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The Skin Trade

BY RICHARD A. POSNER

Beyond All Reason: The Radical Assault on Truth in American Law by Daniel A. Farber and Suzanna Sherry

(Oxford University Press, 195 pp., \$25)

The postmodern left is defined by its opposition to the values, the beliefs, and the culture of the "West," the "West" being conceived as the domain of nondisabled heterosexual white males of European extraction and their east Asian and west Asian "imitators," such as the Japanese (Hitler's "honorary Aryans") and the Jews. The postmodern left is radically multiculturalist, but it is more, for the "West" that it denigrates is not historically specific; it encompasses liberalism, capitalism, individualism, the Enlightenment, logic, and science, the values associated with the Judeo-Christian tradition, the concept of personal merit, and the possibility of objective knowledge.

The postmodern left provides an intellectual framework for "identity politics." Having demolished to its satisfaction universal values and criteria, it has cleared the way for the claim that the most important thing about a person is his or her race, ethnicity, sex, sexual orientation, and degree of physical or mental disability (what else is there?); and that good jobs and the other rewards of social life should be distributed across groups in proportion to their fraction of the population, except that women are entitled to live longer than men and blacks to dominate professional basketball. For if there is no such thing as individual merit—if "merit" is just the preference for your own kind—the only fair way to allocate goods is randomly, and this will tend to produce an allocation proportional to the relative size of groups. If 12 percent of the population of the United States is black, then 12 percent of the professors at the Harvard Law School should be black, and half of those blacks should be women, and so it is a scandal that there are no black women on the Harvard Law School faculty.

The example is not chosen at random. The postmodern left is well ensconced in American universities, and even has a foothold in the law schools, where professors of critical race theory, such as

Derrick Bell, Kimberlé Crenshaw, Jerome Culp, Richard Delgado, Alex Johnson, Mari Matsuda and Patricia Williams, hold forth. It is these professors—along with radical legal feminists such as Kathryn Abrams, Catharine MacKinnon, and Robin West, and the fast-fading adherents of critical legal studies—who are the particular target of *Beyond All Reason*. Written by two respected law professors at the University of Minnesota, the book classifies critical race theory, radical legal feminism, and critical legal studies under the rubric of "radical multiculturalism," and it subjects to courteous but relentless criticism this "paranoid mode of thought that sees behind every social institution nothing but the tracks of white supremacy and male oppression." The term "radical multiculturalism" is not entirely apt; it is too narrow for what Daniel A. Farber and Suzanna Sherry are talking about and, since it is not limited to law, also too broad. A better term, less suggestive of merely racial and ethnic concerns and more precise about academic affiliation, would be "radical legal egalitarianism."

Every intellectual movement has a lunatic fringe. Radical legal egalitarianism is distinguished by having a rational fringe and a lunatic core. The latter is constituted by the critical race theorists and the other legal academics who have swallowed postmodernism hook, line, and sinker, such as Ann Scales, who declares that "objective reality is a myth," adding inconsistently that "the physics of relativity and quantum mechanics demonstrate that nature is on our side." The fringe consists of the postmodernist thinkers, such as Michel Foucault and Stanley Fish, who created the intellectual framework within which the radical legal egalitarians operate, and of the ablest legal radicals, such as Duncan Kennedy and Catharine MacKinnon.

The scholars of the rational fringe are rational mainly by contrast to the core. They have plenty of goofy ideas and irresponsible dicta. Just read Kennedy on

legal education or MacKinnon on pornography and rape, or for that matter on science: "our critique of the objective standpoint as male is a critique of science as a specifically male approach to knowledge. With it, we reject male criteria for verification." MacKinnon does not consider herself a postmodernist—she has sharply criticized the postmodernist left—but Farber and Sherry are trying to trace the postmodernist virus in all its legal hosts, even those who have not succumbed completely. Maybe they overdo it; despite the lack of qualification in the passage that they quote from MacKinnon, it is apparent from the context that she is talking only about social science, and her rejection of radical skepticism comes only three pages after the passage that Farber and Sherry quote.

But the critical race theorists have succumbed completely to postmodernist absurdity, and so they provide the biggest target for Farber and Sherry's attack and receive the largest number of arrows. In the case of critical race theory, however, criticism is almost secondary. One has only to illuminate the target. The most useful service that *Beyond All Reason* performs is to cull from the extensive publications of the critical race theorists representative statements, such as that "racism and enlightenment are the same thing," or that "if you are black or Mexican, you should flee Enlightenment-based democracies like mad, assuming you have any choice." Flee to where, I wonder? The same article identifies "democracy" as the "mechanism" that accounts for "black subordination and the maintenance of a racist regime." The author is Richard Delgado, who claims to be a member of, and a spokesman for, a group that he calls "people of color." The group seems to be more a state of mind than a race. I have met Professor Delgado. He is as pale as I am, has sharply etched features in a long face, speaks unaccented English, and, for all that appears upon casual acquaintance, could be a direct descendant of Ferdinand and Isabella. He lives and teaches, contentedly so far as I know, in an "Enlightenment-based democracy," namely the United States.

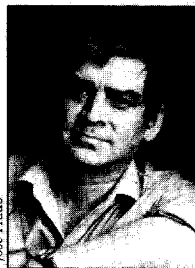
Delgado's whiteness lends an Evelyn Waugh touch to critical race theory. But that theory is not primarily comical, and in fact it has an ugly streak. Its practitioners attack conservative blacks as white men with black faces (or as slaves "willing to mimic the masters' views," which is Derrick Bell's description of Clarence Thomas). They attack white radicals as interlopers in a domain reserved for nonwhites: Delgado has written that whites should not write about civil rights,

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but should leave the field to people of color, such as himself. When white radicals fail to go all the way with the most radical of critical race theorists, the critical race theorists turn on them, calling them racists. In an article published too late to be cited in Farber and Sherry's book, Delgado compares an article by the radical feminist Jane Larson to *Plessy v. Ferguson*, the Supreme Court's "separate but equal" opinion. Larson's article denounces the working conditions of Mexican-Americans in a district in Texas that seems a throwback to feudalism, but she points out that if the full panoply of worker-protective laws, such as the minimum wage, were to be suddenly extended to these workers, many of them would lose their jobs. For this concession to reality, she is accused of racism.

In the most original chapter of their book, Farber and Sherry expose what they consider to be the latent anti-Semitism of critical race theory. Law professors with little to say about the law itself, critical race theorists are particularly concerned about the underrepresentation of blacks and Hispanics in American law faculties. As is well known (and extensively documented in *Beyond All Reason*), Jews are heavily overrepresented on these faculties, as they are on university faculties generally. Jews, like east Asians, have a very strong ethic of success through education. Jews in particular have an affinity for law, and for academic law: they are less than 2.5 percent of the population, but they constitute 50 percent of the faculty at a number of the leading law schools. A central thesis of critical race theory is that success in America is undeserved; and it follows that the most undeserving, because they are relatively the most successful, among law professors at any rate, are Jews. Thus they are occupying places in law schools that belong of right to blacks and Hispanics.

The success of Jews and of Asians, moreover, is a triumph of individualism and meritocracy, since neither group got where they are through identity politics, claiming a share of good jobs equal to their fraction of the population, though there has been a bit of affirmative action for Asians. To be for identity politics is to be against the social and political conditions that have enabled Jews, Asians, Mormons, West Indians and other minorities (including homosexuals, in the face of continuing official discrimination)—including even Mexican-Americans, charter members of Delgado's populace of color—to advance. It is even to be against successful blacks, since they must have "sold out" to get where they are.

Still, I would not call this anti-

Semitism. To do so is to make the same mistake that critical race theorists make when they call anyone who opposes special privileges for minorities a racist. Farber and Sherry say that any political theory that "implies that Jews have unjustly taken more than their fairly earned share should be rejected" because of its anti-Semitic implications. By parity of reasoning, any theory which implies that affirmative action has resulted in minorities taking more than their fairly earned share should be rejected as racist. Yet that is the very theory—that of the allocation of goods on the basis of individual merit—that this book propounds! Perhaps we have all been infected by the postmodernist virus. Farber and Sherry announce that they themselves are Jewish. By their own lights, however, this is as irrelevant as, though it is more plausible than, Delgado's announcing himself a person of color. If Jews get to define anti-Semitism, then blacks get to define racism. But Farber's and Sherry's whole point is that arguments can be evaluated objectively by the use of criteria that transcend group identity, that are "observer independent."

I do not think that the critical race theorists are anti-Semites. The hallmark of an anti-Semite is to be preoccupied with Jews. The critical race theorists, unlike Louis Farrakhan and some of his followers, are not preoccupied with Jews; they are not even interested in Jews, who for them are part of an undifferentiated mass of white oppressors. This position, lumping Jews in with the other whites of America, may be insensitive; but insensitivity is not hostility.

What is most arresting about critical race theory is that, as Farber and Sherry amply document, it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites. By claiming to speak in the "Voice of Color," critical race theorists exaggerate the difficulty of interracial discussion of social issues and discourage such discussion. By depicting the telling of stories as the characteristic method of nonwhites' "reasoning," critical race theorists do their clientele the same disservice that Amartya Sen has analyzed in these pages and elsewhere, when he points to the strong rational

tradition in Indian and Confucian thought and deplors the tendency to associate Asians with mysticism. The reinforcement by the critical race theorists of traditional stereotypes about blacks is all the greater because these theorists are not talented storytellers, with the exception of Patricia Williams. Since they do not have literary skills, they cannot excuse their turn to narrative by claiming merely to be better storytellers than analysts.

The ironic consequence is that the critical race theorists are poor role models. Instead of exemplifying in their careers the potential of members of their groups for respected achievement in the world outside the ghetto of complaint—the kind of exemplification that we find in the career of Colin Powell—critical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group.

I do not doubt the power of literature to awaken readers to injustice. But the stories told by the critical race theorists do not rise to the level of literature. They are flops as stories and, as Farber and Sherry demonstrate, flops as scholarship. For one thing, the authors of these stories frequently equivocate about their truth content. With Derrick Bell, at least you know that he is writing science fiction, not science; but with the other storytellers you often don't know whether they are writing fact or fiction—especially since they do not consider this a meaningful distinction. Alex Johnson says that "it is perfectly acceptable . . . if that which is presented as the truth turns out not to be objectively true. . . ." In other words, truth doesn't matter, even if it can be said to exist. Patricia Williams doesn't think it matters whether Tawana Brawley was lying or telling the truth about being the victim of a racist assault (it was the former): she was "the victim of some unspeakable crime. No matter who did it to her—and even if she did it to herself." By parity of reasoning, it doesn't matter whether Alfred Dreyfus was innocent; the French right wing must have been fearfully upset about *something* to have believed him guilty, and that's all that should matter. Williams is the best writer in the group, but she is also one of the most credulous. In her book *The Alchemy of Race and Rights*, she accepts one of the linchpins of loony Afrocentrism, the claim that Beethoven was black.

Even when stories are true, they are not a reliable basis for generalization. So it is not surprising that the critical race

theorists are deeply misinformed about the actual situation of the groups about whom they write. They claim that law schools discriminate against black women in faculty hiring. In fact, as Farber and Sherry show, a black female lawyer (also a black male lawyer) has a better chance of being hired for a law school faculty than a white male lawyer. Universities discriminate, all right; but they discriminate in favor of blacks, Hispanics, and women, and against white males. Since blacks and women are traditionally subordinated groups, the critical race theorists believe that the situation of black women must be worse than that of black men. That is not true. Judged by income, employment, longevity, or rates of criminal victimization and incarceration, black women are much better off than black men. Critical race theorists are likewise wrong when they claim that the situation of blacks in the United States is worse today than it has been at any time since slavery was abolished. It is much better today, for most though not all blacks, than it was in the days of lynching, apartheid, and rampant discrimination in employment and public accommodations, which is to say, as recently as the 1940s and 1950s.

Critical race theorists are terrible lumpers. Black men and black women are not similarly situated. Blacks and Hispanics are not similarly situated either. Welfare dependence, violence, family disintegration, poverty, lack of business entrepreneurship, proclivity for public over private employment, and diehard loyalty to the Democratic Party are far more common among blacks than among Hispanics, who are coming to resemble—politically, socially, and economically—central and eastern European ethnics. Richard Delgado has nothing in common with a drug pusher in Harlem or a teenage mom in South Central. Minorities have little in common not only with each other but also with women, with homosexuals, with the disabled. The critical race theorists speak for a sliver of the black intelligentsia and a few university radicals; they do not speak for, or to, an oppressed class of Americans.

By exaggerating the plight of the groups for which they are the self-appointed spokesmen, the critical race theorists come across as whiners and wolf-criers. By forswearing analysis in favor of storytelling, they come across as labile and intellectually limited. By embracing the politics of identity, they come across as divisive. Their grasp of social reality is weak; their diagnoses are inaccurate; their suggested cures (rigid quotas, 1960s-style demonstra-

tions, transformations of the American spirit, socialism, poverty law practice) are tried and true failures. Their lodgment in the law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement's scholarship bunk. To be sure, it is not a unique embarrassment; there is plenty of shoddy legal scholarship. But this is hardly an excuse for the extremism, the paranoia, the hysteria, and the irrationalism of critical race theory, which are embarrassments to sober liberal egalitarians, such as Farber and Sherry, and obstacles to solving the problems created by the nation's racial and ethnic variety.

I think that *Beyond All Reason* would have been an even stronger book if Farber and Sherry had not played the Jewish victim card, and if they had confined their attention entirely to the critical race theorists, who have gotten a free

ride for too long because they have wrapped themselves in the mantle of race. Still, this is a fine book, a work of intelligence and courage that will alter the terms of debate in academic law. And, oddly, it may save critical race theory. White scholars have largely ignored this movement. This has been no favor to it. Criticism is the oxygen of a scholarly movement. Race relations are a serious American social and legal problem; and minority legal scholars who have decided to devote their professional lives to the consideration of this problem should be able to contribute to its solution. If it is read by them in the right spirit, *Beyond All Reason* may help them to reorient critical race theory in a constructive, and genuinely scholarly, direction.

RICHARD A. POSNER is Chief Judge of the United States Court of Appeals for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School.

War and Fleece

BY BERNARD KNOX

The Argonautika: The Story of Jason and the Quest for the Golden Fleece by Apollonios Rhodios translated with introduction, commentary and glossary by Peter Green

(University of California Press, 480 pp., \$60)

Most literate members of the English-speaking community have come to know the story of the good ship Argo, of Jason, Medea, and the Golden Fleece, in their childhood, from reading (or better still, from hearing a parent read) Andrew Lang's *Tales of Troy and Greece*, or the more sanitized version of Hawthorne in *Tanglewood Tales*. But few besides scholars have read the Alexandrian Greek poem, the *Argonautika* of Apollonios of Rhodes, which is the fullest and most powerful account of Jason's quest that has come down to us from the ancient world. The reason is not far to seek. Few English translations are available, and they are in prose. Richard Hunter's spirited version of 1992 is a signal advance on E.V. Rieu's pedestrian Penguin translation of 1959, but it is condemned to wage a losing battle against great odds. A prose translation of Homer's *Odyssey*, even in the

artificial Biblese of Butcher and Lang (1879), can still sweep the reader along because of the speed, vigor and surface simplicity of Homeric narrative, but the *Argonautika* is another matter.

Apollonios is a learned and sophisticated poet, and these qualities are manifested, in Hunter's words, "in a dense texture of allusion to earlier literature ... a preference for unusual or recondite myths ... an interest in the origins of cities, cults and rituals ... and reflections of contemporary debate and scholarship ...," not to mention a penchant for ethnographic and mythological digressions. His matter and his treatment of it need the help of the Muses, on whom he calls, early in the poem, to inspire his song; and only a verse translation can hope to maintain the reader's engagement with this elaborate, discursive reworking of one of the oldest Greek myths: the Argo's voyage to the fabulous East, the love story of Jason and Medea,