

The grey line in-between the rainbow: (Re)thinking and (re)talking critical race theory in post-apartheid legal and social discourse

Joel SM Modiri*

All I'm saying is that even if they tried, the constitutional dispensation that they [the ANC] have negotiated for and have accepted and are not testing is anti-Black.¹

[I]n a racially structured polity, the only people who can find it psychologically possible to deny the centrality of race are those who are racially privileged, for whom race is invisible precisely because the world is structured around them.²

Nothing will be reconciled in the time of reconciliation.³

1 Introduction

Being part of a historically white, Afrikaner, middle-class university, it is not difficult to detect the deeply entrenched manifestations of institutional racism and the systematic exclusion and demotion of black students and lecturers from campus life.⁴ I am haunted by the banality of racism and the absence of race-sensitive and

*Researcher in the Department of Legal History, Comparative Law and Jurisprudence, Faculty of Law, University of Pretoria. My thanks to friends who read earlier drafts of this paper and gave valuable inputs: Petronell Kruger, Serena Kalbskopf, Alfred Moraka and Cara Furniss. A special word of thanks is extended to Professor Christof Heyns for his comments and continued support and to Professor Karin van Marle for her insight and encouragement.

¹Mngxitama 'Blacks can't be racist' <http://www.counter-racismnow.com/2010/09/black-s-cant-be-racist-by-andile.html> (accessed 2010-10-30). For printed version, see Mngxitama 'Blacks can't be racist' (2009) 3 *New frank talk: Critical essays on the black condition* 1.

²Mills *The racial contract* (1997) 75.

³Van der Walt 'Psyche and sacrifice' (2003) *TSAR* 651.

⁴See Madlingozi 'Confronting and dismantling institutional racism in the Faculty of Law, University of Pretoria' in Visser and Heyns (eds) *Transformation and the Faculty of Law, University of Pretoria* (2007) 27. See: Jansen *Knowledge in the blood: Confronting race and the apartheid past* (2009).

race-critical approaches to law and life in general. I am also vexed by a number of questions concerning race and racialism in South Africa. Among them are: 'can blacks be racist?', 'why are people in denial of the central role "race" should play in post-apartheid legal and social transformation?' and 'how can racism be justified?' In this article, I attempt to confront these questions without claiming to have conclusive answers or facile solutions. My starting point is the decision of the Faculty of Law at the University of Pretoria which, after much persuasion, established an elective module on Critical Race and Gender Theory for fourth year law students. I want to take issue with making the module an elective course with the result being that only a few students who are already race-sensitive and race-critical will register for the module thus defeating the rationale for the course. I also do not agree with conflating difficult race questions with gender issues which, although equally important, tend to lead students to focus on the less controversial sex and gender debates and not on race as the course intends.

As a black, middle-class male, I cannot (nor do I pretend to) offer a 'neutral' evaluation of South Africa's trajectory of race discrimination – from slavery, to colonialism and imperialism, to apartheid and to modern power racism. My contention is that it is precisely these supposedly 'neutral' and 'objective' responses to race that have resulted in the slow pace of transformation from a society based on white domination and racial separation to a democracy based on non-racialism, equality and dignity. It is also my contention that because the apartheid regime's subjugation of *black people* had material (economic) consequences, a neutral approach to transformation – one that claims that black people and white people are equal or that they are both *victims* of apartheid – weakens the former's claims to redress and reparations.

Although the main concern of this article is jurisprudential and aims to highlight the relationship between law and our 'race and colour lives', the broader concern is also political and societal. My argument is that what happens in society on one level also reproduces itself in legal institutions and judicial processes on another. For example, the systemic inequality (in terms of socio-economic status and education) that already exists between a poor black factory worker from Alexandra Township and a wealthy white business tycoon immediately implies that should the two parties enter into litigation against one another, the latter will be able to afford an expensive lawyer with an elite education and will be looked upon favourably by the presiding officer while the former will have no other recourse but legal aid from an underpaid and overworked attorney. This example – like many other real-life circumstances of people – exposes the fallacies of 'equality before the law' and of 'access to justice'.

In this article, I also want to follow up on Karin van Marle's remark that '[c]ritical race perspectives acknowledge the subject positions by continually displacing mainstream liberal approaches of the subject and critical or post-

modern announcements of the “death” of the subject’.⁵ Her remarks add a pointed critique to the perceived neutrality and objectivity of law and human rights and, in this way, also illustrates how formal and instrumentalist approaches to transformation and rights lack substantive effect on people’s lives. This discussion is also shaped by the thoughts shared by radical black thinker and activist, Andile Mngxitama in his New Frank Talk Series entitled *Blacks can’t be racist*. I will refer to some of his most cogent critiques of present race discourses in order to highlight the importance of critical race perspectives in public thought and also to illustrate the ‘unfinished business’ and ‘unresolved complications’ of ‘race’ in post-Mandela South Africa. The article begins in section 2 to recall important concepts adopted by Critical Race Theorists and Critical Legal Scholars with the aim of exposing the *limits* and *impossibilities* of law. I revisit Van Marle’s focus on four central issues, namely, *indeterminacy*, *fundamental contradiction*, *false consciousness* and *reification*. In section 3, I turn to the work of feminist theorists with a view to reconceptualising them within a race context. Van Marle’s ‘ethics of refusal’, Ann Scales’ warning against ‘incorporationism’ and Drucilla Cornell’s ‘imaginary domain’ will be reflected on as ways in which to resist and to subvert hegemonic race nationalisms and rigid race-based identities. Andile Mngxitama’s reading of the ‘house negro/field negro’ dichotomy also adds a dynamic approach to race questions in South Africa. In section 4, I refer to Alan Paton’s novel *Cry the beloved country* to point to the significance of race in present social, legal and political discourses in South Africa. Another purpose behind this article is to debunk and challenge dominant assumptions and ideas about race and its connection to privilege, disadvantage and redress in South Africa by arguing for a historically-conscious approach. In sections 5 and 6, by way of conclusion, I argue that, contrary to Michael Jackson’s famous song, it *does* matter if you are black or white!

The central thesis – what can be called ‘the spirit’ – of this article is that if lawyers, judges and legal academics do not address and honestly confront racial issues in their respective fields and also inside their organisations, firms, bar associations, and judicial appointments, they will do a great injustice to the social reconciliation and transformation project of post-1994 South Africa. Although my own position is not to affirm Afrocentric, Nationalist or Pan-Africanist rhetoric, I do believe that the condition of black people should be central to (and not sidelined in) any investigation on racial (in)equality in South Africa. I find any equation of black people’s historical disadvantage with white people’s economic concerns very patronising. I also find claims that ‘we are all on an equal level now’ deeply concerning. It is argued that while the apartheid system of legislated racial discrimination might have come to a formal end, white people still control the

⁵Van Marle ‘Reflections on teaching critical race theory in South African universities/law faculties’ (2001) *Stell LR* 86.

levers of power in society and that institutional racism against black people and socio-economic disparities are worse now than at any time in history, especially because wealthy and influential black people (the so-called 'black elite') have become instrumental in continuing the subjugation and exclusion of poor black communities through crass neoliberal, pro-business and capitalist policies. This article also adds its voice to the (hopefully) emerging body of critical race theory in South Africa.

2 Critical Race Theory in the CLS movement

As long as we continue to believe that 'Justice is blind' we sustain the illusion that the law protects citizens through a mandate that is somehow above the petty practices of (our) commerce, politics and socio-cultural interactions. Barbarism and civilization go hand in hand and we are all implicated.⁶

Critical Race Theory (CRT) falls under the broader category of jurisprudence (with feminist jurisprudence, it is sometimes referred to as 'outsider jurisprudence') in general and Critical Legal Theory in particular. For this reason, it also draws upon diverse intellectual currents – political theory, sociology, anthropology, history, literary themes and current affairs – to support the basic thesis of the Critical Legal Studies (CLS) movement, namely, that law is political and ideological by its very nature and serves as a mechanism for preserving existing power relations. According to Woodard, the aim of the Critical Legal Scholars was to:

[Reinvent the law] to give it a revolutionary new purpose, that is to lead the dismantling the various hierarchies of power and privilege that through the perversions of the legal process have come to threaten the higher values of our society'.⁷

The emergence of Critical Race Theory was motivated in large part by the fact that Critical Legal Studies did not sufficiently recognise the experiences of black people. This was the same when Critical Race Feminism rejected the white liberal rhetoric of feminist legal scholars who ignored the 'embeddedness' and 'embodiedness' of black women. For example, one could argue that a white lesbian in South Africa today might be punished for her homosexuality by her and her partner not being invited to family gatherings, whereas a black lesbian will be subjected to violent gang-rapes (the so-called corrective rape) by men in her community. Critical race perspectives on law shifted the focus from rules, universal categories and formal processes to understanding people/legal subjects as concrete beings. When asked to motivate the establishment of a course on Critical Race Theory, Van Marle began

⁶Thom 'The sleeping monster produces reasons' <http://johanthom.com/writtenbiocv/ authored/the-sleeping-monster-produces-reasons-diane-victor/> (accessed 2010-04-26).

⁷Woodard 'Toward a "super liberal state": A review of "The Critical Legal Studies Movement" by Roberto Unger' *The New York Times* 1986-11-23 at 27.

her paper by referring to four aspects of the CLS rights critique to substantiate why a law faculty should teach law students to take notice of other extra-legal phenomena like race, gender or class when confronted with legal issues.⁸ This article, however, is more driven by the call for law students, legal academics and lawyers and judges to be specifically vigilant and sensitive to race discrimination and racial bias.

2.1 *Indeterminacy*

Following American legal Realism, indeterminacy contends that judges will always be confronted with contrasting options and multiple considerations from which to make judgements. The indeterminacy critique argues that the final decision taken by a judge will be more the outcome of his or her political and ideological beliefs and predispositions rather than merely based on 'legal' factors. Karl Klare argues as follows:

[A]djudication runs head-long into the problems of interpretive difficulty and the indeterminacy of legal texts. Legal texts do not self-generate their meanings; they must be *interpreted* through legal work. Legal texts, particularly constitutions, are shot through with apparent and actual gaps (unanswered questions), conflicting provisions, ambiguities and obscurities. Indeed, it is frequently debated what the relevant text *is*, with respect to a particular legal problem, eg, where multiple legal sources (drafting history, prior lines of interpretation, foreign authorities, etc) are referenced, or where a document is sought to be elucidated or trumped by other cultural artifacts (eg, customs, accounts of popular morality, historical narratives, etc). In the face of gaps, conflicts, and ambiguities in the available legal materials, what's a decisionmaker to do? Apart from abdication, there seems no option but to invoke sources of understanding and value external to the texts and other legal materials.⁹

2.2 *Fundamental contradiction*

The second aspect Van Marle raises is the notion of 'fundamental contradiction' or the inherent tension in law and society between individualism and altruism and between form and substance. Since Duncan Kennedy introduced the notion of 'fundamental contradiction', 'CLS thinkers have forced legal scholars to grapple with the complex links between law and structural constraints imposed on it by contingent dynamics in the state, economy, and culture – links often concealed by liberal visions legal formalism, legal positivism and even much of legal realism'.¹⁰

2.3 *False consciousness*

The false consciousness thesis employed by Critical Legal Scholars 'shows that

⁸Van Marle (n 5) 86.

⁹Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 157. See also Botha 'Freedom and constraint in constitutional adjudication' (2004) *SAJHR* 249.

¹⁰West 'CLS and a liberal critic' (1988) *Yale LJ* 757.

things that are static and objective are really contingent and relative'.¹¹ The law, as a system that legitimates dominant power and social relationships, is accepted as a normal and impartial institution. Critical perspectives in legal analysis open room for the contingency, relativity and subjectivity of things to become more visible, to become part of any legal enquiry. Van Marle argues that:

[w]e should never stop exposing how dominant power inequalities and ideologies influence, ever so subtly, public and legal discourse, how, because of a hidden belief, heavily loaded acts and expressions are seen as objective and neutral.¹²

The false consciousness thesis also illustrates that, contrary to what has been conventional wisdom in legal thought, the constraints and textual limitations in adjudication are not natural, pre-political and non-ideological. Klare writes:

The point is that the constraint or bindingness of the legal materials is an *experience* or *interpretation* of them, not an innate (ie, uninterpreted) property of the materials themselves that we can know objectively.¹³

2.4 Reification

Of the four aspects Van Marle focuses on, I find 'reification' to be the most evocative for these reflections. Reification (of rights) refers to a process whereby rights are shown as being frozen, concrete or 'set in stone'. The indeterminacy of rights, the fundamental contradiction in legal texts and the false consciousness thesis are often concealed through reification – through the idea that rights have a life of their own. When rights are reified, judges do not focus on the particular context or relationship which gives a right its significance or value, instead they adhere only to the same fixed meanings. Peter Gabel adds that reification:

is therefore but another word for the quality of 'belief' itself, through which we imbue legal concepts with their law-like power, and through which we deny the contingent and surpassable character of our current existence ... Indeterminacy allows rights to possess an infinite number of surface meanings that serve ... to protect their fantastic nature from the call of desire to give them realized meaning. Reification allows us to believe in the determinacy of any of these surface meanings through our very own attachment to the fantasy of connection that each provides. As a consequence, the law does not have to be 'really' rational for people to believe in it – in fact, this very 'belief' is sustained by its non-rational indeterminate quality.¹⁴

The aim of this four-fold critique on law and human rights is to expose the political and contentious nature of law and thereby reflect on race in ways that break

¹¹Van Marle (n 5) 90.

¹²Van Marle 'To revolt against present sex and gender images: Feminist theory, feminist ethics and a literary reference' (2004) *Stell LR* 266.

¹³Klare (n 9) 160.

¹⁴Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1984) *Texas LR* 1585.

with cautious liberal perspectives and go beyond mere rights-based approaches. Without turning to a nihilistic view of law and the multiple possibilities of law, I find critical race theory even more relevant in South Africa because present political and legal discourses have been overtaken by an over-reliance on the Constitution and on the lofty promises of human rights. The result of this, as Van Marle notes, has been a society 'where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental'.¹⁵ I find the grand narrative of nation-building based on 'non-racialism' and the calls for a politics of colour-blindness very misplaced in a country where despite having a 'black majority' government and a 'black majority' population, wealth, knowledge and power still rests with the 'white minority'. bell hooks aptly coined the term '*imperialist, white supremacist, capitalist patriarchy*' to denote the interlocking systems of political power that are the foundation of legal and public discourses globally.¹⁶ This widens the discursive spaces for analyses that focus on marginalised black communities and also on more effective anti-subordination strategies that examine how the intersection of race, gender, class, sexual orientation, religion and (dis)ability induce multiple forms of discrimination and oppression. To revise the words of Ngairé Naffine,¹⁷ the proposition that law is imbued with the culture of whites and capitalist values moves beyond the claim that law is made by the wealthy and by whites and therefore tends to entrench their position and dominance and protect their interests. The indictment is more damning and far-reaching. Law, it is said, is conceived through the white eye; it represents the white perspective. It starts from the white experience and fails to recognise the view and experiences of the disadvantaged and black persons.

In the upcoming sections, I delve deeper into the ideological and theoretical instruments that could best support the reconceptualisation and adoption of critical race theory in South African legal and political thinking.

3 Theory and ideology

The world does not become raceless or will not become unracialized by assertion. The act of enforcing racelessness ... is itself a racial act.¹⁸

I have previously argued for a 'politics of peace and friendship' as a possible mechanism to resist racism and racist social thinking.¹⁹ Significant background in this

¹⁵Van Marle 'Laughter, refusal, friendship: Thoughts on a "jurisprudence of generosity"' (2007) *Stell LR* 196.

¹⁶Hooks *Outlaw culture: Resisting representations* (1994) 116. See also Hooks *Ain't I a woman: Black women and feminism* (1981).

¹⁷Naffine *Law and the sexes* (1990) 7-8.

¹⁸Morrison *Playing in the dark: Whiteness and the literary imagination* (1992) 46.

¹⁹Modiri 'Race and raci(al)ism, the politics of peace and friendship and a liberal constitution' (2010) 4 *Pretoria Student LR* 43.

section is provided by three distinct theories in the work of feminist legal scholars – Van Marle, Scales and Cornell – which could prove invaluable to the becoming of a politics of peace and friendship in South Africa. (CRT has of course developed its own theories and theses like anti-essentialism, storytelling and narrative, structural determinism, critique on liberalism, interest-convergence etc). But before that, I turn to Mngxitama's powerful critique of present conversations on race.

Mngxitama laments how critical black thinkers (like Archie Mafeje and Lewis Nkosi) have been excluded and ignored by anthropology and sociology academics in universities. He then goes on to explain why, in his view, black people cannot possibly be classified as racist. He starts by discussing the comments made by one of his black students when they were handed pamphlets for the talk he was giving to students at the University of Witwatersrand. The student said 'No, you can't say we're not racist, I am racist, I hate white people'.²⁰ Mngxitama in response to this comment says:

I was thinking how do you get around that point because that is the most natural response that Black people should have against white racism. We should hate people that oppress us. We should hate a system that oppresses us. But you see we've been messed up so much that we can't even say it.²¹

He then refers to Steve Biko's definition of racism as 'discrimination by a group against another for the purpose of subjugation or maintaining subjugation'²² in order to substantiate his claim that Black people cannot be racist:

If racism is everything. If you say white people can become victims of racism, what you have done right there, is to wipe off the historical slate clean of the specialized, unique ways in which Black people have been oppressed over the ages. We alone, only we were enslaved in the manner that we were enslaved. Us (*sic*) alone were colonized in the manner that we were colonized, Capitalism today and white civilization ... are created out of these sort of oppressions that us (*sic*) as Black people, that us (*sic*) alone have suffered.²³

Mngxitama's contribution to Critical Race theory here is that only those who wield economic, social and political power have the resources and arsenal to give effect to their racism through exclusion, domination and oppression. It so happens that 'those in power' in South Africa are white people. A different reading of Mngxitama might suggest that there are also taxonomies and varieties of racism. In other words, 'white-on-black' racism is more premised on supremacy, privilege and historical advantage whereas 'black-on-white' racism tends to be motivated by resentment, anger and misery. To call them both 'racism' could be factually misleading and conceptually disingenuous. Crenshaw *et al* lament that:

²⁰Mngxitama (n 1).

²¹*Ibid.*

²²Biko *I write what I like* (1978).

²³*Ibid.* See Carmichael and Hamilton *Black power: The politics of liberation in America* (1969) 37.

In the construction of racism as the irrational and backward bias of believing that someone's race is important ... the cultural mainstream neatly linked the black left to the white racist right: according to this quickly coalesced consensus, because race consciousness characterized both white supremacists and black nationalists, it followed that both were racists.²⁴

Mngxitama traces his arguments back to slavery and to three related moments of dispossession. First, he points to land dispossession as a very violent process through which white colonialists seized the land of indigenous peoples and began to re-create black people in their image. Secondly, he points to labour dispossession as a continuation of the domination and oppression of black people. He notes how 'they come to your village and take your land and force you to come and work for them' on the mines and in their houses. The final process of dispossession which he points to is 'the dispossession of the African being'. He adds that '[t]he destruction of our Africanness was led by two processes: the one is their education, their white education and secondly, their white God'.²⁵ He argues that these three historically entrenched processes of dispossession have created the simultaneous inferiority complex of black people on the one hand and the superiority complex of white people on the other. The historical legacy of dispossession and racial inequality then correlates with everything from academic performance, access to resources, and quality of life which consequently form the basis for the future acquisition of wealth, income, good health, personal happiness and longevity – thus perpetuating the cycle of white privilege and revealing the practices of subordination facilitated and permitted by legal discourse.²⁶ Mngxitama's ideas here could be seen as biased against white people. I am more concerned with how they could open up the space for dialogue and for the tension(s) between race and rights, race and power, and race and reconciliation to play themselves out. This can only happen within the academic framework of a course on Critical Race Theory.

The manner in which colonialism and apartheid distorted and re-created the identities of black people can be linked up with Cornell's vision for an imaginary domain where people (of all races) can claim the right to articulate their desires and be afforded the moral and psychic space to evaluate and represent themselves not just as 'sexed creatures' but as creatures embroidered with race and ethnicity.²⁷ Through this imaginary domain, black (and this includes so-called 'coloured' and Indian people) and white people, are able to 'individuate' themselves, to imagine and re-imagine their identities in ways that go beyond their skin colour. By protecting every person's imaginary domain, we recognise the

²⁴Crenshaw, Gotanda, Peller and Thomas (eds) *Critical race theory: The key writings that formed the movement* (1995) xiii. See also Hooks *Killing rage: Ending racism* (1995) 154.

²⁵Mngxitama (n 1).

²⁶Delgado and Stefancic *Critical race theory: An introduction* (2001) xx.

²⁷Cornell *The imaginary domain: Abortion, pornography and sexual harassment* (1995).

inherent freedom, equality and dignity of all people to participate in public life as equals.²⁸ In this way, the use and abuse of racial labels and stereotypes is displaced. The imaginary domain proceeds from the anti-essentialist viewpoint that a person's identity and values are never fixed and that like most of the social world, they can be constructed, deconstructed and reconstructed – through words, stories, actions and images.

Van Marle introduced the notion of 'refusal' as a way in which to disrupt present systems and discourses within law and politics.²⁹ I have previously argued that an ethics of refusal also marks a major shift in traditional legal theory because it is concerned with the possibility of another political community and the possibility of a more egalitarian set of relationships between people.³⁰ Stu Woolman describes two elements of an ethics of refusal which can augment our understanding of how law and race continuously, albeit unwittingly, reinforce each other:

[Van Marle's] 'ethics of refusal' makes a bolder, two-fold claim. First, genuine reformation is more likely to be found in the day-to-day interactions and relationships that take place beyond the law, beyond normal politics and beyond revolution. Secondly, it is a perfectly reasonable response to the world as it is to turn away from law, politics and revolution – because they have failed to deliver – and to embrace 'solitude' – and a refusal to give the processes of law, politics and revolution our tacit imprimatur of approval.³¹

Van Marle developed the notion of refusal in response to what she perceived as the erosion of a politics of action, thinking and revolt by an uncritical over-reliance on law and human rights as the panacea for all socio-political issues, like transformation, reparation and socio-economic rights, faced in post-apartheid South Africa. The approach of refusal, then, is one that breaks way from the 'business-as-usual' ways of doing law and embraces alternative approaches. For my purposes, refusal exposes the failure of current legal and human rights discourse to explicitly address the historical legacy of racism, with the result being that the actual severity of black suffering is concealed and white privileges accrued under apartheid are virtually self-perpetuating. The adoption of refusal signals a revolt against, and a questioning of, the brutality of existing forms of racial power. Refusal illustrates the possibility of black people being able to struggle against pervasive race-based dominance in South African economic and

²⁸Van Marle 'No last word: Reflections on the imaginary domain, dignity and inherent worth' (2002) *Stell LR* 299. See also Cornell *At the heart of freedom* (1998) x.

²⁹Van Marle (n 15) 194. See also Van Marle (ed) *Refusal, transition and post-apartheid law* (2009) for a more comprehensive philosophical and political engagement with the notion of *refusal* that Van Marle, following Hanafin, introduced to South African jurisprudence. Admittedly what I offer here is not sufficient to grasp Van Marle's complex philosophical project.

³⁰Modiri (n 19).

³¹Woolman 'On rights, rules and relationships: A reply to Van Marle's "jurisprudence of generosity"' (2007) *Stell LR* 516.

social life. Refusing stereotypes, refusing to be silenced or assimilated, refusing to be labelled are also part of the effort towards a politics of peace and friendship in South Africa. I find *refusal* to be suggestive for contemplations on the 'rainbow nation' myth and the misdirected work of the Truth and Reconciliation Commission (TRC)³² which created the delusion in the South African community that 'we can now move on' and that we have been able to develop a cohesive non-racial national identity in South Africa. Refusal in this way discloses possibilities for how a society can confront and impede the reproduction of white supremacy and anti-black racism and also, be more aware of material disadvantage and systemic inequality.

Mngxitama criticises the ANC government with the pointed remark that '[t]he managers of white supremacy are Black people'.³³ Scales similarly warns against the dangers of incorporationism – a process by which marginal voices (in this context, black people) are made to believe that their interests are being served by the mainstream (in this context, law and liberal capitalism).³⁴ As someone constantly concerned with and confronted by the banality of racism in our daily lives, I have become highly sceptical of the perfunctory and cynical approach(es) to transformation and affirmative action taken by public and private institutions. It has been argued before that many of these bodies appoint and promote only those black people who will go along with the system without questioning or challenging it – only those black people who can be controlled, who 'fit the profile'.³⁵ This is a novel idea in the sense that the prevailing perception has been that once black people are promoted to senior positions and if AA quotas and equity targets are met, then there is adequate transformation. Scales' conception of incorporationism shows us that it is not only black bodies that must be appointed and promoted in order to promote racial integration but critical black voices as well. In the context of the law faculty, it was in fact a young white female Afrikaans-speaking lecturer who vigorously campaigned for a course on critical race theory and not the black professors employed there – not that many were employed there in the first place.³⁶

I am not making any assumptions about those black professors but merely wish to argue that while it is primarily the '*black condition*' that is at stake in contemplations on race, reconciliation and transformation, we should be careful not to alienate, exclude and worse than that, demonise progressive and race-sensitive

³²On how the TRC failed to engage with the historical legacy of racism, see Valji 'Race and reconciliation in a post-TRC South Africa' <http://www.csvr.org.za/wits/papers/papnv3.htm> (accessed 2010-09-11). See also Mamdani 'When does reconciliation turn into a denial of justice?' (1998) *Sam Nolutshungu Memorial lectures series* (1998) 14.

³³Mngxitama (n 1).

³⁴Scales 'The emergence of a feminist jurisprudence: An essay' (1986) *Yale LJ* 1373.

³⁵Van Marle 'Meeting the world halfway – the limits of legal transformation' (2004) *Florida Journal of International Law* 651.

³⁶Van Marle (n 5) 86.

white scholars and activists. By conforming to eurocentric and western behaviours and ideas, many influential black South Africans (the so-called 'compradorial' black elite) have been incorporated into a system which is designed to continue an unofficial but far more dangerous form of black oppression and degradation. When people are incorporated under the guise of transformation or racial integration, we negate the pervasive power of white supremacy and call racism by many names – 'bureaucracy', 'disciplinary procedures', 'unfair dismissal', 'meritocracy', 'legitimate complaint', 'standards', 'fairness', etc – everything except its real name.

Mngxitama refers to Malcolm X's distinction between a 'field negro' and a 'house negro' to explain how incorporationism often involves an interplay between power, emotional manipulation and identity exploitation. The house negro was the slave who worked in the house of the white slavemaster and was responsible for overseeing the field negroes. Because he was always given the leftover food and the master's old clothes and spoke and dressed like the master, the house negro developed a false sense of loyalty and love for the master and the master's family – so much so that he elevated himself to being the tyrannical master of his own brothers and sisters – the field negroes. The field negroes, in contrast, exemplified an *ethics of refusal*. Unlike the house negroes, when the master was sick, they prayed to their 'Black God' for the master to die; when the house of the master was on fire, they prayed for more wind to increase the fire. Through song and through protecting their imaginary domain, field negroes survived the oppression and degradation of slavery and waged a silent struggle against their oppressors.³⁷

The field negro/house negro dichotomy is telling for apartheid and post-apartheid politics in three significant ways. First, it draws an intriguing parallel by showing how efforts to suppress resistance against anti-black racism and white power prevailed during apartheid (through state-sponsored 'black-on-black' violence and the cunning appointment of black people as spies for the apartheid regime) and still persist in post-1994 South Africa (through the co-option of black people in white-dominated institutions by making them feel that their interests are being served). Secondly, it highlights that the struggle against 'racism' is more complex than just eradicating racial hatred and discrimination but also means challenging white privilege and dislocating the cultural processes that perpetuate white supremacy in society. Thirdly, it moves the discourse away from thinking about apartheid as a legal mistake that can be fixed through new laws and policies to recognising that raci(al)ism is a socially engineered, pervasive and brutal structure of power that requires radical transformation

In this section, I have attempted to sketch a brief outline of theoretical approaches to the relationship between race, law and politics that could form the basis of a course or discussion on critical race theory. Complexity, analytical rigour and equivocation will always inform such approaches because of the innate

³⁷Mngxitama (n 1).

differences between people inside and across the 'races'. The rationale for my focus on these three theories can be explained as follows: (1) We should never take people for granted but should rather consider them as a 'work in progress' – instead of buying into stereotypes and misconceptions about 'blacks' (or 'whites'), we should challenge ourselves to see the ethical completeness and rich human complexity of the person beyond the skin colour; (2) It is imperative that we reflect on new approaches to law and human rights that can eradicate the legacy of racism in the lives of the marginalised and also be aware of the emergence of modern racism(s) in the post-1994 legal and political order; and (3) we should be careful that, in attempts to infiltrate previously racially exclusive organisations, we do not find ourselves co-opted and used to uncritically support the status quo.

4 South African fragments – (re)collecting the 'bits and pieces' of a genuine discourse on race, rights, plurality and 'the law'

Freedom is a scary thing, not many people want it.³⁸

Mosikatsana, following Gilroy,³⁹ James and Lever,⁴⁰ motivates the need to adopt critical race theory in South Africa by describing the new phenomenon of 'modern racism' which he explains as forms of racism which not only do not invoke racial labels but are also cryptic and subliminal enough to escape detection. He notes that the shift from overt racism to informal racial exclusion poses strategic difficulties to anti-racism strategies and therefore highlights the potential of critical race perspectives to detect and resist these new emerging forms of racism which do not explicitly invoke race but are implicitly prejudicial and racially discriminatory:

The deinstitutionalisation of racism in South Africa by abolishing racist laws ushered in a new phenomenon referred to as modern racism. This form of modern racism, has distanced itself from ideas of biological inferiority by linking race with concepts such as 'culture', 'the maintenance of standards' and 'tradition' ... the lack of explicit references to race is a significant characteristic of the new types of racism.⁴¹

According to Mosikatsana, these new types of racism come in many forms such as, among others, (1) denial of racism, (2) reversing the charge of racism, and (3)

³⁸'Pieces and parts' by Laurie Anderson from her album *Life on a string* released in 2001.

³⁹Gilroy 'The end of anti-racism' (1990) *Journal of Ethnic and Migration Studies* 71-83.

⁴⁰James and Lever 'The second republic: Race inequality and democracy in South Africa' in Hamilton *et al* (eds) *Beyond racism: Race and inequality in Brazil, South Africa and the United States* (2001) 50.

⁴¹Mosikatsana 'Critical race theory' in Roederer and Moellendorf (eds) *Jurisprudence* (2004) 283.

elite discourses in which white people speak as members of the dominant race group.⁴² Whether it is the 'self-centred language politics' of AfriForum or the Group of 63,⁴³ the grievances about BEE disturbing white power and affecting white interests or the complaints about an 'incompetent' government official or black professional, we should remain vigilant in decoding and confronting subtle racism(s).

The post-apartheid context also demands a new stream of approaches that operate from the starting point that the formal end of apartheid has not occasioned the end of black alienation and white privilege. Talking and thinking about race today requires us to understand the suppressed and silenced dimensions of racial power. A central tenet of critical race theory is to alert us to the dangers of white dominance reproducing itself through nepotistic networks of patronage⁴⁴ and attempts to maintain white cultural hegemony as the dominant force of social relations. Before I put forward some elements of a South African approach to race through the literary work, *Cry the beloved country*, I want to turn some attention to the notion of race as a social construct. Henk Botha argues that a class-based approach to economic redress might be better able to address the systemic (economic) disadvantage (of black people) because it does not reduce individuals to reified social categories like 'race' but takes their material circumstances and complex particularities into account.⁴⁵ Botha here seems to be saying that race is not an important feature of South African life and does not hold social value simply because, as a social construct, it lacks ontological or scientific legitimacy. Mngxitama argues as follows:

[T]hey teach bad Sociology these days. They say race is a social construct [and] therefore has got no scientific basis. What is not socially constructed? Even God is socially constructed. Everything we know is socially constructed. Class and gender are also socially constructed. Why is it that race is socially constructed but has got no scientific basis? We as Black people we know that if you are aware and open your eyes, you can feel it. You know it. You know that you are black when you walk in a room full of white people.⁴⁶

As crude as Mngxitama's views may seem to some, they bring in the element of honesty in his engagement with race in sociology theory. I am critical of Botha here for subsuming race under class, and thereby ignoring the psychological and structural effects of racism and in the process places too much emphasis on material gains. For affirmative action to be effective and to affirm black people's sense of worth, race must remain a central and socially significant category of perception,

⁴²*Ibid.*

⁴³Van der Walt 'The time of reconciliation' in Van Marle and Le Roux *Post-apartheid fragments – law, politics and critique* (2007) 19.

⁴⁴This is a trend that is most prevalent in schools, hospitals, universities and 'white-owned' companies.

⁴⁵Botha 'Equality, plurality and structural power' (2009) *SAJHR* 22. See also MacDonald *Why race matters in South Africa* (2006) and Dupper 'Affirmative action: Who, how and how long?' (2008) *SAJHR* 425.

⁴⁶Mngxitama (n 1). See Glasgow *A theory of race* (2009).

representation and analysis.⁴⁷ Black and white people must internalise the fact that their current positions in society are a result of the historical reality of racism. When white people criticise governments or affirmative action policies, they should be careful not to ignore that their privilege and wealth is directly connected to the historical suppression, objectification and deprivation of black people and that 'merit', intelligence and hard work are not neutral or independent factors but rather part of the benefits that accrued to white people under colonialism and apartheid. Critical race perspectives point to the fact that racism is banal not aberrational – it is difficult to cure and address precisely because it has psychic and material benefits (for the white elite and middle-class blacks). The overriding attitude in society will be of docility largely because there is no incentive to eradicate racism because its eradication destabilises existing power relations and also threatens the accrual of the benefits that are enabled through exploitation, lack of transformation and poverty. Racism in South Africa is far more complex, involved and menacing than just intolerance, ignorance, misunderstanding or fear; it embeds all socio-cultural interactions and experiences, informs historical memory and influences (consciously and subconsciously) thought patterns and behaviours. On a structural level, the corollary of this is that anti-black racism has been normalised and that legal norms, rules and doctrines are not impervious to this but rather, directly implicated.

The Constitutional Court as an institution that embodies the ambitions of the post-apartheid legal order has had a number of opportunities to directly confront race and the paradox that in order to remedy the inequality and disadvantage created by racist apartheid laws, it will be necessary to invoke the broad racial labels, identities and categories which are themselves implicated in racial discrimination and prejudice. I will briefly point to two specific cases to demonstrate how court judgments and issues across all legal disciplines must also form part of a critical race inquiry. The first case is *Minister of Finance v Van Heerden*⁴⁸ in which the Court held that a pension fund scheme which differentiated between members of Parliament who had already been MPs before 1994 and those who joined only after 1994 was not unfairly discriminatory. Moseneke J ruled that the provision for higher employer's contributions in respect of the latter group complied with the requirements set out in section 9(2) of the Constitution. He further ruled that it was designed to protect and advance persons who are presently disadvantaged due to past discrimination and thus promoted the broader objective of equality. The most striking proclamation in *Van Heerden* was when the Court expressly noted that 'we are far from having eradicated the vestiges of racial discrimination'.⁴⁹

The other case where the Constitutional Court confronted racial discrimination was *City Council of Pretoria v Walker*.⁵⁰ In the Walker case, the City Council of

⁴⁷See Crenshaw *et al* (n 23) xv.

⁴⁸2004 6 SA 121 (CC); 2004 11 BCLR 1125 (CC).

⁴⁹*Van Heerden* (n 47) paras 147-148.

⁵⁰1998 3 BCLR 257 (CC).

Pretoria was charging Black townships, as was the case during apartheid, based on a flat rate (because no meters were installed for measuring water) whereas the municipal charges for 'old city' residents were based on consumption. Walker (a white resident of old city Pretoria) considered the differential methods of levying and collecting service charges as unfair discrimination and consequently decided to pay the flat rate that was charged in the black townships. As a result, he fell in arrears for which the City Council of Pretoria sued him. After numerous decisions in the lower courts, the case ended up in the Constitutional Court which had to consider whether the system of charging different tariffs was a form of reverse discrimination which was in violation with the equality clause in the Interim Constitution. Langa DP stated that the matter must be viewed in light of the fact that residents of Black Townships were 'disproportionately poor and under-serviced'.⁵¹ The court held that while the practice of charging different fees did indeed amount to discrimination, it did not constitute *unfair* discrimination on the grounds of race. Sachs J pointed out that Walker had benefitted from past discrimination against blacks and continued to enjoy 'regular municipal services at all material times'⁵² which was not the case in Black townships.⁵³ These two cases point to the more 'direct' nexus between race and law – even though my contention and that of all other CLS/CRT scholars is that even events in the media, literary works and political issues dealing with race also point to a direct nexus between race and law. The significance of these judgements, among others,⁵⁴ also emphasises that a course on Critical Race Theory does not belong in the Faculty of Humanities – as some would suggest – but in a Faculty of Law as part of discrediting the conservative,⁵⁵ positivistic and formalist methodologies that dominate South African legal education.

This brings me to *Cry the beloved country*, a novel by Alan Paton which together with other literary works such as JM Coetzee's *Disgrace* (2000), Antjie Krog's *Country of my skull* (1998) and Njabulo Ndebele's *The cry of Winnie Mandela* (2003) offer significant reflections and starting points for thinking and talking about race relations from a literary perspective.⁵⁶ *Cry the beloved country* is set in the 1940s – around the same time when the National Party announced the formal policy of apartheid and state-managed racial segregation. Although it explores many themes, a recurring theme Paton brings to bear is the vicious cycle of inequality and injustice and the

⁵¹Walker (n 49) para 269.

⁵²Walker (n 49) paras 103-105.

⁵³This paragraph is based on a section in a previous article. See Modiri (n 19).

⁵⁴See also the cases of *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC); *S v Collier* 1995 8 BCLR 975 (C); *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC), 2005 4 BCLR 347 (CC); *Moseneke v Master of the High Court* 2001 2 SA 18 (CC), 2001 2 BCLR 103 (CC); *Mabaso v Law Society of the Northern Provinces* 2005 2 SA 117 (CC), 2005 2 BCLR 129 (CC).

⁵⁵Karl Klare uses the word 'conservative' to describe the legal culture in South Africa. See Klare (n 9) 165.

⁵⁶See also, Krog *Begging to be black* (2009); *A change of tongue* (2003); Malan *Resident alien* (2009); *My traitor's heart* (1990); Venter *Horrelpoot* (2006) and Mda *The whale caller* (2006).

moral repair of human relationships that were destroyed or separated during apartheid. I do not give a full or comprehensive account of the novel. Instead I wish to briefly draw attention to significant lessons that can be gleaned from the novel and also to highlight the value of literary references in critical race theory.

Paton depicts a pastor, Stephen Khumalo, in search of his son, Absalom, who had moved to Johannesburg to escape the poverty and strife that was the norm for black people in the village of Ndotsheni. When they were finally reunited, Absalom who had begun city life as a factory worker had turned to a life of crime and was on trial for the murder of Arthur Jarvis, a white anti-apartheid activist. Arthur and his father James did not agree on Arthur's decision to join the struggle. James, unlike Stephen, never had the chance of being reunited physically with his son. Through reading James' writings on the injustices and inequalities faced by black people in South Africa, a previously ignorant and indifferent Arthur decides to continue the struggle to which his son had committed himself. The moral conversation that Arthur and James have – through the writings – is suggestive of how white people can come to appreciate the realities of racism and the effects of apartheid on black people. Through the personal sacrifices (of money and of his standing in the white community) exemplified by James' reconciliatory acts (of donating milk to children in the village and helping to improve their soil irrigation system), the possibilities of overcoming a superiority complex are also uncovered. Absalom's turning to crime as a response to poverty and indignity can also be seen as a warning sign for young black people confronted with iniquity and who have lost hope in law's universal promise to promote the common good.

The novel ends with the sun rising on the morning after Absalom was executed and, in many ways, reflects the values of hope, mourning and forgiveness which are so central to reconciliation in post-apartheid South Africa. The discourse on race relations will also have to confront the seminal question of whether the sun can still rise after apartheid. This novel as well as the metaphors – of 'searching', of 'moral repair' and of 'sacrifice' – explored in the novel provide a useful source for reflecting on political friendship, trans-racial equality and overcoming racism in day-to-day relationships and can add to critical race insights and analyses.

5 'It doesn't matter if you're black or white'? Really?

The world changes
Revolutionaries die
And the children forget
The ghetto is our first love
And our dreams are drenched in gold
We don't even cry, we don't even cry about it no more
Are the beautiful ones really dead?⁵⁷

⁵⁷'Nizwala ngobani' (Who gave birth to you) by Thandiswa Mazai from the album *Zabalaza* (2004).

The late Michael Jackson wrote the words 'it doesn't matter if you are black or white' in a song which has now become famous for its message of racial harmony.⁵⁸ Although the song makes for a great party, it sends a very wrong and very counter-productive message: that race does not matter. This phrase, together with Rodney King's famous line, 'Can't we all just get along?', has been used repeatedly to evade debate and discussion on race thereby perpetuating the status quo of racial inequality and continuing racial injustice. Ansell argues that 'color-blind politics' are 'ill-equipped to rise to the challenge of building a new racial order. Instead color-blindness has become a centrepiece for white backlash politics. Rhetorical accommodation to color-blindness is combined with denial of racial hierarchy and culpability for the racist past'.⁵⁹ In 1999, Van Marle suggested that the reasons for the resistance towards her proposal to launch a course on Critical Race and Gender Theory could be that the Faculty of Law at the University of Pretoria had not yet confronted its racist past and that the predominantly white faculty staff were in denial about race and the risk of racism (and other forms of bigotry) in themselves. They, of course, responded vehemently and with indignation.⁶⁰ In 2010, almost 11 years later, while conducting interviews for tutor positions, senior professors in the same faculty insisted on interviewing the students who had applied for English tutorial posts in Afrikaans. Suffice to say, the three candidates (two of whom were black) who managed to speak Afrikaans to an all-white interviewing panel were the ones who got the job. To me, this incident points to institutional racism and incorporationism (hiring only those black people who are *black on the white professor's terms*, who can speak the language which those *professors* feel comfortable speaking despite the university having three official languages). This brings me to the following question: *what has been the impact (or relevance) of teaching Critical Race (and Gender) Theory in the final year of the LLB and offering it only as an elective module?* If the course was offered in the third or second year as a compulsory subject perhaps such incidents would not go undetected and would not be treated as normal.

The title of this article, 'the grey line in-between the rainbow' could, like all words, be interpreted in many ways. My use of the phrase is to indicate that, despite having a constitution which promises non-racialism, equality and freedom and a comprehensive bill of rights, we are still confronted with the challenges of 'living *differently* under law *after apartheid*'; that in-between the rainbow (of the new South Africa), there is a grey line (inequality, injustice and disadvantage) that reminds us that the 'rainbow nation' project is far from complete. We cannot give in to the complacency of legal formalism and constitutional supremacy when the lived experience(s) and concrete reality(ies) of black (and white, indian and

⁵⁸'Black and white' by Michael Jackson from the album *Dangerous* (1991).

⁵⁹Ansell 'Casting a blind eye: The ironic consequences of colour-blindness in South Africa and the United States' (2006) 32 *Critical Sociology* 333.

⁶⁰Van Marle (n 5) 88-89.

coloured) people does not correlate with the values of the Constitution.⁶¹ I am thus inclined to agree with Mngxitama that the constitutional protections and rights extolled by constitutional lawyers, judges and academics are a 'vicious rumour' to most black people who remain trapped in the structural violence of poverty and other various violations of their purported socio-economic rights.⁶²

The ongoing uneasiness between race and constitutionalism was tested in 2008 when the Forum for Black Journalists (FBJ) invited then ANC President Jacob Zuma to a closed meeting of the FBJ. When white journalists attempted to gain entry to the meeting they were prevented from doing so by the FBJ. The white journalists who had been excluded from the meeting laid a complaint with the Human Rights Commission which hastily found that exclusion of people on the grounds of race is unconstitutional and that the FBJ should amend its constitution accordingly.⁶³ Michael Trapido commented on this issue by saying the FBJ and Jacob Zuma are a 'disgrace'. Referring to BEE as a form of 'legislated racism', Trapido asks 'Having arranged this function on a racist basis, what moral ground [is the FBJ going to] stand on when [they] are excluded on the basis of their race in the future'. He ends his piece by saying 'welcome back apartheid, under new management'.⁶⁴ Mngxitama however argues that the HRC's judgement is tantamount to saying that Black people are not allowed to organise meetings 'without ... supervision from white people'. He adds that 'It [surprises him] a lot ... that after 350 years of systematic oppression of black people, by racism, which benefit[ted] white people, when black people gather in their own meeting, white people can insist to be part of that'.⁶⁵ I find the HRC judgement and Trapido's knee-jerk vitriol very worrying because it does not take the context and rationale

⁶¹If I were to follow the late Etienne Mureinik's 'bridge' metaphor, I would argue that South African society is stuck in the middle of that bridge, somewhere between an authoritarian system based on racial oppression and inequality and a 'transforming' democratic system based on dignity, freedom and equality. The official formal shift from apartheid to the new South Africa is not conterminous with people's current economic, political and social situations. See Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) *SAJHR* 31. However, I prefer Van der Walt's reading of the bridge metaphor to where he argues for a bridge that 'allows and invites multiple crossings, in both directions' that opens up the space for genuine transformation and multiple interpretations and leaves room to 'imagine alternative futures'. Bishop 'Why must I cry? Justification, sacrifice, loneliness, madness and laughter in post-apartheid judicial decision-making' (2007) 1 *Pretoria Student LR* 35. See Van der Walt 'Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *SALJ* 258.

⁶²See Mngxitama 'Black anti-blacks are denialists' *Mail and Guardian* (online) <http://mg.co.za/article/2010-07-19-black-antiblack-are-denialists> (accessed 2010-12-14).

⁶³'SAHRC to debate black media freedom' *Mail and Guardian* (online) <http://mg.co.za/article/2008-02-25-sahrc-to-debate-black-media-forum> (accessed 2011-09-27).

⁶⁴Trapido 'Zuma and Forum of Black Journalists disgrace South Africa' Thought Leader (Blog), *Mail and Guardian* (online) <http://www.thoughtleader.co.za/traps/2008/02/22/zuma-and-forum-of-black-journalists-disgrace-south-africa/> (accessed 2010-11-7).

⁶⁵Mngxitama (n 1).

for the FBJ's meeting into account and thereby runs the risk of reinforcing the paternalistic idea that when black professionals organise around their race in order to discuss common interests and to combat racism in the media sector they must do so with the permission of white journalists. I also take issue with equating the isolated exclusion of a white journalist from a meeting with the entrenched historical subjugation and marginalisation of black intellectuals and reporters from the public space. In cases such as these, (historical) context matters.⁶⁶

I take the point that the intensity of the issue opens room for more than just one argument. This can also be said of the visceral responses to the novel *Disgrace* by JM Coetzee that Van Marle discusses. The part in question in the novel is when the daughter of a white professor (who had just been dismissed for having a sexual relationship with a coloured student), Lucy, is raped by three black men (robbers) while they had set her father on fire in the bathroom.⁶⁷ In response to the rape of Lucy, the ANC angrily noted how:

[F]ive years after our liberation, white South African society continues to believe in a particular stereotype of the African, which defines the latter as immoral and amoral; savage; violent; disrespectful of private property; incapable of refinement through education; and driven by hereditary, dark satanic impulses.⁶⁸

While debates around events detailed in *Disgrace* and the debacle concerning the Forum for Black Journalists have created some level of acrimony, they are part of the building blocks towards the development of a unique and original discourse on race and law in South Africa. Since 1994, a number of critical events have shaped and re-shaped racial attitudes – some positively and others negatively. The 1994 elections, the 1995 Rugby World Cup and the recent 2010 World Cup were

⁶⁶That is why in the United States of America, eg, schools are legally impelled to celebrate black history week/month. The reason why there is no white history month is because of the acknowledgement that the rest of the history curriculum is white: it is about white politicians, white conquests and white issues under the authorship of white academics. Pierre de Vos vividly crystallises this argument by saying that '[n]ot all distinctions based on race constitute unfair discrimination because context matters. That is why a Black Lawyers Association would be constitutionally valid while a White Lawyers Association might well not be.' De Vos supports the idea of black journalists meeting exclusively to discuss common concerns and to 'organise around their blackness'. His disapproval of the FBJ's decision to ban white reporters is more because of the prominence of the risk of secrecy and the crass exclusion of white people from an event where Zuma, a national public figure, was to make an announcement (presumably in the public interest). See De Vos 'On Zuma, race and the black journalist forum' <http://constitutionally-speaking.co.za/on-zuma-race-and-the-black-journalist-forum/>. By this, I am not (nor do I think De Vos is) suggesting that only black organisations should be protected by the 'freedom of association' clause; I merely argue for a context-based approach to determining whether the racial exclusion is justified or not (I hasten to add that there should not be too many reasons justifying such exclusion). This short note is an example of an issue that must be examined, debated and investigated by critical race theorists and public law scholars (or critical race public law scholars?).

⁶⁷Coetzee *Disgrace* (1999) 220.

⁶⁸ANC submission to the Human Rights Commission Hearings on Racism in the Media' *ANC Online* <http://www.anc.org.za/show.php?id=2674> (accessed 2011-09-27).

all spectacles of national unity and served as examples of embracing the *other*. However, beyond these grand events, lurk moments in our history which are far more ominous. Whether it was the manner in which black people resented the TRC's approach to justice or the senseless racially driven murder of four black squatters by Johan Nel, or the Reitz scandal at the University of Free State, there is ample proof that racial hatred and disharmony is far from gone. Lawyers, judges and academics would be naive to ignore or to underestimate the power of these discourses over legal processes and institutions. As an aside, I want to argue against an approach that excludes the unique experiences and interpretations of the Indian and Coloured communities. The becoming of a critical race jurisprudence in South Africa should be open to concepts and theories that can help us explain and interpret the definitive differences between diverse ethnic and racial groups in South Africa and not just the hackneyed binary opposition of 'blacks' and 'whites'.

It is trite that the inherent difficulty of engaging 'academically' with race is amplified by our subject positions (the 'race group' we fall into, the skin colour tied to our corporeal and incorporeal selves), our chosen representations of the world and our frames of reference. Van Marle and Danie Brand, in their contribution to a debate on transformation in the Faculty of Law at the University of Pretoria, offered ten thoughts on transformation which aptly capture the difficulties of transition from a past of racism to a future of multi-racial democracy. Three of these deserve mention here:

Transformation is not evolution. Evolution occurs when an institution changes on its own terms, without the identity of the institution itself having to change. Transformation, in contrast, is change radical enough so that the *identity of the institution itself must also change*.⁶⁹

And:

Transformation entails risk. That is, an institution and the people who work in it must place themselves and their way of doing things, of thinking and of living on the line, and must be willing to sacrifice some part of it.⁷⁰

And also:

Transformation entails problematising existing positions of power, in other words a radical questioning of that which we see as normal, a reevaluation (*sic*) of standards, merit and excellence. To explain: Transformation does not indicate a lowering of standards, but a consciousness of the subjective nature of any existing set of standards or conceptions of merit and excellence and an acceptance that standards and conceptions of merit and excellence must also change.⁷¹

⁶⁹Van Marle and Brand 'Ten thoughts on transformation' in Heyns and Visser *Transformation and Faculty of Law of the University of Pretoria* (2007) 55. See also Cornell *Transformations* (1993) 1.

⁷⁰*Id* 56.

⁷¹*Ibid*.

6 Concluding remarks

The beginning of a richer critical race perspective in South Africa is a disruptive force to mainstream approaches to equality jurisprudence and western legal liberalism. It provides alternative answers to those given by conservative, denialist and formalist accounts. Critical race theory introduces a language in which to engage in a race-based methodical critique of legal reasoning and legal institutions and because of its activist, reform-oriented dimension, opens up new possibilities for racial justice.⁷² This is what will differentiate critical race theory from a course on ethnic studies, political science or identity politics: its specific focus on race and its ability to expose the *indeterminacy*, *fundamental contradiction*, *false consciousness* and *reification of rights* in law and legal theory.

Klare correctly points out that '[d]enial is a general phenomenon, but arguably additional considerations arise in the context of the new South Africa'.⁷³ I want to connect this with the fictional words of Winnie Mandela from the novel *The cry of Winnie Mandela* which succinctly capture South Africans' precarious relationship with reconciliation:

I give you my heaven as possibly the single element of consistency in my political life: my distrust of reconciliation. In this I proclaim a new life in South Africa, against those who proclaim a truce between old lives ... I will not be an instrument for validating the politics of reconciliation. *For me, reconciliation demands my annihilation.*⁷⁴

The language of reconciliation, so far, has been superficial. South Africans might acknowledge the need for reconciliation but they are resistant to and in denial of it because it demands their 'annihilation'⁷⁵ in the sense that to achieve real transformation, white power must be challenged and black entitlement to reparations must be scrutinised and justified. Reconciliation is an active and demanding politics and indeed 'there is no such thing as innocent bystanding'.

I have alluded to legislation, case law, government policy, media/popular culture, philosophy and literature as some sites for critical race inquiry. Topics as wide as land redistribution, transitional justice, post-apartheid social movements,

⁷²Delgado and Stefancic (n 25) xix.

⁷³Klare (n 9) 166.

⁷⁴Ndebele *The cry of Winnie Mandela* (2003) 112-113 (my emphasis). It is also instructive to quote Ariel Dorfman: 'There is no guarantee that we will ever reach the deep reconciliation we need as a species. Indeed, I tend to think – it may be the transgressive writer in me – that some damage done is irreparable, I notice that when justice comes infrequently the most long-lasting memories are in danger of fading.' Dorfman 'Whose memory? Whose justice? A meditation on how and when and if to reconcile' *8th Annual Nelson Mandela lecture* (2010-07-31) 14. http://www.nelsonmandela.org/index.php/news/article/eighth_nelson_mandela_annual_lecture_address/ (accessed 2011-09-27).

⁷⁵My use of the term 'annihilation' does not mean a physical or emotional destruction but rather I use it to argue that reconciliation demands that we change, that we 'annihilate' our current lifestyles and mindsets – this involves sacrifice. Annihilation in this sense can be linked to the notions of 'renewal' and 'regeneration'.

education, access to healthcare, development, unemployment, housing shortages, corruption, criminal justice and even subjects currently covered in courses on legal pluralism and customary law should also be investigated within a post-apartheid context by critical race scholars. These, together with analysing society's mental images, perceptions and stereotypes about race signal the difficulties of developing one monolithic seamless theoretical framework under the banner of Critical Race Theory. Though the aim of CRT is to expose and dismantle discrimination and alienation based on racial hierarchies, I do not propose CRT as a course just for those students who are fervently committed to the project on non-racialism embedded in the Constitution. On the contrary, I think a CRT module must accommodate students who hold divergent (reactionary, conservative, liberal and radical) views on race and make room for the subjectivities, irrationalities and clashing values that colour people's attitudes towards race. A course in Critical Race Theory must emphasise dialogue, conceptual fidelity and intellectual clarity. In this way, the aim of such a course is the reconstruction, transformation and re-imagining of the South African public space. It also highlights the values of emancipation, enlightenment and inclusive citizenship which should still be pursued concurrently with race-sensitive and race-critical approaches to law and legal interpretation.

The miscellaneous (and often clashing) texts of critical race scholars and theorists such as, among many others,⁷⁶ Kimberlè Crenshaw,⁷⁷ Derrick Bell,⁷⁸ Paul Gilroy,⁷⁹ Frantz Fanon,⁸⁰ Steve Biko⁸¹ and Patricia Williams⁸² add multiple pictures and dimensions to the rights critique by viewing them from the vantage point of race within the contexts of democracy, globalisation, multiculturalism, economics, redress, history, post-colonial studies, etc. This article is concerned with the absence of race critical approaches in all spheres of South African post-apartheid

⁷⁶Other prominent and influential critical race scholars include Alan Freeman, Charles Lawrence, Richard Delgado, Jean Stefancic, Mari Matsuda, Angela Harris, Angela Davis, Adrien Wing and Patricia Hill Collins. There are also notable scholars and philosophers who have also contributed to the discourses on issues of race, culture and identity: Paget Henry, Lewis Gordon, Stokely Carmichael, Aime Cesaire, Gloria Anzaldúa, Jean-Paul Sartre, Cornel West, Charles Mills, David Theo Goldberg and Drucilla Cornell.

⁷⁷Crenshaw *et al* (n 23); Crenshaw *et al* *Words that wound: Critical race theory, assaultive speech and the first amendment* (1993); 'A black feminist critique of anti discrimination law and politics' in Kairys (ed) *The politics of law: A progressive critique* (1998) 356-380.

⁷⁸Bell *And we are not saved: The elusive quest for racial justice* (1989); *Faces at the bottom of the well: The permanence of racism* (1993); *Afrolantica legacies* (1998).

⁷⁹Gilroy 'The end of anti-racism' (1990) *Journal of Ethnic and Migration Studies* 71-83; *Between camps: Nations, cultures and the allure of race* (2001); *The black Atlantic, modernity and double consciousness* (1993).

⁸⁰Fanon *Black skin, white masks* (1952), *Wretched of the earth* (1963); *Toward the African revolution: Political essays* (1967).

⁸¹Biko *I write what I like* (1978). See also Mngxitama *et al* *Biko lives! Contesting the legacies of Steve Biko* (2008).

⁸²Williams *The alchemy of race and rights* (1991); *The rooster's egg* (1995).

life, and thus does not claim to offer a scientific, nuanced or pedagogical breakdown of how to teach Critical Race Theory in law schools/faculties. Instead the aim here was to offer some insights, thoughts, ideas, opinions and boundaries that could possibly find expression within the broad genre and academic field of Critical Race Theory. If readers feel constrained to differ with the arguments posited and methodologies followed here, that too, is most welcome.

I have previously linked Hannah Arendt's thoughts on the 'banality of evil' and the thoughtlessness of Adolf Eichmann to the pervasiveness of racism and of racist, essentialist attitudes in society.⁸³ To conclude, I want to connect the call for Critical Race perspectives in South Africa to Arendt's search for a 'thinking space' or a 'timeless now'.⁸⁴ CRT forces us to move away from preordained and outmoded ideas about race and law and pushes us to embrace complexity, radical alterity and multiple voices. It urges us to move beyond abstract rules, principles and theoretical beliefs and rather focus on the material conditions of ordinary people. The following quote by Jeremy Waldron describes Arendt's concerns about thoughtlessness in everyday life and my concerns about the (inattentive and out-of-tune) conversations on race in South Africa:

The paraphernalia of thoughtlessness is legion. Clichés and jargon, stock phrases and analogies, dogmatic adherence to established bodies of theory and ideology, the petrification of ideas – these are all devices designed to relieve the mind of the burden of thought, while maintaining an impression of intellectual cultivation.⁸⁵

Anton Kok begins the second chapter of his dissertation which focuses on law's role in effective societal transformation with the quote, '[I]aw is some tricky shit' from the film *Thelma and Louise*.⁸⁶ I think this is true also for thinking and talking (and also writing) about critical race theory in post-apartheid South Africa – and also true for the movement towards a post-apartheid theory of law.⁸⁷ The question of 'race' and its tensile interaction with law is a vexed question – because it transcends the categories of law, politics, and social transformation. It is complex and complicated. Critical race theory THEREFORE urges AN engagement with complex thinking. I end off with Derrida:

⁸³Modiri (n 17). Arendt *Eichmann in Jerusalem: A report on the banality of evil* (1963).

⁸⁴Young-Bruehl *Hannah Arendt: For the love of the world* (2004) (2nd ed) 450.

⁸⁵Waldron 'What would Hannah say?' *The New York Review of Books* (2007) 12.

⁸⁶Kok *A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* LLD dissertation (University of Pretoria) (2008) 34.

⁸⁷On the 'becoming' of a post-apartheid jurisprudence, see Van Marle 'Jurisprudence, friendship and the university as heterogenous public space' (2010) *SALJ* 628; Van der Walt AJ 'Resisting orthodoxy – again: Thoughts on the development of post-apartheid South African law' (2002) *SAPR/PL* 258-278. See also Botha, Van der Walt A and Van der Walt J (eds) *Rights and democracy in a transformative constitutionalism* (2003); Cornell, Barnard-Naude and Du Bois (eds) *Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008); Van der Walt J *Law and sacrifice: Towards a post-apartheid theory of law* (2005).

These things are difficult, I admit; their formulation can be disconcerting. But would there be so many problems and misunderstandings without this complexity and without these paradoxes? One shouldn't complicate things for the pleasure of complicating, but one should also never simplify or pretend to be sure of such simplicity where there is none. If things were simple, word would have gotten round.⁸⁸

⁸⁸Derrida *Limited Inc* (1988) 119.