

## REPLY: "REAL" MEN AND HISTORY<sup>1</sup>

*Jerome McCristal Culp, Jr.*

I would like to reply very briefly to all three articles that responded to my article on racism. Professor Bell was my teacher in law school and over the years I have come to appreciate some of the truths he tried to instill in his classroom. I understood some of those truths as a student in his class, but I hoped, the hope of the innocent, that they were not or would not be true about life and the academy for my generation in law teaching. I appreciate the time and effort he took with his coauthor Linda Singer to write *Making a Record*<sup>2</sup> and the substantial support they provide for my argument. I believe that Professor Bell has gotten too little credit for his ability to reshape how we think about race. Professor Bell's work provokes me individually and the legal academy in general; I have spent the last year attempting to fill in some of the gaps that his work has revealed.<sup>3</sup> I should add that although I had read the critical comments of me in response to my criticism of the Chief Justice, I did not appreciate the anger and threat associated with them until I reread them in Professor Bell's article.<sup>4</sup> He

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1. There is a tendency for authors to want to have the last word on a subject. I hope this response to Professor Carrington's reply to my article has neither that unfortunate tone nor the quality of personal animosity that I find unuseful sometimes in others. If it does, I would add that I do not intend that result. I do not think the history of the Duke Law School is a personal indictment of anyone. However, I do believe that decisions have consequences that should be examined.

2. Derrick A. Bell & Linda Singer, *Making a Record*, 26 CONN. L. REV. 265 (1993).

3. See Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993); Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993); Jerome McCristal Culp, Jr., *The Intersectionality of Oppression: Affirmative Action, Race, Gender, and Class*, N.Y.U. L. REV. (forthcoming 1994) (tentatively titled).

4. See Bell & Singer, *supra* note 2, at 283 n.50. However, the fact that one of my white students asked somewhat breathlessly what I had written about Chief Justice Rehnquist after an interview for a summer job with one of Justice Rehnquist's former law clerks should have told me that such statements are not permissible and can be dangerous to the innocent. The former clerk told my student that I had called Chief Justice Rehnquist a racist, and the student did not get an invitation for summer employment from that law firm. (I obviously cannot prove nor do I necessarily assume that the only reason such an offer was not forthcoming was due to this

reminds me again and again how much I have learned from his wit and wisdom.

I have had the pleasure of knowing Professor Tushnet for almost thirteen years, or perhaps more correctly, I started reading Professor Tushnet eighteen years ago and I met him at a critical legal studies conference when I entered teaching. I am sure he does not remember me from that brief interchange. I have in the past been publicly critical of some of Professor Tushnet's work, so I appreciate the nonpatronizing effort that his reply, *Spite Fences and Scholars: Why Race Is and Is Not Different*,<sup>5</sup> represents. Were the situation reversed, it probably would have taken more self-discipline than I possess to not respond, given an opportunity such as this Commentary affords to him, if he had directed similar comments at me.

I think that Professor Tushnet's description of the conflict between universalism and particularism is excellent and pinpoints an issue that I have attempted to raise in a number of articles.<sup>6</sup> I also think his extension of *St. Mary's Honor Center v. Hicks* is extremely useful.<sup>7</sup> I agree with him that race is different and that we ought to look at it differently precisely because it creates problems for judges and juries. I further agree with him that there is a missing element to Justice Souter's dissenting opinion in *Hicks*.<sup>8</sup> His example of a spite fence, however,

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student's association with me, but I expect most of my students would rather not be judged by someone who thinks they approve of someone who called their judge a "racist.") I now try to warn students to be careful about mentioning me to people who may be offended by some of what I have written or spoken in the past.

5. Mark Tushnet, *Spite Fences and Scholars: Why Race Is and Is Not Different*, 26 CONN. L. REV. 285 (1993).

6. See Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993); Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992); Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992); Jerome McCristal Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61 (1992); Jerome McCristal Culp, Jr., *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021; Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 41 DUKE L.J. 39 (1991); Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 CAP. U. L. REV. (forthcoming Winter 1994); Jerome McCristal Culp, Jr., *The Intersectionality of Oppression: Affirmative Action, Race, Gender, and Class*, N.Y.U. L. REV. (forthcoming 1993-94) (tentatively titled).

7. Tushnet, *supra* note 5, at 285-88 (discussing *Saint Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742 (1993)).

8. One is tempted to wonder whether, if Justice Thurgood Marshall had still been on the

though an extremely useful general example, simplifies one aspect of the employer/employee relationship that would require a reversal even in the situation that he posits.

In the case of a spite fence, if the builder of the fence testified that he had no permissible "personal" reason for building the fence as the supervisor asserted in *Hicks*, an appellate court would have to ask whether the conclusion that indeed it was "just personal" was a conclusion that could be drawn from the demeanor of the fence builder. What troubles Justice Scalia is precisely that a supervisor might have interests in conflict with the employer and that a judge ought to be able to see through such subterfuges which unfairly disfavor white employers.

If the lessee of a property who demanded that a spite fence be built testified that he had no personal bias against his neighbor, and there was no evidence other than demeanor to refute that statement, an appellate court should be moved to think that the factfinder had ignored the weight of the evidence or that the district court should be instructed to permit the factfinder to hear evidence on this point. I think that the Court, in *Hicks*, comes to this conclusion, not because it treats race the same, but because it treats race differently—and less well. Justice Scalia has tried to create a mythical sameness because he believes that em-

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Court, we might have gained from his understanding that race is indeed different. At times he and Justices Douglas and Brennan demonstrated that they understood this point. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 380 (1987) (Justice Marshall notes the race of the complainant which at least suggests that it is important to an understanding of how this case came to the Court). *But see* Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 41 DUKE L. J. 39, 80-87 (1991) (suggesting that Justice Marshall could have gone further). *See also* *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (Marshall, J., dissenting) (suggesting that the majority opinion ignores the history of racism in Richmond, the former capital of the confederacy). One can still hear echoes of Justice Brennan's concern with these issues in cases like *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990) (Brennan, J.). Even some current justices who are not always solicitous of racial issues sometimes seem to understand this point. *See, e.g., Brown v. North Carolina, cert. denied*, 479 U.S. 940, 941-42 (1985) (O'Connor, J., concurring):

*Batson*, in my view, depends upon this Nation's profound commitment to the ideal of racial equality, a commitment that refuses to permit the State to act on the premise that racial differences matter.

. . . .

We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be. That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact.

ployers are put upon by an unfair antidiscrimination system.<sup>9</sup> This is not the only situation where the Court is willing to do that,<sup>10</sup> but it stems from the fact that even when race is not discussed by the court—and sometimes when it is—race often drives the Court's decision.<sup>11</sup>

Professor Carrington helped to bring me to Duke Law School. I have in the past defended him when I thought he was misunderstood by people who did not know him, but only had read his words.<sup>12</sup> I am now convinced that there are two Paul Carringtons: one who can be sensitive to the need for change—the Paul Carrington I hear sometimes in faculty meetings and occasionally in print; and another Paul Carrington who, for all of his brilliance, “just doesn't get it.”

Carrington responds in his brief reply that I have been unfair to Elvin (Jack) Latty, the former dean of the Duke University School of Law, who, Paul Carrington says, “did what he could to achieve desegregation at Duke in 1960.”<sup>13</sup> I have discussed the history of race and Duke Law School in three articles,<sup>14</sup> but I do not think you can interpret in them any direct or indirect criticism of Jack Latty. I do criticize the fact that Duke had an explicit policy of excluding black students and that until I was hired, long after Jack Latty was no longer dean or active in legal education, we had no black faculty. Why are those criticisms so difficult for Professor Carrington to deal with? Perhaps it

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9. I have made this point more extensively elsewhere. See Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and the Supreme Court: A Reform Program for Title VII After Hicks*, 23 CAP. U. L. REV. (forthcoming Winter 1994) (asserting that the Supreme Court is concerned with minimizing the situations where employers are falsely accused of discrimination but found guilty of it, and is not very concerned with situations where an employer is guilty of discrimination but is found innocent).

10. See Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209, 235-37 (1993) (discussing *Shaw v. Reno*, 113 S. Ct. 2816 (1993)).

11. See *U.S. v. Reynolds*, 235 U.S. 133 (1914) (holding that limiting peonage has nothing to do with race).

12. See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL ED. 222 (1984) (arguing that “nihilistic” law professors are more likely to train crooks than radicals and have an ethical duty to leave the law school). This article created a storm of controversy. See, e.g., Peter W. Martin, “*Of Law and The River*,” and *of Nihilism and Academic Freedom*, 35 J. LEGAL ED. 1 (1985).

13. Paul D. Carrington, *Buffaloes and a Straw Man*, 26 CONN. L. REV. 295, 295 (1993).

14. See Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

is that he and some of my other colleagues demand the right to decide what part of our history is relevant to tell. This is lamentable. However, only one of my colleagues, Professor Melvin Shimm, has raised an objection with me about any article I have written about Duke Law School. Professor Shimm's objection was directed at one sentence in the three articles that I have published, and never in that objection did he say that somehow I had been unfair to Jack Latty and his activities in 1960 or before.<sup>15</sup> This objection was not, despite Professor Carrington's statement to the contrary, backed by any objective evidence.<sup>16</sup> My impression had been that our five living black alumni from the 1960s (there evidently were seven black graduates of Duke Law School in total in the 1960s; and one is deceased, and one's address could not be ascertained) had been questioned about their experiences during that time. I have yet to see any notes on the subject, however. I have to wonder how that history reflects on the issues I have raised about our history.

Numerous colleagues of mine have written and spoken about their

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15. I have filed with the now, I am sure, overburdened editors of the *Connecticut Law Review* copies of the two letters Professor Shimm wrote to me criticizing one sentence in an article I wrote in the *DePaul Law Review* and a letter he wrote to the five alumni of the 1960s about that sentence.

16. Professor Carrington points to the courage of the Duke Law faculty for their admission of black students in 1961 in defiance of the university ban. See Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501, 558 n.307 (1992). He does not refer to the history of fights inside the AALS that are the published proceedings of the law school community, and neither he nor Professor Shimm, the lone survivor from that period, has suggested that my general history of the law school change is wrong. When Professor Carrington writes "when the trustees of [Duke] were slow to admit African-American students, the faculty in 1961 admitted them to the Law School in defiance of the University rule," he does not deal with the history reported in the annual reports of the AALS about our own slowness to change. *Id.*

Indeed, as I have written elsewhere, see Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS and Apartheid*, 41 DEPAUL L. REV. 1141 (1992), the Board of Trustees adopted a non-discriminatory policy late in the Spring of 1961, applicable to the Graduate Schools of Law, Divinity and Medicine. See ASS'N OF AMERICAN LAW SCHOOLS PROC. 218 (1961). The two students who entered the law school in September 1961 came subsequent to that action. I also would quote the report of the AALS Committee on Racial Discrimination that said, "The struggle for integration of colleges and universities has abated for the moment, but the question will return to our law schools. It would be well if the individual schools which have not done so would move quietly and firmly toward accepting Negro applicants." ASS'N OF AMERICAN LAW SCHOOLS PROC. 235 (1960). Paul Carrington would not have Moses judged by the standards of Sparta, but he seems unwilling to have any criticism, no matter how indirect, of the actions of "good" people. It is hard for someone who has grown up watching "good" people tell black people to wait and that oppression will end tomorrow and seeing that not be the truth about history or the present.

view of our past and present history with respect to race. I do not question my colleagues right to examine the history of Duke Law School and defend it if they must, but if there is to be a defense of the system of segregation that excluded black students as a matter of policy, which is what I mentioned and criticized, it will have to deal with the facts I have mentioned in two of those articles. I examined the public record on the AALS and the effort to change the official policy of excluding black students. I quote that record extensively and I do not know of any public statement that I missed or left out of that record.<sup>17</sup> The history of that period is not a form of property that belongs to the people who were at Duke Law School and who happen to have been white by conscious policy. This history is not sacred text to be interpreted by a sacred college that does not include me or people who look like me.

Despite efforts to change the subject to one that my colleagues find more comfortable (one they control), the truth is that Duke Law School was among the last schools in American legal education to remove official barriers to the exclusion of black students, and was among the last schools in American legal education to successfully hire a permanent tenure-track faculty member who was black. People can make anything they wish of those facts, but as long as I have pen to write and voice to speak I will continue to remind us of that history. The other Paul Carrington sometimes understands history. This Paul Carrington seems to find our history to be none of my business. I believe we ignore that history at our peril. In particular, I believe our failure to appreciate our history allows us, like a racially dysfunctional family, to ignore the racial reality that exists. A point that Professor Bell reminds us can be fatal, and Professor Tushnet reminds us is unnecessary.

At least one of my colleagues has questioned whether anything can come from the interchange between me and Professors Carrington and Shimm. I understand that fear, and I have in the past ignored and undoubtedly will continue to ignore some issues that I find to be troublesome, racist or offensive. Life is too short to deal with every slight or misunderstanding, but I really do not understand why the things I have written about the Duke Law School have upset some of

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17. In none of these three articles do I contend that I am writing a complete history of race and Duke Law School. As I suggested to Professor Shimm, I do believe that some at the law school have done some things to bring about change. But as I indicate above, individual acts are not enough without systematic change.

my colleagues. Indeed, I do not understand why Paul Carrington, who has published a number of spirited pieces on controversial subjects, finds my discussion of the reality of one of them to be a personal attack on him and our law school.

When I was a kid during the time before Duke admitted its first black law student in the 1960s, I, and most black people I knew, used to choose the college team we would root for on one simple basis. We would root for the team that had black players. I rooted against Duke University and other "white" schools. After integration came to these schools, I, and many other black people, used a modified version of this rule—we rooted for the teams that had the most black players. In those simple days it was clear that one could measure the lack of discrimination by that standard, or so we thought. This was a variant on the rule of support that created a large black following in my parents' generation for the Brooklyn (and now Los Angeles) Dodgers because they were the first team to admit black players. Ending segregation was important, and those of us who grew up in that period did not remain unscarred or unaffected by the choices made by the Duke Law School and other institutions that enforced racial segregation. I have not seen a satisfactory response to that history that makes me comfortable with the choices that were made by Duke and others. I do not assign blame for those moral choices, but still I do tend to root against those teams that have difficulty finding even one athlete who is black to have on their team. When institutions or athletic teams rule out black people, I have a hard time not concluding that they should also lose my support. When I look back on the law school that consciously excluded black people by rule, I have a very difficult time not seeing some negative consequences. I guess when my colleagues look at that history they see only the positive aspects. In this we will continue to disagree.

