suggestions about how we actually compose such interdisciplinary work.

Despite its reputation, good interdisciplinary work has rigorous practical demands. It must maintain a structure through which coherent observations can be made out of widely divergent materials. There are at least several ways of organizing such projects I can think of, the most compelling being the delineation of interdisciplinary structural analogies, in which ideological consistencies across fields of inquiry are described, or are the lens through which sites or subjects of contestation between texts and contexts can be highlighted. If one is able to make a strong case for intertextuality, that it somehow illuminates or explains in a unique way both qualitative and quantitative discoveries, the work becomes that much more compelling. For example, we might gather materials on race and rates of incarceration, media depictions of people of color and police surveillance within communities of color. But then, to produce work that is useful, we have to attempt to ask and answer whether there is a thread that connects these bodies of information. Is there a theory that makes them make sense together? Should there be a bridge text? Do we need to look at music or language to understand how the community under surveillance responds and makes sense of it?

We have to make decisions about the apparatus of these race based practices, and by that I do not mean the cop doing the cuffing (although perhaps I could). Instead, I ask where do we lay our understanding of how this all works? This is a theoretical question with enormous practical implications.

And so, these compositional questions are on the one hand aesthetic (we want clean, coherent work) and on the other hand quite meaningful (we want our work to be useful). Cultural studies, Critical Race Theory and LatCrit have all been movements that embrace a commitment to social transformation. In cultural studies, the counter-hegemonic voice, the narratives of oppressed people and identity as a site of resistance were critical means by which social transformation was imagined. The very idea of Critical Race Theory and LatCrit as movements within legal academia is counter-hegemonic. I can hear the collective sighing of the nonbelievers. They say, "a bunch of law professors as oppressed people . . . tell it to

NELL L. REV. 1093 (2002); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

someone who will buy it." But of course, we bring voices from the margins, from outlaw spaces, we are surveyed in our profession, we are marked physically, linguistically, ideologically, never normative, never able to disappear our bodies behind our objective legal minds even if we were to try to do something so bizarre.²¹ Critical Race Theory and LatCrit have a counter-hegemonic sensibility and there is no better evidence to be found than the hostility with which our voices have too often been met in mainstream legal scholarship.

Critical race theorists are often charged with being less than objective, or theoretically sound, because we are too crudely political. But I want to end by taking the critique of the political seriously, as a methodological challenge instead of a form of personal attack because it is a similar challenge to that which has been faced by cultural studies and cultural theorists. I believe an essential way of responding to this challenge is to devote energy to not simply cultural analyses of law, but cultural theories of law with an ethical underpinning.

Politics are of course central to Critical Race Theory, LatCrit and many other important academic movements, and with them the idea that we argue against normative standards and ideologies that serve to marginalize and oppress peoples of color. A good deal of important work is done in exposing the norms that serve to marginalize us (notions of merit, color blindness without considering privilege, wealth versus income, etc.). But I would like to imagine a movement in emphasis from politics to ethics, or to say metaphorically, to building the dancehall as well as doing a dance.

The hubris of creating theory out of the vernacular of political life is what I am talking about. John Locke²² did it, as did Henry Louis Gates, Jr.²³ What if we built an ethical framework out of the political knowledge and experience thus far garnered in counter-hegemonic movements, a framework to guide our scholarly work and our political practice?

The move from emphasizing the political to emphasizing the ethical is in itself something of a political move. It seeks to do something which is on some level always a failing proposition, to create some objective standards about what is good and right. Moreover, on some level the move to the ethical is inconsistent with the critical posture we have taken that sees usefulness in the critical space itself, the marginal, threshold, trickster exist-

21. See Patricia L. Williams, *On Being the Object of Property*, 1 SIGNS: J. WOMEN IN CULTURE & SOC'Y 14 (1988).

22. John Locke (1632-1704) was a British philosopher. For Locke's theory of the origins of property law in labor and desert, see JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT*, Chapter 5 (1690).

23. Henry Louis Gates, Jr. is the W.E.B. Du Bois Professor of the Humanities, Chair of African and African American Studies and Director of the W.E.B. Du Bois Institute for African and African American Research at Harvard University. See HENRY LOUIS GATES JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* (1988) (1989 winner of American Book Award for his innovative African American vernacular literary theory).

tence. But ethics are essential because they allow for the creation of a community of sentiment and ideas, of values, that is not fundamentally contingent. So, in this moment, perhaps we need a split. On the one hand, we should continue modifying, correcting, revising and critiquing the status quo. On the other hand, we need to continue to devote energy to the task of articulating ethical norms around which we can extend a theory and praxis. To the extent that we do the latter, it provides a means of using our work across multiple disciplinary and even national boundaries. We need a language of thought with multiple valences.

And the right hand should monitor the left (or better yet the left should monitor the right). Even as the ethical norms are created, they should be subject to the practices of critical social theory, a self-reflexive critique, as well as maintain a critical stance towards the social reality they evaluate. And so, a language of self critique must be provided within this ethical framework. It will be important for the critique of the institutions, practices and ideologies that are constitutive of the reality it comments upon, as well as the epistemological framework in which the ethical theory has evolved.

So I conclude with a call to practice on one level, using the methods of cultural studies (text, context, theories) to examine law and make arguments that speak to an audience that is of the world of law. On another level, I am making a call for more theory, a theory that has ethical norms as a branch of Critical Race Theory/LatCrit, which intellectually structures our political beliefs in racial justice. Those beliefs do have some normative dimension. It is only logical, and it is good, for us to follow their force.

