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# Foreword Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship

Clark Freshman

*UC Hastings College of the Law*, [freshman@uchastings.edu](mailto:freshman@uchastings.edu)

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# BOOK REVIEW SYMPOSIUM

## Foreword: Revisioning the Constellations of Critical Race Theory, Law and Economics, and Empirical Scholarship

Clark Freshman\*

PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION. By Ian Ayres.\*\* Chicago: University of Chicago Press, 2001. 433 pp. + xi.

CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY. Edited by Francisco Valdes,† Jerome McCristal Culp‡ & Angela P. Harris.§ Philadelphia: Temple University Press, 2002. 414 pp. + xxi.

The individual reviews that follow speak largely for themselves, but the concept of this Symposium may seem to demand some brief explanation. Partly the explanation that follows explains how the Symposium evolved, and partly it offers one perspective on some lessons from the Symposium.

It's hard to say exactly where the idea for pairing the latest critical race theory (CRT) collection and Ian Ayres's collection of empirical studies of inequality first began. In some ways, it springs from a simple feeling and intuition: These are good books by good people about an important topic, so what might connect them? As I posed this question to many fellow scholars and teachers, new motivations arose as well. Many people were rather shocked

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\* Professor of Law, University of Miami School of Law. I am grateful to Mitu Gulati and Devon Carbado for their helpful comments and questions—many of which I have only been able to answer partially. I am also especially grateful to the *Stanford Law Review* for its enthusiastic embrace of this Symposium and for precise and thoughtful editing. Many thanks to Barbara Cuadra and Sue Ann Campbell, for lightning-fast, cheerful, and resourceful help in the library; Ari Tenzer and Enza Boderone for thoughtful and reliable research assistance; and Beth Hanson and Felicia Martin, for administrative assistance—and very welcome encouragement—of every sort.

\*\* Townsend Professor, Yale Law School.

† Professor of Law, University of Miami School of Law.

‡ Professor of Law, Duke University School of Law.

§ Professor of Law, University of California-Berkeley School of Law.

that one could even try to pair the two works. Some could see one book only as law and economics, the other as CRT, and the two movements as somehow inherently and profoundly antagonistic. Given the tenor of published criticism of both, this reaction is easy enough to understand.

It's also easy enough to understand given the experiences I have had since I first began law school. As a student, my small section at Stanford had as professors both Patricia Williams, often thought of as one of the founders of CRT, and Mark Kelman, who often applied law and economics principles with a critical legal studies twist. Our section soon seemed as divided as Northern and Southern California: Many of us loved one, and had far less fuzzy feelings about the other. And yet some of us, including myself, found ourselves fascinated by both—much as some of us grew to love all of California.

So, too, since I left law school, I came to better know how the other contributors to this Symposium also found themselves drawn to practices and works that others habitually saw as different, and often antagonistic, schools of thought. In the case of Kevin Haynes, that has meant many years of transactional lawyering practice, years of graduate training in American literature and literary theory, and, when we were both at Stanford, editing the huge Stanford symposium on women of color and the law. For Rachel Moran, this has meant applying law and economics in her teaching, exploring her experiences as one of the only women of color at Boalt Law School (and the University of California at Berkeley generally), and enriching her scholarship with insights from psychology, economics, and literature.<sup>1</sup> For Mary Anne Case, among many other things, this has meant showing the sometimes ironic links between Richard Epstein, often invoked as an exemplar of one brand of law and economics, and feminism.

The venues for the Symposium reflected quite deliberate choices. The live version of the Symposium took place at the annual Law and Society meeting. Partly this reflects an appreciation of the good aspects of that meeting and association: It draws together those interested in law and society, be they from law schools or other schools, be they trained in law or in one of many other disciplines. And partly the choice reflected an idea of a level playing field. Both CRT and law and economics have their own regular home bases and meetings. Law and society was a kind of neutral ground. It was also an event

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1. A confession: I also thought of Rachel and Kevin because they are friends with whom I'd worked before—I was a member of the *Stanford Law Review* when Kevin was Managing Editor, and I was Rachel Moran's research assistant when she visited at Stanford and was doing early research on what became a book on interracial intimacy. This seems like something of a confession because my own contribution to this Symposium, as well as my work elsewhere, suggests that our automatic preferences for those we like may tend towards those like ourselves, thereby disadvantaging many various outsiders. I take some comfort from the knowledge that the three of us represent three different ethnicities (white, Latina, and African American), different sexual orientations, and different religions. Also, at least one of us might qualify as disabled, and at least one of us grew up other than in the middle class.

that would find in the same meeting people who might rarely go to the same meetings. Finally, it also represented a way to bring law and economics and CRT back to Law and Society when many within Law and Society found both suspicious!

The *Stanford Law Review* seemed like a natural home as well. Where other law reviews often seemed more readily linked to this or that perspective, the *Stanford Law Review* has a history of taking many kinds of scholarship seriously. One past symposium brought together women of color and the law, and many volumes have included both important works associated with CRT and those associated with law and economics.

While the history of putting on this Symposium came to make this look like an exploration in conducive atmospheres, it took some time to figure out what we would find during the exploration. Many of the discoveries remain in the following individual reviews. And partly the reviews, like the books themselves, tell a similar story.

Both the books themselves, and the reviews here, can be seen as constellations in many ways. In many ways constellations have value. They let us see patterns that might seem otherwise undetectable. So, too, they give us some reference point for change—what’s going on near that constellation? We know the schools of our scholars, and we wonder how they evolve. Both books themselves partake of this kind of familiar pattern: the CRT most obviously in the “crossroads” in its title; the Ayres collection more traditionally in its final chapter on new directions in empirical research. Just as astronomers may make much of discovering some new planet or moon in a system, many may find some delight in discovering how each volume speaks of its new contributions to what previously looked like established systems. Some law and economics followers may see new satellites of research in the new methods for testing for discrimination, and many critical scholars of various strands will recognize new attention to sometimes neglected areas of difference (e.g., people with disabilities and Native Americans) and sometimes relatively neglected areas of analysis (like international development).

At the same time, the constellations can be limiting as well. We “see” a constellation, and we forget how some once saw other patterns.<sup>2</sup> It is all too easy to speak of CRT and law and economics or empirical scholarship as if they were neat, natural categories. We may see some patterns so clearly that we do not see differences within. What are the different stars in the big dipper?<sup>3</sup> How are some of those stars like stars in other constellations? It’s easy to forget that many scholars thought of as towering figures of CRT, like

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2. JOSEPH GOLDSTEIN, *INSIGHT MEDITATION: THE PRACTICE OF FREEDOM* 112 (1994) (describing how the concept of the Big Dipper may also be “useful because it helps us to recognize the constellation” but the concept also “separate[s] out those stars from all the rest . . . and we lose sight of the night sky’s wholeness”).

3. *Id.*

Williams, did not use the term to describe themselves, or how even an editor of the volume, Frank Valdes, struggled to deal with the homophobia he felt within CRT.

Constellations may also limit us by their focus on stars. We may focus so much on the stars that we do not notice other features of the sky.<sup>4</sup> And we may so “naturally” sort leading scholars like Ayres and Williams into certain categories that we do not give enough thought to the categories themselves. This may also distort the way we view approaches because we may easily take the way one star criticizes another star as if there were some inherent tension between whole constellations or schools of thought. Most notably, the often suspicious and even shrill assaults by law and economics guru Richard Posner on some figures in CRT may lead many to see some inherent and profound antagonism between law and economics and CRT.

We also overlook other potential patterns. Much like campers who become mesmerized by one constellation, legal audiences may read only one type of scholarship, never learning what others may teach. Take the example of intersectionality. Many might look and look at different concepts of intersectionality in CRT and learn much. Alas, many who think about intersectionality might not approach a work like Ayres’s because it seems so thoroughly part of law and economics or, as Haynes’s contribution to this Symposium suggests, so thoroughly quantitative.<sup>5</sup> And yet Ayres makes a compelling and elegant case for intersectionality—even as his response in this Symposium suggests explorations of other intersections that may raise methodological and political dangers.<sup>6</sup> His quantitative analysis shows African American men and women may really face quite different treatment.

More generally, it is important to note how both Ayres and the CRT editors recognize that their methods complement each other. As the CRT editors note in their response, and as Case and I emphasize in our own pieces: “The two methods work best in tandem to capture glimpses of social reality missed by the limits of each other,” and “the two mutually confirm the virulence of the historic and ongoing epidemic” of discrimination.<sup>7</sup> Ayres’s statistical analyses carefully showed how older rules on kidney transplants had the effect of keeping African Americans waiting years longer than whites for a kidney. Still, Ayres notes in his own response how “Jerome Culp’s powerful discussion of his own experience attempting to qualify for a . . . transplant brought home to me in a very personal way the continuing value of . . . [CRT] narrative.”<sup>8</sup>

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4. *Id.*

5. Kevin Haynes, *Taking Measures*, 55 STAN. L. REV. 2349, 2353-54 (2003).

6. Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2423-24 (2003).

7. Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2449 (2003).

8. Ayres, *supra* note 6, at 2432.

And yet what follows is not a simple love fest. Real controversies remain. At the methodological level, Ayres calls for far more tests for discrimination involving variations on his own careful quantitative testing—and testing reflecting quantitative tests from other disciplines like psychology, sociology, and political science.<sup>9</sup> The CRT editors worry such calls for proof are “luxur[ies]” and that those themselves subject to subordination often find themselves “doubted by others” in their claims of unfairness.<sup>10</sup> At the policy level, Ayres considers reforms that might shock many of his law and economics colleagues: allowing the mere showing of different results for groups as a whole to establish liability; letting computer-generated tests of unconscious discrimination impeach witness credibility; and requiring auto dealers to disclose far more information on pricing practices to consumers. And yet it still falls far short of the CRT editors’ call in their Article for “structural and social transformation” and “no less than the establishment of substantive security and social dignity for all.”<sup>11</sup>

More follows. The reviews below explore different ways to view the constellations that make these two books—as well as the wider systems that may contain them. They also mark what I hope will be a starting point for other explorations as well, ones that build on some of the connections and reconstructions we offer and that spin their own.

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9. *Id.*

10. Culp et al., *supra* note 7, at 2444.

11. Culp et al., *supra* note 7, at 2452. As I suggest in my review below, overly abstract generalizations about “the market,” like abstractions about “individual” versus “institutional” versus “social” reform, may both exaggerate and obscure debate. It often may clarify discussion to instead focus on more particular arguments and proposals. See Clark Freshman, *Prevention Perspectives on “Different” Kinds of Discrimination: From Attacking Different “Isms” to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2343 n.235 (2003).

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