

# SLAVE ARTISTS AS POWERFUL REALITY CREATORS<sup>1</sup>: TAKING RESPONSIBILITY AND REJECTING RACE CONSCIOUSNESS<sup>2</sup>

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1. See Reginald Leamon Robinson, *Critical Race Theory: History, Evolution, and New Frontiers: Article: Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U.L. REV. 1361 (2004) [hereinafter Robinson, Human Agency]. In Human Agency, Robinson contends that people can be “powerful reality creators” that are “earthly gods who name and thus co-create their realities,” *id.* at 1381, by “exercis[ing] levels of human agency that allow them to overcome social and personal hurdles.” *Id.* at 1417.

2. ©2007 by Kimberly L. Alderman.

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## ABSTRACT:

*This article critiques the race conscious thinking inherent in Critical Race Theory (“CRT”) and offers an alternative to structuralism and determinism. It reviews the colonial origins of race consciousness, and argues that advocating race conscious remedies perpetuates the very racism CRT decries. The article focuses on powerful reality creators of the past to create a more empowering framework of individual responsibility and personal reality construction. The article makes a case study of David Drake, a slave potter from 1800s South Carolina. Slave artists like David Drake show us that, no matter how strong the forces of oppression, a marginalized individual has the authority and power to decide who he or she becomes.*

*...I'm afraid we're losing the real virtues of living life passionately, the sense of taking responsibility for who you are, the ability to make something of yourself and feeling good about life.*

*Existentialism is often discussed as if it's a philosophy of despair. But I think the truth is just the opposite... It's like your life is yours to create. I've read the post modernists with some interest, even admiration. But when I read them, I always have this awful nagging feeling that something absolutely essential is getting left out.*

*The more that you talk about a person as a social construction or as a confluence of forces or as fragmented or marginalized, what you do is you open up a whole new world of excuses...*

*It might be true that there are six billion people in the world and counting. Nevertheless, what you do makes a difference... Makes a difference to other people and it sets an example.*

*...I think the message here is that we should never simply write ourselves off and see ourselves as the victim of various forces.*

*It's always our decision who we are.<sup>4</sup>*

## I. INTRODUCTION

Critical Race Theory (“CRT”) relies on structural determinism to explain the black experience.<sup>5</sup> Critical race scholars (“Race Critics”) assert that the

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4. WAKING LIFE (Fox Searchlight Pictures 2001) [hereinafter WAKING LIFE].

5. See Robinson, *supra* note 1, at 1380-1387 (providing a detailed explanation of how CRT relies on structural determinism).

white dominant structure compels judges and administrators to use facially neutral law to discriminate against racial minorities.<sup>6</sup> Race Critics contend this racist legal structure<sup>7</sup> controls the lives of minorities in order to keep them subordinate to whites.<sup>8</sup> Accordingly, Race Critics argue that determinative forces governed and explained the day-to-day existence of slaves.<sup>9</sup> Viewed in this light, slaves would have had no power over their own lives.<sup>10</sup>

Despite CRT's structuralist position<sup>11</sup>, slave artists like David Drake expressed humanity and individualism through artistic expression, thus disrupting the Race Crit claim that the dominant structure controls the moment-to-moment existence of black life.<sup>12</sup> His work demonstrated that slave artists designed their internal<sup>13</sup> and external realities<sup>14</sup>, shaping their

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6. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1358 (1988) [hereinafter Crenshaw, *Antidiscrimination Law*] ("The coercive power of the state operates to suppress some groups, particularly when there is consensus among others that such coercion is warranted.").

7. See Angela Harris, *Foreword* to RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001) ("[R]acism is part of the structure of legal institutions.").

8. See Crenshaw, *supra* note 6, at 1360 (an analysis of hegemony that includes racial subordination suggests that the creation of a clearly visible 'other,' whose interests are seen as being opposed in every way to the interests of those who identify -- by virtue of color and culture—with the dominant class, is a hegemonic tool used to maintain legitimacy.); See also Derrick Bell, *The Supreme Court, 1984 Term: Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); See also Reginald Leamon Robinson, *The Sacred Way of Tibetan CRT Kung Fu: Can Race Critics Teach the Shadow's Mystical Insight and Help Law Students "Know" White Structural Oppression in the Heart of the First-Year Curriculum? A Critical Rejoinder to Dorothy A. Brown*, 10 MICH. J. RACE & L. 355, 374 (2005) [hereinafter Robinson, *Sacred Way*] ("Race Critics, the Shadows, rely on their experience to 'know' that white racism operates behind the façade of objective, neutral laws.").

9. See Crenshaw, *supra* note 6, at 1357 ("Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others.").

10. *Id.* at 1359 ("[S]omething other than their own structure of thought prevents Blacks from changing their world.").

11. See Robinson, *supra* note 1, 1388-1389 ("In CRT, Race Critics rely heavily on the mindset doctrine to analyze and deconstruct how liberal legalism, like Equal Protection, and structural determinants, like rights, affect ordinary people... A mindset prevents ordinary people from subverting elite realities, and so it becomes natural and normal for the lazy, undeserving poor to live at the bottom... In short, elite whites exist naturally on top, ordinary people at the bottom. ...With this very staid, structuralist view, Race Critics know that mindsets like white structural oppression can influence how and why ordinary people, like Latinos and Asian Americans, have experienced America as they have.").

12. See generally Crenshaw, *supra* note 6.

13. See ROBERT ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 33 (1972) [hereinafter ORNSTEIN].

14. See Robinson, *supra* note 8, at 364 ("If they draw so-called racist experiences to

own destinies. If slaves were truly mere pawns of the oppressive dominant structure, then slave artists such as David Drake, Bill Traylor & Augustus Washington would not have been able to creatively shape their world and construct their own realities.<sup>15</sup>

In advancing this thesis, I will argue, first, that CRT perpetuates the very racism it decries by embracing race consciousness.<sup>16</sup> The ruling class in colonial America invented race consciousness in order to artificially divide the underclass and minimize its threat to elite value systems.<sup>17</sup> Race Critics perpetuate this invention by advocating race conscious legal remedies. As long as Race Critics remain race-centric, CRT will be unable to purge the scourge of racism that results from race consciousness. Second, I will argue that marginalized people, including racial minorities, can free themselves from the oppressive dominant structure by assuming roles as powerful reality creators. This requires that they, first, take responsibility for their individual lives, and, second, create their own personal realities,<sup>18</sup> thereby shaping their own destinies.

Part II reviews the invention of race consciousness in colonial America and discusses how Race Critics' use of race consciousness furthers the racism CRT attempts to remedy. Part III argues that by focusing on powerful reality creators of the past, we can create a more empowering framework of individual responsibility and personal reality construction. Selected powerful reality creators are woven into the discussion, concluding with an examination of David Drake, a slave potter from nineteenth century South Carolina. Slave artists like Drake were subject to a violent, state sponsored, system of human

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themselves but view them as external, then they may feel helpless, wounded, and victimized. These feelings appear to intrude on them, an external thing that violates their personal boundaries.”)

15. ORNSTEIN, *supra* note 13, at 58.

16. See GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END*, 167 (1995) (“Critical race theorists focus on racial consciousness to address the question of ‘color’ in American law.”) See also Crenshaw, *Antidiscrimination Law*, *supra* note 6 at 1335 (“[R]ace consciousness, I contend, must be taken into account in efforts to understand hegemony and the politics of racial reform.”). See also Margaret Montoya, *Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *HARV. WOMEN'S L.J.* 185, 206 (1994) (note Montoya's disappointment that Chavez' “ethnic and socio-economic context” was not considered in regard to her sentencing for the crime of drowning her newborn infant). See also Robert L. Hayman, Jr., *Re-Cognizing “Race”: An Essay in Defense of Race-Consciousness*, 6 *WID. L. SYMP. J.* 37 (2000) (“We are all of us, after all, entombed in race.”)

17. Neil Gotanda, *A Critique of “Our Constitution in Color-Blind”*, 44 *STAN. L. REV.* 1, 32-35 (1991) [hereinafter Gotanda].

18. *Id.* See also ORNSTEIN, *supra* note 13.

oppression, but nonetheless took active roles in deciding their own destinies. Finally, I conclude in Part IV that enslaved reality creators show us that no matter how strong the forces of oppression, each individual has the authority and power to decide who he or she becomes.

## II. RACE CONSCIOUSNESS: EFFECTIVELY DESIGNED TO DAMAGE

### A. *Managing the Masses: The Invention of Race*

From the time Virginia was founded as a British colony in 1624,<sup>19</sup> until the tax acts of the mid-1700s that ultimately led to the American Revolution, the colonists managed their affairs without Great Britain's interference.<sup>20</sup> The white English ruling class managed a growing labor force of workers who enjoyed varying degrees of freedom. During the first half of the 17th century, indentured servitude was the most common form of labor.<sup>21</sup> People of French, African and Scottish origin comprised the labor force.<sup>22</sup> The hierarchy in the labor force was based on national origin, not race.<sup>23</sup> In these early days of colonial America, a dichotomy of English and non-English prevailed, producing a colorblind underclass of people with various nationalities.<sup>24</sup>

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19. See generally LAWRENCE GIPSON, *THE BRITISH EMPIRE BEFORE THE AMERICAN REVOLUTION* (15 vol.) (1936-1970) (for a complete history of the colonial period).

20. Until the 1750s, the colonists did not pay 99% of the taxes due Britain. See generally FRANCIS D. COGLIANO *REVOLUTIONARY AMERICA 1763-1815: A POLITICAL HISTORY* 27 (2000); See also GEOFFREY HOLMES & DANIEL SZECHI, *THE AGE OF OLIGARCHY* (1993); See also KEITH PERRY, *BRITISH POLITICS AND THE AMERICAN REVOLUTION* (1990); See also IAN CHRISTIE, *CRISIS OF EMPIRE: GREAT BRITAIN AND THE AMERICAN COLONIES 1754-1783* (1966) ("From the time the first British colony of Virginia was founded in 1606 until the mid-1700s century, Britain practiced salutary neglect. This policy avoided enforcement of parliamentary laws in the colonies to keep them subservient and to ensure exclusive trade with Great Britain. The system deteriorated in the mid-1700s when England faced a growing debt due to the Seven Years War in Europe. They began to enact and enforce tax laws that the colonists rebelled against, ultimately leading to the American Revolution.").

21. See Gotanda, *supra* note 17, at 33.

22. *Id.*

23. *Id.*

24. *Id.* See also Reginald Leamon Robinson, *Race Consciousness: A Mere Means of Preventing Escapes From the Control of Her White Masters?*, 15 *TOURO L. REV.* 401, 419 (1999) [hereinafter Robinson, *Race Consciousness*].

Virginia enacted the first regulations on servants and laborers in 1642.<sup>25</sup> These laws required that indentured servants who ran away serve double the amount of time left under their obligations.<sup>26</sup> If a servant arrived in Virginia without papers of indenture, then the default amount of service was set at four years.<sup>27</sup>

Between 1642 and 1669 race consciousness evolved. The black servant transitioned to the black slave, one that could be owned as permanent property. A law was passed in 1668 which stated that negro women, even if set free, were taxable as property.<sup>28</sup> The following year, the Virginia legislature enacted a law that held a black slave could be killed at the hand of his master without legal consequence.<sup>29</sup> These laws were among the first clear

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25. WILLIAM WALLER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619* (1823), available at <http://www.law.du.edu/russell/lh/alh/docs/virginiaslaverystatutes.html> (last visited Nov. 22, 2006) [hereinafter HENING] (“WHEREAS there are divers loytering runaways in the collony who very often absent themselves from their masters service, And sometimes in two or three monthes cannot be found, whereby their said masters are at great charge in finding them. And many times even to the losse of their year’s labour before they be had, Be it therefore enacted and confirmed that all runaways that shall absent themselves from their said masters service shall be lyable to make satisfaction by service at the end of their tymes by indenture (vizt.) double the tyme of service soe neglected.”).

26. *Id.*

27. *Id.* (“WHEREAS divers controversies have risen between masters and sevants being brought into the colony without indentures or covenants to testifie their agreements whereby both masters and servants have been often prejudiced, Be it therefore enacted and confirmed for prevention of future controversies of the like nature, that such servants as shall be imported havinge no indentures or covenants either men or women if they be above twenty year old to serve fowre year, if they shall be above twelve and under twenty to serve five years, And if under twelve to serve seaven years.”).

28. *Id.* (“Negro women not exempted from tax.... WHEREAS some doubts, have arisen whether negro women set free were still to be accompted tithable according to a former act, It is declared by this grand assembly that negro women, though permitted to enjoy their freedome yet ought not in all respects to be admitted to a full fruition of the exemptions and impunities of the English, and are still lyable to payment of taxes. It is not entirely clear as to whether the word “slave” in the Virginia laws from the earlier 1660s refers to what we today consider today to be slavery or whether it represents a transition from the indentured system to one of slavery.”).

29. *Id.* (“An act about the casuall killing of slaves..... WHEREAS the only law in force for the punishment of refractory servants (a) resisting their master, mistris or overseer cannot be inflicted upon negroes, nor the obstinacy of many of them by other then violent meanes suppress, Be it enacted and declared by this grand assembly, if any slave resist his master (or othe by his masters order correcting him) and by the extremity of the correction should chance to die, that his death shall not be accompted ffelony, but the master (or that other person appointed by the master to punish him) be acquit from molestation, since it cannot be presumed that prepned malice (which alone makes murther ffelony) should induce any man to destroy his owne estate.”).

indications that certain people were the property of others. The Virginia laws from the late 1660s codified the transition from a system of servitude to one of slavery.

Reading the Virginia slave laws in sequential order, one can see the struggle for control intensify. A sense of growing desperation emerges from the text, as each law more thoroughly subjugates minorities and their English sympathizers. This progression was likely a result of the severe labor shortage in colonial America and increasing pressures for profits.<sup>30</sup> These pressures motivated the ruling class to develop a system that could reduce the power of the expanding underclass by creating artificial divisions within it.<sup>31</sup> The new system also gave the ruling class a way to justify increasingly deplorable treatment of both servants and slaves.<sup>32</sup>

The colonial system first divided the non-English underclass into servant and slave, thereby reducing the threat of a focused rebellion. When the indentured servants considered their situations in comparison to those of slaves, they considered themselves “lucky” to suffer mere exploitation.<sup>33</sup> European indentured servants, even if treated poorly, sympathized with the

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30. See Robinson, *supra* note 24.

31. See HENING, *supra* note 25 (a law passed in 1660-1 addressed the problem of English and negro servants running away together)(“English running away with negroes. BEE itt enacted That in case any English servant shall run away in company with any negroes who are incapable of making satisfaction by addition of time, Bee itt enacted that the English so running away in company with them shall serve for the time of the said negroes absence as they are to do for their owne by a former act.”).

32. See FREDERICK DOUGLAS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS: AN AMERICAN SLAVE* (Signet 1968) (1845) (for detailed descriptions of the kinds of treatment that became common).

33. Derrick A. Bell, Jr., *Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs*, 33 VILL. L. REV. 767 (1988), reprinted in *CRITICAL RACE THEORY: THE CUTTING EDGE* 71, 75 (Richard Delgado & Jean Stefancic, eds. 2000) [hereinafter Bell, *Property Rights*] (“[T]he creation of a black subclass enabled poor whites to identify with and support the policies of the upper class. . . . [S]lavery for blacks led to greater freedom for poor whites, at least when compared with the denial of freedom to African slaves. Slavery also provided mainly propertyless whites with a property in their whiteness.”); See also Crenshaw, *supra* note 6, at 1371-1372 (“throughout American history, racism has identified the interests of subordinated whites with those of society’s white elite. Racism does not support the dominant order simply because all whites want to maintain their privilege at the expense of Blacks, or because Blacks sometimes serve as convenient political scapegoats. Instead, the very existence of a clearly subordinated “other” group is contrasted with the norm in a way that reinforces identification with the dominant group. Racism helps create an illusion of unity through the oppositional force of a symbolic “other.” The establishment of an “other” creates a bond, a burgeoning common identity of all non-stigmatized parties -- whose identity and interests are defined in opposition to the other.”).

mentality of the English ruling class in order to avoid identifying with the truly oppressed African slaves.<sup>34</sup>

Dividing the underclass into slaves and servants diminished the potential power of both groups, encouraged the servant class to support the slave system, and created a highly profitable labor system. As the laws evolved and the system grew in strength, the textual dichotomy changed from free versus slave to black versus white.<sup>35</sup> This evolution had the effect of solidifying race consciousness in the underclass. Race consciousness operated to oppress underclass people of all colors and exploited the human tendency to categorize.<sup>36</sup> The ruling class exploited race consciousness to its fullest potential.<sup>37</sup>

The Virginia slave laws enacted in 1705 were comprehensive, requiring that all servants not born of Christian parentage would be auctioned off as slaves upon arrival in the colony.<sup>38</sup> Meanwhile, Christian servants coming into the country without papers were forced to serve for only five years.<sup>39</sup>

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34. Further, even if an indentured servant received substantially the same treatment as slaves, he or she could aspire to his or her future freedom. Identifying with the ruling class permitted servants to consider themselves “free” because their status as servants was merely temporary.

35. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (for a discussion about the ideological move from the slave/free dichotomy to the white/black dichotomy in early colonial America).

36. See Ronald Grigor Suny, *Constructing Primordialism: Old Histories for New Nations*, available at [http://www.dartmouth.edu/~crn/crn\\_papers/Suny3.pdf](http://www.dartmouth.edu/~crn/crn_papers/Suny3.pdf) (last visited June 11, 2007) (“As sensible as the fluidity of constructivism is for theorists, in the actual world of group identifications and distinctions, a belief in sharp and relatively fixed distinctions between groups and predictable harmonies and homogeneities within groups gives a person an easy and reliable map of a complex and changing world. This kind of mental map provides a degree of predictability in an insecure world; it allows expectations of comfort with some and danger from others; and it permits different forms of treatment of those one considers like oneself from those who are considered different. In worse cases it licenses treatment of ‘others’ in ways that one would not treat one’s own.”).

37. Consider the 1654-55 law that placed a higher burden of service for indentured servants from Ireland as opposed to other nations that arrived without papers (six years instead of four). See HENING, *supra* note 25 (“BE it enacted by this Grand Assembly, That all Irish servants that from the first of September, 1653, have bin brought into this collony without indenture(notwithstanding the for servants without indentures it being only the benefitt of our own nation) shall serve as followeth, (vizt.) all above sixteen yeares old to serve six years, and all under to serve till they be twenty-four years old and in case of dispute in that behalfe the court shall be judge of their age. Race and ethnicity were tied together in the mid-1600s.”). Consider the 1654-55 law that placed a higher burden of service for indentured servants from Ireland as opposed to other nations that arrived without papers (six years instead of four).

38. See HENING, *supra* note 25 (“An act concerning Servants and slaves. October 1705.”).

39. *Id.*

Since Africans were easy to identify as born of non-Christian parentage, they were particularly desirable for traders seeking to avoid question as to whether their “merchandise” was slave or servant.

The Virginia slave laws codified the merciless treatment of slaves as legal.<sup>40</sup> The 1705 law stated that it was acceptable to punish a slave for disobedience by dismembering him or her.<sup>41</sup> It also became legal “to kill or destroy [fugitive] slaves by such ways and means [the owner] shall think fit, without accusation or impeachment of any crime for the same.”<sup>42</sup>

While earlier laws forced white people to forfeit their servants for marrying negro or mulatto people, the Virginia slave law of 1705 placed an outright ban on interracial marriages.<sup>43</sup> It also instated severe penalties for a Christian woman to have a child by a negro or mulatto person.<sup>44</sup> If she did have such a child, she owed the local parish a large sum of money or face being sold herself for five years of service.<sup>45</sup> Whether she paid or not, the child was to be a servant, sold for the benefit of the churchwarden, until thirty-one years of age.<sup>46</sup> To use the church as an enforcement mechanism reminded Christian women that fornicating with a non-white was not just a legal

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40. *See id.* (“An act concerning Servants and slaves. October 1705.”).

41. *Id.* (“XXXVII And if any slave, that hath run away and lain out as aforesaid, shall be apprehended by the sheriff, or any other person, upon the applicaiton of the owner of the said slave, it shall and may be lawful for the county court, to order such punishment to the said slave, either by dismembring, or any other way, not touching his life, as they in their discretion shall think fit, for the reclaiming any such incorrigible slave, and terrifying others from the like practices.”).

42. *Id.*

43. *Id.* (“XX. And be it further enacted, That no minister of the church of England, or other minister, or person whatsoever, within this colony and dominion, shall hereafter wittingly presume to marry a white man with a negro or mulatto woman; or to marry a white woman with a negro or mulatto man, upon pain of forfeiting and paying, for every such marriage the sum of ten thousand pounds of tobacco.”).

44. *Id.* (“And if a free christian white woman shall have such bastard child, by a negro, or mulatto, for every such offence, she shall, within one month after her delivery of such bastard child, pay to the church-wardens for the time being, of the parish wherein such child shall be born, for the use of the said parish fifteen pounds current money of Virginia, or be by them sold for five years to the use aforesaid: And in both the said cases, the church-wardens shall bind the said child to be a servant, until it shall be of thirty one years of age.”).

45. *Id.*

46. *Id.* This was not really an indentured servitude, considering the likely life expectancy. In England in 1700, the average life expectancy was 37 years old. It may have been even lower in colonial America given a life of hard labor. *See THE DETERMINANTS OF MORTALITY, THE NATIONAL BUREAU OF ECONOMIC RESEARCH, available at <http://www.nber.org/aginghealth/spring06/w11963.html> (last visited June 11, 2007).*

offense, but also a religious one. In this way, race consciousness was further justified by way of the preexisting religious consciousness.

The Virginia slave laws of the 18th century established and enabled the thriving slave trade for over a hundred fifty years.<sup>47</sup> When religion turned against slavery because of its inhumanity, science was substituted to justify the oppression.<sup>48</sup> Scientific explanations for racial inferiority were employed. For example, the emerging discipline of anthropology was manipulated in Nott's and Gliddon's *Indigenous Races of the Earth* to show how blacks ranked between whites and chimpanzees on the evolutionary scale.<sup>49</sup> Dr. Cartwright also reported on the newly discovered "disease" of drapetomania, which allegedly caused slaves to run away from plantations.<sup>50</sup>

Americans of European descent were taught that those of African descent were inferior in a multitude of ways. Persons of African descent had skulls said to be shaped like those of chimpanzees, so they were considered *biologically* inferior.<sup>51</sup> Those of African descent did not know how to read or write, while many people of European descent did, so they were regarded as *intellectually* inferior. They had "strange propensities" to flee from the "benefit" of a kept life, so they were viewed as *psychologically* estranged.<sup>52</sup> They failed to practice religion the way it was considered ordained by God to be practiced, so they were also deemed *spiritually* inept.<sup>53</sup>

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47. The Emancipation Proclamation, freeing some four million slaves, was announced in 1862. See Hon. Gerald W. Heaney, *Busing, Timetables, Goals, and Ratios: Touchstones of Equal Opportunity*, 69 MINN.L.REV. 735, 741 (1985). In 1865, the Thirteenth Amendment, abolishing slavery, was enacted. U.S. CONST. amend. XIII.

48. See Alfred L. Brophy, "over and above... there broods a portentous shadow,--the shadow of law": Harriet Beecher Stowe's Critique of Slave Law in *Uncle Tom's Cabin*, 12 J. L. & Religion 457, 463 (1995-96).

49. J. C. NOTT & G. R. GLIDDON, *INDIGENOUS RACES OF THE EARTH* (1857) (using misleading imagery to suggest that blacks ranked between whites and chimpanzees on the evolutionary spectrum) [hereinafter NOTT].

50. First reported in 1851, drapetomania was the disease proposed to cause enslaved Africans to run away from plantations, which was apparently puzzling behavior to plantation owners who believed plantation life favorable for enslaved workers. It was first reported by a Dr. Cartwright in 1851, and he explained a variety of ways it could be treated, including by whipping. See Samuel A. Cartwright, *Report on the diseases and physical peculiarities of the Negro race*, NEW ORLEANS MED. & SURGICAL J. 691-715 (May 1851).

51. See generally NOTT, *supra* note 49.

52. See DETERMINANTS OF MORTALITY, *supra* note 46.

53. Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2074 (1993) ("Thus, in the seventeenth century, when English settlers first adopted slavery, the very 'heathenism' of Africans made them subject to slavery.")

Over 150 years went by between the passage of the first Virginia slave law in 1642 and the height of the institution of slavery in the early 1800s.<sup>54</sup> With every passing generation, the subordinate position of blacks became more “natural” to all classes.<sup>55</sup> Race consciousness has persisted in the minds of Americans for so long because it was slowly made into a natural and scientific phenomenon, becoming an invisible, pervasive ideology.<sup>56</sup>

### *B. Critical Race Theory and Race Consciousness*

The racial divisions created in America during the colonial era divide Americans even in the present day. In the last few decades, claims of genetic differences between races have fostered preexisting racial divisions.<sup>57</sup> Reference to higher incidence of sickle cell anemia for blacks demonstrates that there remains an inherent, fundamental difference between blacks and

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54. See Robert L. Hayman, *Re-Cognizing “Race”: An Essay in Defense of Race-Consciousness*, 6 WID. L. SYMP. J. 37 (2000).

55. Cf. Crenshaw, *supra* note 6, at 1351 (“This is Antonio Gramsci’s notion of ‘hegemony,’ *i.e.*, that the most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are.”).

56. Cf. Hayman, *supra* note 54, at 41 (“But the science of race could never do what the politics of race demanded: it could not establish a natural hierarchy of racial beings.”).

57. See Gotanda, *supra* note 17, at 261 (“The modern use of physiognomic tradition has ironic implications when considered in light of the goals of the scientists who originally studied physiognomy. Nineteenth-century racial scientists hoped to prove that the African race was inherently inferior. The modern tradition links racial categories to science in order to show that race is a neutral and apolitical term without social content. However, both traditions support racial subordination.”); See also Lisa C. Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937, 943-944 (1997) (“In fact, the genetic presumption has already given rise to definitions of disease and defect that police normalcy along racially subordinating lines. The sickle cell trait was defined by law in a way that represented the sickle trait as evidence of African American racial inferiority. Exclusion from the Air Force, commercial flying positions, health insurance access, and the enactment and implementation of the National Sickle Cell Anemia Control Act specifically targeted African Americans who have the highest, but not the sole incidence of the trait. The inaccurate use of sickle cell “disease” rather than sickle cell “trait” to describe the incidence, to justify the exclusions, and to explain testing results, exaggerated the medical risks and exacerbated the social harms. The screening goals were framed as means of protecting the general public, not members of the African American community. Sickle cell became a racial stigma and a sign that genetic fitness was racially specific.”).

non-blacks.<sup>58</sup> In fact, no such objective, scientific distinction based on race exists in biology.<sup>59</sup>

The purpose of racial distinctions is sometimes said to be administrative efficiency, for identification and reference.<sup>60</sup> But the practice of identifying people by race has damaging effects on American society.<sup>61</sup> Race Critics contend that the practice of grouping people by race can be continued so long as the negative effects are neutralized, or at least mitigated.<sup>62</sup> Expecting race consciousness to cure racism is counter-intuitive.

Further, CRT tends to focus on the damaging aspects of racism to the exclusion of the damaging aspects of race consciousness. Established scholars

58. See Gotanda, *supra* note 17, at 29-30 (regarding the scientific legitimation of race).

59. Sickle cell is detectable in the genetic markers of those with central and western African ancestry, but not for those from southern Africa. Sickle cell is a mutation that, if inherited from only one parent, provides resistance to malaria but causes no sickness. It is only when the allele is inherited from two parents that disease is caused. That is to say, a darker shade of skin does not correlate to sickle cell genetic markers, but ancestry from central and western Africa does. See Larry Adelman, *Race – The Power of an Illusion* (2003), available at: <http://www.newsreel.org/guides/race/whatdiff.htm> (last visited June 11, 2007); See also S.O.Y. Keita et al., *The persistence of racial thinking and the myth of racial divergence*, 99 AM. ANTHROPOLOGICAL 534 (1997) (“The concept of race, racial thinking, and approaches using received racial schema are a part of a theoretical worldview deemed by most anthropologists to be incorrect and passé.”); See also Ryan A. Brown, et. al., *Apportionment of Racial Diversity: A Review*, EVOL. ANTHROPOLOGICAL 10:34-40 (2001) (“It no longer makes sense to adhere to arbitrary racial categories, or to expect that the next genetic study will provide the key to racial classification.”).

60. See *generally Doe v. Louisiana*, 479 So.2d 369 (La. 1985) (where the court refuses to reclassify plaintiffs’ dead parents from “colored” to white). See also David M. Tanovich, *Moving Beyond “Driving While Black in Canada”: Race, Suspect Description and Selection*, Ottawa L. Rev. (forthcoming), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=671361](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671361) (last visited June 11, 2007).

61. See Gotanda, *supra* note 17, at 4 (“Black and white are seen as neutral, apolitical descriptions, reflecting merely ‘skin color’ or region of ancestral origin.”). See Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, in “RACE,” WRITING AND DIFFERENCE 21, 36 (Henry Louis Gates, Jr. ed., 1986) (“To call it ‘biologizing’ is not to consign our concept of race to biology. What is present there is not our concept but our word only. Even the biologists who believe in human races use the term ‘race,’ as they say, ‘without any social implication.’ What exists “out there” in the world-communities of meaning, shading variously into each other in the rich structure of the social world—is the province not of biology but of hermeneutic understanding.”).

62. See Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893 (1994) (acknowledging CRT scholars generally favor affirmative action) (Farber at 904, quoting PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 50 (1991) “Affirmative action is an affirmation; the affirmative act of hiring—or hearing—blacks is a recognition of individuality that re-places blacks as a social statistic . . . . In this sense, affirmative action is as mystical and beyond-the-self as an initiation ceremony. It is an act of verification and of vision. It is an act of social as well as professional responsibility.”)

have explained that some of the damaging aspects of race consciousness are that it is ideological and structurally determinant because it legitimates American society (including CRT), and therefore determines social outcomes.<sup>63</sup> As a result, such focuses render race consciousness invisible and persistent, allowing it to operate to a large extent in the unconscious minds of people of all races.

Race Critics maintain that unconscious racism causes adverse economic and social conditions in the black community.<sup>64</sup> Moreover, Race Critics contend that the white norm is submerged in the unconscious of all people.<sup>65</sup> People subject to this unconscious perspective may apply facially neutral law in ways that inherently discriminate on the basis of race.<sup>66</sup> Therefore, a person who is not overtly racist may apply laws in a racially discriminatory way.

CRT proposes race conscious remedies to cure the adverse conditions caused by unconscious racism,<sup>67</sup> but such measures require discriminating on the basis of race. Much like western medicine will first treat the myriad of symptoms of a disease before addressing its root cause<sup>68</sup>, CRT looks to cure racism while nurturing the true malady—race consciousness.<sup>69</sup>

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63. See Robinson, *supra* note 1, at 1383 (pointing out that structural determinism is “a mode of thought or widely shared practice [that] determines significant social outcomes, usually without our conscious knowledge.” (quoting from RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 155-56 (2001)). Compare this to Kimberle Crenshaw’s definition of legal ideology as “a social artifact which operates to recreate and legitimize American society.” See Crenshaw, *supra* note 6, at 1350.

64. See generally Lisa A. Crooms, *Stepping into the Projects: Lawmaking, Storytelling, and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1 (1996); See Charles R. Lawrence, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) (“Throughout American history, a cultural myth that describes blacks as an inherently inferior race has justified their economic and social subjugation.”). See also Crenshaw, *supra* note 6 at 1335. (“This expanded critique presents race consciousness as a central ideological and political pillar upholding existing social conditions.”).

65. See Crenshaw, *supra* note 6, at 1379 (“The white norm, however, has not disappeared; it has only been submerged in popular consciousness.”)

66. See Judge Ming W. Chin, *Fairness or Bias? A Symposium on Racial and Ethnic Composition and Attitudes in the Judiciary*, 4 ASIAN L.J. 181 (1997).

67. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Reparations*]. Reparations and affirmative action programs are two specific means of redress proposed by CRT scholars as a way to cure racism.

68. See generally DR. ANDREW WEIL, *EATING WELL FOR OPTIMUM HEALTH* (2000) (for a detailed discussion comparing the way Eastern and Western medicine work).

69. See Verna L. Williams, *Reading, Writing, and Reparations: Systemic Reform of Public Schools as a Matter of Justice*, 11 MICH. J. RACE & L. 419, 428 (2006) (“In this connection, race and racism are not viewed atomistically; rather, reparations theory places the ongoing subordination of groups into a historical context to demonstrate the consistent salience

Race consciousness detaches one human from another<sup>70</sup> by creating artificial and arbitrary divisions which categorize people on the nebulous basis of immutable characteristics.<sup>71</sup> CRT reinforces this contextual disparity by emphasizing race conscious legal remedies to repair past injustices and to level the playing field.<sup>72</sup> To advocate for race conscious remedies while decrying racism and white race consciousness is counterintuitive. For as long as people of any color consider themselves to be “black,” “white,” or within another racial category, the social context will remain one of division and difference. The “other”<sup>73</sup> will persist.

### III. RESPONSIBILITY NOT RACE: PULLING A HOUDINI ON THE DOMINANT STRUCTURE

#### A. *Looking at the Past with a Positive, Race-Rejecting View*

If race is not an objective reality, then it is a subjective, fictional story. In order to maintain this social construction, people must retell the story.<sup>74</sup> Absent our initiative to make these stories part of our present reality, the stories that are told to us exist in the past, outside of the present moment. The present moment remains pure unless we bring the stories told in the past into the present. Race Critics are preoccupied with past injustices because the past is where the stories that create an unsatisfactory paradigm originated.<sup>75</sup> Race Critics emphasize bringing the past into the present as the way to remedy past wrongs.<sup>76</sup> I argue that the reverse is true—true healing can be found in actively refusing to let the past impose itself on our present.

Race Critics posit that if the descendants of those who profited from slavery made reparations to the descendants of those that were enslaved, then

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of race in the legal system and society.”)

70. See generally Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

71. See Gotanda, *supra* note 17, at 28 (discussing the immutability of racial categories).

72. See generally Crenshaw, *supra* note 6. See also Matsuda, *supra* note 67.

73. Suny, *supra* note 36. See Crenshaw, *supra* note 6, at 1371-1376 (discussing the role of the “other” in American ideology).

74. See Matsuda, *supra* note 67, at 376 (“The hierarchical relationship that places white people over people of color was promoted by the specific wrongs of the past.”). See also Margaret M. Russell, *Race and the Dominant Gaze: Narrative of Law and the Inequality in Popular Film*, 15 Legal Stud. F. 243, 244 (1991).

75. See Matsuda, *supra* note 67.

76. *Id.* at 63.

this would settle a long-outstanding debt based on the mistreatment.<sup>77</sup> Little would change, however, because any debt owed is ideological, and money cannot cure a damaging ideology.<sup>78</sup> Reparations are fundamentally compensatory.<sup>79</sup> Even if they could economically compensate for past wrongs, however, reparations do not repair the damage done.

I argue a better alternative is to repair the damage. The way to do so is by choosing how we internalize and conceptualize the experience of living in what was, fairly recently, a slave society. By making this choice, we can change how we perceive our ancestors and positively transform the way we feel about ourselves.

If we focus on the exemplary, powerful reality creators of the past, this shift will empower minorities in the present. This model is superior to CRT's because structural determinism produces victims in both the past and present.<sup>80</sup> Under CRT's deterministic model, anyone that succeeds is an outlier. At what point do we as a society stop considering the triumphant black as an exception? A better alternative is to make powerful reality creation the rule. Black history provides models for behavior, not mere stories of victimization and failure. How a person chooses to view black history reveals more about them than about objective "truth."

In an Art History framework, paintings of historical scenes are said to reveal less about the event they depict than they do about the time period in which they were painted. Stories, like paintings, reveal more about the people telling them than about the people in the stories. When we tell our stories about slaves, why not focus on the powerful reality creators, those that did not permit a system designed to subjugate to ever truly break them? The past does not exist in a place where our views are impotent to change it. Quite the opposite.

A young slave potter defiantly carves his name into the side of a ceramic pot.<sup>81</sup> The son of a slave prepares to sail east for Liberia in search of Home.<sup>82</sup>

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77. See Matsuda, *supra* note 67, at 383 (arguing that reparations would bridge "the wider gulfs of time and space to connect act and injury.").

78. *Id.* at 390. (compare Matsuda's argument that the compensation would lie in the implicit "promise of liberty for those on the bottom, [which] has meant freedom from public and private racism.").

79. Black's Law Dictionary defines reparations as "[t]he act of making amends for a wrong" and "compensation for an injury or wrong." Black's Law Dictionary 1301 (7th ed. 1999).

80. See *id.* See also Robinson, *supra* note 1.

81. Referencing David Drake, discussed in more detail in Part III.

82. Referencing Augustus Washington, discussed in more detail in Part III.

And a “mulatto woman . . . whose independent spirit could not brook the degradation of slavery,”<sup>83</sup> makes yet another attempt to escape through an all too familiar field. Any one of these people could be viewed as mere slaves, but given that each of them acted as if they were free regardless of the external structure, it does not seem fitting to think of them as passively “coerced into living in worlds created and maintained by others.”<sup>84</sup> Each of these individuals, instead, chose to be empowered.

We have an obligation to all disadvantaged individuals (whether minority or not) to create a paradigm that will empower them. By discussing, emphasizing, and illuminating the lives of powerful reality creators from the past, we can help our brothers and sisters in the present draw from the positive experiences of those reality creators and create a support system unhindered by the illusory limits of time.<sup>85</sup>

CRT focuses on inaccessible and inalterable past victimization to explain present-day paradigms and to justify Race Critics’ demands for race conscious remedies for disparity.<sup>86</sup> Focusing on the weakest, the most victimized, and the least resistant to the structure, does not give rising minorities empowering models for behavior. I do not suggest we close our eyes to past oppression and injustice. Instead, I propose that we reconstruct our conception of the past in order to empower present-day minorities. Further, in order to achieve such models of empowering models for behavior, we must expressly deny CRT-

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83. THEODORE DWIGHT WELD, *AMERICAN SLAVERY AS IT IS: TESTIMONY OF A THOUSAND WITNESSES* 22 (1839), available at <http://docsouth.unc.edu/neh/weld/weld.html> (last visited June 11, 2007) (“A handsome mulatto woman, about 18 or 20 years of age, whose independent spirit could not brook the degradation of slavery, was in the habit of running away: for this offence she had been repeatedly sent by her master and mistress to be whipped by the keeper of the Charleston work-house. This had been done with such inhuman severity, as to lacerate her back in a most shocking manner; a finger could not be laid between the cuts. But the love of liberty was too strong to be annihilated by torture[.]”).

84. See Crenshaw, *supra* note 6, at 1357.

85. See DAISSETZ TEITARO SUZUKI, *MYSTICISM: CHRISTIAN AND BUDDHIST. THE EASTERN AND WESTERN WAY* 12 (1969) (quoting Master Eckhart, a German theologian of the 13th century; “A day, whether six or seven ago, or more than six thousands years ago, is just as near to the present as yesterday... To talk about the world as being made by God tomorrow, yesterday, would be talking nonsense. God makes the world and all things in the present now. Time gone a thousand years ago is now as present and as near to God as this very instant.”); See also BANESH HOFFMANN & HELEN DUKAS, *ALBERT EINSTEIN: CREATOR AND REBEL* (1972) (Einstein is said to have written in a letter to a friend, “[T]he distinction between past, present, and future is only an illusion, even if a stubborn one.”).

86. See Matsuda, *supra* note 67, at 379 (“Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims.”) Also consider the section “Identification of Victims and Perpetrators” in the same article on pages 374 to 380.

endorsed race consciousness and reinstate the humanity and agency<sup>87</sup> of people once considered merely black slaves.

It is essential that we recognize powerful reality creators like slave artists for what they really were—strong, independent, creative, and human—and reject how CRT would view them—oppressed, enslaved, and victimized. To say that slavery and oppression was purely a structural phenomenon is to leave black ancestors helpless, powerless, and hopeless, in perpetuity throughout existence. Revising our story about the nature of slaves to focus on their humanity validates them in a way that considering them as cybernetic victims does not. If we transform how we internalize our own experiences and adopt a new, empowering way of telling the stories of others, we can transform the reality of our experience as a whole.

*B. Living the Dream: Taking Responsibility and Shaping Your Destiny*

In the first paragraph of *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, Derrick Bell says in regard to black Americans, “[W]e are shaped, molded, changed, from what we might have been... into what we are.”<sup>88</sup> He calls blacks the “invention” of white society.<sup>89</sup> This structurally deterministic framework places the minority at the command and within the control of a discrete majority will<sup>90</sup> and as a result wrongly disempowers minorities and perpetuates an unnecessary and damaging contextual disparity between races.

Structuralism maintains that the present-day minority underclass is what it is because the white dominant structure decided it for them, and would reason that slaves were slaves because the structure imposed it upon them. This mentality makes people readers of the stories that are their lives, but does not make them authors. In this way, CRT’s structuralist methodology disempowers the very people it could and should be helping.

In the same way that CRT methodology takes away the power to control one’s life, it takes away responsibility for one’s actions. “It’s not their fault,”

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87. See Robinson, *supra* note 1, at 1363 (defining “human agency” as the power to act, which is ultimately the power to support or transform society.) See also Robinson, *Sacred Way*, *supra* note 8 at 360 (juxtaposing the traditional structuralist framework of CRT against human agency).

88. See Derrick Bell, *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, 33 VILL. L. REV. 767 (1988) [hereinafter Bell, *Whiteness*].

89. *Id.* at 767.

90. See Robinson, *supra* note 1, at 1380-1388.

Race Critics say of poor minorities.<sup>91</sup> CRT posits that destitute black people are not answerable for their condition because oppression incapacitates them from making moral or rational decisions. The responsibility that CRT takes off the individual, however, is the same responsibility that could empower him or her. Only by taking responsibility can ordinary people turn into powerful reality creators.

Reginald Robinson explains that powerful reality creators are “earthly gods who name and thus co-create their realities.”<sup>92</sup> He believes that ordinary people who consider themselves victims are denying their true nature as powerful reality creators.<sup>93</sup> The lives and work of slave artists are examples of powerful reality creators. By taking responsibility for the past, an action that CRT explicitly rejects, black people can generate the internal strength to create their own realities. They can do this by managing the filtering system by which they internalize their experiences.

Under the ordinary consciousness theory proffered by Ornstein, each individual constructs his or her version of reality in order to create a stable, manageable environment.<sup>94</sup> The less inclined a person is to find his or her own way of thinking, the more his or her construction of reality will be based on the preexisting narrative designed by the white, dominant class.<sup>95</sup> Even if one cannot change the preexisting narrative and external aspects of his or her life, he or she can decide how to internalize that narrative and those experiences.<sup>96</sup> People are free to view their experiences in a light most favorable to fostering realization of conscious goals, both for themselves as individuals and for society as a whole.

To view experiences in this empowering light, a person must consciously manage the system they use to internalize their experiences. Each person develops a sensory-filtering system in their formative years, and continues to use the same system throughout life to reinforce their belief systems.<sup>97</sup> These systems operate as mechanisms of self-affirmation, continuously validating previously held beliefs by interpreting experiences as corroboration of the

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91. See Matsuda, *supra* note 67.

92. See Robinson, *supra* note 1, at 1381.

93. *Id.* at 1383.

94. See ORNSTEIN, *supra* note 13, at 33.

95. See Robinson, *supra* note 1, at 1363.

96. Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. Third World L.J. 231, 241 (2000) (“With race-thinking, we internalize race’s limitations—self-hatred, alienation, and segregation.”).

97. See also ORNSTEIN, *supra* note 13.

beliefs.<sup>98</sup> Whatever kind of belief system a person develops, whether positive or negative, it will perpetuate itself. It is possible, however, to make an intentional, conscious change.

The human being is a dynamic creature, and it is never too late to make the conscious changes necessary to create a better reality. Take Bill Traylor, for instance. Traylor was born into slavery on an Alabama cotton plantation in 1854.<sup>99</sup> He lived there, working as a field hand and later a sharecropper, until he was eighty-two years old.<sup>100</sup> In the mid-1930s, following the death of his wife, he moved to Montgomery as an old man.<sup>101</sup>

Bill Traylor had never been an artist.<sup>102</sup> Nonetheless, at the age of eighty-three, Traylor picked up a pencil stub and a stick for a straight edge.<sup>103</sup> He sat in a chair on Monroe Street, a thoroughfare for the city's black community, and began drawing on a scrap of cardboard.<sup>104</sup> Sketching at his "sidewalk studio" became a daily ritual for Traylor.<sup>105</sup> He hung his drawings on the fence to amuse the other locals and attract attention,<sup>106</sup> selling his artwork for nickels.<sup>107</sup> His friends from the country would come into the city on Saturdays and keep Traylor company there on the sidewalk.<sup>108</sup>

98. *Id.* at 43.

99. See Frances McQueeney-Jones Mascolo, *A Look at 'Outsiders' Bill Traylor & William Edmondson*, (Jan. 25, 2005), available at: [http://antiquesandthearts.com/2005-01-25\\_13-31-47.html&page=2](http://antiquesandthearts.com/2005-01-25_13-31-47.html&page=2) (last visited November 19, 2007) [hereinafter *Outsiders*].

100. See The Menil Collection, *Bill Traylor, William Edmonson, and the Modernist Impulse*, available at: [http://www.menil.org/pdfs/The%20Menil\\_Traylor-Edmondson.pdf](http://www.menil.org/pdfs/The%20Menil_Traylor-Edmondson.pdf) (last visited November 19, 2007) [hereinafter *Menil Collection*].

101. See Roberta Smith, *Altered Views in the House of Modernism*, *NEW YORK TIMES* (April 29, 2005), available at: <http://www.nytimes.com/2005/04/29/arts/design/29smit.html?n=Top/Reference/Times%20Topics/Organizations/S/Studio%20Museum%20in%20Harlem> (last visited November 19, 2007) [hereinafter *Altered Views*]. See also The Milwaukee Art Museum, *Bill Traylor*, available at: [http://mam.org/collections/folk\\_detail\\_traylor.htm](http://mam.org/collections/folk_detail_traylor.htm) (last visited November 19, 2007). See also *Outsiders*, *supra* note 99.

102. See *Altered Views*, *supra* note 101. See also *Outsiders*, *supra* note 99.

103. See Culture Kiosque, *Bill Traylor, William Edmonson, and the Modernist Impulse at the Studio Museum in Harlem* (May 3, 2005), available at: <http://www.culturekiosque.com/art/travel/trayloredmonson.html> (last visited November 19, 2007).

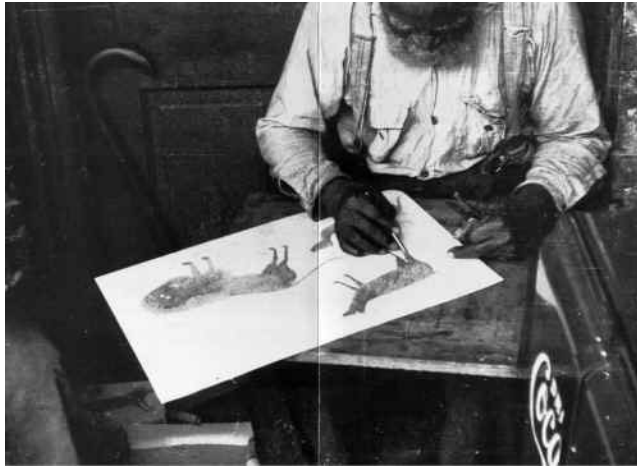
104. *Id.* See also *Altered Views*, *supra* note 101. See also *Outsiders*, *supra* note 99.

105. See Grace Glueck, *Anecdotes of an Ex-Slave Turned Master 'Outsider'*, *NEW YORK TIMES* (February 7, 1997), available at: <http://query.nytimes.com/gst/fullpage.html?res=9F05E2DD143CF934A35751C0A961958260> (last visited November 19, 2007). See also *Outsiders*, *supra* note 99.

106. See *Outsiders*, *supra* note 99.

107. See R.C. Baker, *Two Southern artists who didn't need to be told anything*, *VILLAGE VOICE* (June 28, 2005), available at: <http://www.villagevoice.com/art/0526,baker.65374.13.html> (last visited November 19, 2007).

108. See NF Karlins, *Bill Traylor*, *RAW VISION NO. 15* (publication date unknown)



Traylor's drawing was a public event, and this is how he met the young photographer Charles Shannon.<sup>109</sup> Shannon befriended Taylor, visited him daily, and gave him art supplies.<sup>110</sup> In 1941, Shannon organized the first exhibition of Traylor's artwork.<sup>111</sup>

Traylor had never learned to read or write.<sup>112</sup> In fact, a black man who would watch Traylor work showed him how to sign his name.<sup>113</sup> Many of his works feature this signature in a sprawling, looping script.<sup>114</sup> Over the course of four years, Traylor produced over 1,800 drawings on scraps of paper and cardboard of all the things he saw and remembered.<sup>115</sup>

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[hereinafter Raw Vision].

109. See Menil Collection, *supra* note 100. See also Outsiders, *supra* note 99. See also Altered Views, *supra* note 101.

110. See Menil Collection, *supra* note 100. See also Outsiders, *supra* note 99. See also Altered Views, *supra* note 101.

111. See Menil Collection, *supra* note 100. See also Outsiders, *supra* note 99. See also Altered Views, *supra* note 101.

112. See Outsiders, *supra* note 99.

113. *Id.* See also Raw Vision, *supra* note 108.

114. See Raw Vision, *supra* note 108.

115. See Outsiders, *supra* note 99.



The preexisting narrative which Race Crits would posit was designed for Traylor by the white majority would have left him on the plantation in Benton. Traylor spent over eighty years on that farm living the same way his slave parents had lived. Yet he became a powerful reality creator despite many years of servitude. He arrived in Montgomery and created his own destiny. Traylor learned to sign his name at the age of eighty-three. After eight decades of working within a subordinating system, Traylor stepped outside of it and completely changed his way of life.

The record is not clear what prompted Traylor, so many years entrenched in a system explicitly designed to his detriment, to start expressing himself creatively and publicly.<sup>116</sup> With every drawing, he purged himself of his past and created for himself a better reality.

The alternative to taking responsibility for oneself is to accept a reality of dominant structure and preexisting narrative.<sup>117</sup> That reality is rigid because it is pre-formed and derived from an external source. Experiences that are inconsistent with that construction will threaten its validity. This

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116. *Id.*

117. Reginald Leamon Robinson, "The Other Against Itself": *Deconstructing the Violent Discourse between Koreans/African Americans*, 67 S. CAL. L. REV. 15 (1993) [hereinafter Robinson, *Violent Discourse*] (Robinson portrays Latasha Harlins and Soon Ja Du as accepting certain aspects of the preexisting narrative in determining how to relate to one another).

threat will generate the intense emotional sensation of fear.<sup>118</sup> The people that Robinson calls “ordinary people,”<sup>119</sup> those who deny responsibility for their lives, must live in a constant state of fear.

The better alternative is to recognize that race consciousness and a preexisting narrative exist, and then to reject both entirely. A person can say, “That is not *my* reality. Race has nothing to do with me.” But one must see the structure in order to reject it. By internally reconciling his or her role in the preexisting narrative, a person opens themselves to a world or possibilities and the opportunity to construct his or her personal reality. No external structure offers all of the possibilities that a person can offer him or herself.

Augustus Washington is one man who saw possibilities that the preexisting narrative did not offer him.<sup>120</sup> As the son of a former slave and an Asian mother,<sup>121</sup> he was not a likely candidate when Dartmouth accepted him for admission in 1843.<sup>122</sup> He learned daguerreotyping to pay his way, and later opened a portrait studio in Hartford.<sup>123</sup> As a free person of color he persistently objected to his obligation to pay taxes because he was unable to vote.<sup>124</sup> After six years, Washington closed his studio and set sail for Liberia with his wife and children.<sup>125</sup> He said only in Africa would he “find a home.”<sup>126</sup>

Did the structure of 1821 create Augustus Washington? Or did he more likely create himself? This man was born of a slave and made himself into an

118. *See id.* (in the confrontation between Soon Ja Du and Latasha Harlins, fear motivated each woman to assault the other).

119. *See generally* Robinson, *supra* note 1. (in this work, Robinson contrasts “powerful reality creators” with “ordinary people.”).

120. *See* Edwards Park, *John Brown’s Picture: A long-lost daguerrotype, made by a black artist in 1847, has lately come to rest at the Smithsonian*, SMITHSONIAN MAGAZINE (AUG. 1997), available at: [http://www.smithsonianmag.com/history-archaeology/object\\_aug97.html](http://www.smithsonianmag.com/history-archaeology/object_aug97.html) (last visited November 13, 2007).

121. *Id.* at 2. *See also* Connecticut Historical Society, *Augustus Washington: Hartford’s Black Daguerrotypist*, available at: <http://www.chs.org/graphcoll/augwash.htm> (last visited November 13, 2007).

122. *Id.* *See also* Barbara L. Michaels, *Augustus Washington at the National Portrait Gallery*, ART IN AMERICA (APRIL 2000), available at: [http://findarticles.com/p/articles/mi\\_m1248/is\\_4\\_88/ai\\_61755657](http://findarticles.com/p/articles/mi_m1248/is_4_88/ai_61755657) (last visited November 13, 2007).

123. *Id.*

124. *Id.*

125. *Id.*

126. *See* Alberta Eiseman, *The View From/Hartford; From the 19th Century, Faces in Formal Style*, THE NEW YORK TIMES (FEB. 20, 2000), available at: <http://query.nytimes.com/gst/fullpage.html?res=9A05E6D81331F933A15751C0A9669C8B63&sec=&spon=&pagewanted=print> (last visited November 13, 2007).

artist. He gave up what was considered a privileged life for a free person of color in order to sail toward the dream of finding a home. These are not the possibilities that the oppressive white structure provides for “ordinary people.”<sup>127</sup> These are the possibilities that powerful reality creators make for themselves. These possibilities allow a person to create a flexible, dynamic reality (sometimes even a dream life) that serves one’s individual, unique goals. Then, every experience can be internalized in a way that will serve personal aspirations instead of those of the dominant class. Every experience, even if negative, can help a person find triumph and enlightenment.

The work and lives of slave artists demonstrate that personal reality creators born as slaves in the most dreadful period of America’s early history could nonetheless become empowered and enlightened forces. They left tangible evidence of their humanity for us to consider. Their artwork shows us that they thought and felt things that the white dominant structure did not design for them to think and feel. They were more than victims of a superficially imposed system.

CRT cannot account for people that create for themselves a beautiful life extending far beyond the role that the dominant structure gave them. However, a paradigm that emphasizes personal reality construction and individual responsibility can. This paradigm views people as unique and powerful in a way that CRT never will. And as long as some people are passionate, fearless, and indomitable, structural determinism is just an excuse for those that are not.

Structural determinism cannot adequately account for the curious burial that archaeologist Maureen Basedow unearthed when excavating a late-eighteenth century slave cabin in North Carolina.<sup>128</sup> A young raccoon was buried in a ritual manner by the cabin’s doorway. Basedow explained that to some Native Americans, the raccoon is sacred because of human traits like washing its food. And in Europe, there is a tradition of burying animals by the doorway to ward off evil. She explains, “So you’ve got an animal that holds special significance for Native Americans being buried in a European ritual manner by West Africans.”<sup>129</sup>

This type of burial was not part of a reality that was pre-formed, endorsed by the dominant structure. If the preexisting narrative were truly controlling,

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127. See generally Robinson, *supra* note 1.

128. See Eric A. Powell, *Ritual Raccoon*, 54:5 *ARCHAEOLOGY* (Sept./Oct. 2001).

129. *Id.*

then a slave would not have been able to conceive of and perform such a unique ritual, drawing from two cultures which were not his or her own.

The lives of slaves were not mere composites of cybernetic responses to an oppressive dominant structure. Slaves were people with feelings. They were creators, existing not only in the life that white oppression designed for them, but also in their own reality. Slave artists had the power to change forms, shapes, and colors, making beauty on the canvas or in the object. This means they had the power to do the same thing in their own lives. Slave artists had virtue, imagination, talent, and skill. They were not entirely defeated and dehumanized by their experience with structurally endorsed oppression. Slave artists were not merely cogs in a big, white, deterministic machine.

*C. Who Was David Drake? A Case Study of a Powerful Reality Creator*

David Drake (also known as “Dave the Potter”) worked at the pottery at Stoney Bluff Plantation in Edgefield, South Carolina, from 1834 to 1864.<sup>130</sup> He was a literate slave, skillful at his craft, and known to be clever and articulate.<sup>131</sup> For most of his adult life he lived and worked with only one leg.<sup>132</sup>

Dave is the only known slave potter to habitually sign and date his work and carve original poetic verses on his vessels.<sup>133</sup> He lived in a state where literacy among slaves was outlawed, and yet he defied this structure by learning to read and write. He proclaimed his education by way of his signatures and verses for several decades. Over the course of his life, Dave created approximately 170 pots.<sup>134</sup>

Dave was a slave of the Drake, Gibbs, Miles, and Landrum families throughout his life.<sup>135</sup> After he was emancipated in the 1860s, he took the last name of one of his early masters, Harry Drake, the man believed to have

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130. I MADE THIS JAR... THE LIFE AND WORKS OF THE ENSLAVED AFRICAN-AMERICAN POTTER, DAVE 23-25 (Jill Beute Koverman, ed., 1998) [hereinafter I MADE THIS JAR].

131. *Id.* at 20.

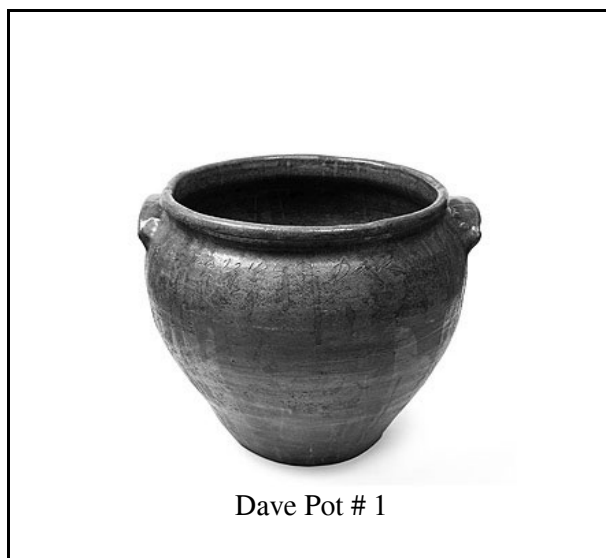
132. *Id.* (“Of course I knew Dave. I know all about him. He used to belong to old man Drake... and it was at that time that he had his leg cut off. They say he got drunk and layed on the railroad track.” Carey Dickson (called Carey Posey before the Civil War).

133. *Id.* at 33.

134. Press Release, Folk Pottery Museum, ‘Dave’ Pottery on Special Exhibition at New Folk Pottery Museum (Sept. 2, 2006), *available at*: <http://www.folkpotterymuseum.com/pr/pr2.html> (last visited June 11, 2007) [hereinafter Folk Pottery Museum].

135. See I MADE THIS JAR, *supra* note 130, at 23-24.

taught Dave to be a potter.<sup>136</sup> Dave learned to read and write while working as a typesetter at The Edgefield Hive, a newspaper owned by one of his masters, Abner Landrum, before he went to work at Lewis Miles' pottery.<sup>137</sup>



The pottery out of the Edgefield District was utilitarian in nature, produced for agrarian plantation life.<sup>138</sup> Dave's pottery is of unusually large size and he inscribed some pots with original poetic verses. Many of them like Dave Pot #1<sup>139</sup> have between 25 and 40-gallon capacities.<sup>140</sup> In order to make pots of this size a potter must manipulate up to 50 pounds of clay while kicking a foot or treadle wheel, requiring a significant output of physical strength.<sup>141</sup> After Dave lost his leg he had a man with crippled arms kick the wheel for him.<sup>142</sup>

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136. *Id.* at 23.

137. *Id.* at 22.

138. See Rick Green, *Dave the Potter*, University of South Carolina Aiken: African-Americans and South Carolina: History, Politics, and Culture (Oct. 5, 2001), available at <http://www.usca.edu/aasc/davepotter.htm> (last visited June 11, 2007) [hereinafter AASC].

139. See Folk Pottery Museum, *supra* note 134.

140. See AASC, *supra* note 138.

141. *Id.*

142. See I MADE THIS JAR, *supra* note 130, at 20 ("Later Dave went to Mile's Mill. After

Dave was not only literate and a skilled artist, but apparently also well liked and intelligent. In the April 1, 1863 issue of *The Edgefield Advertiser*, in an advertisement for buttermilk, editor Arthur Timkins wrote of Dave:

One day in years gone by we happened to meet DAVE POTTERY (whom many readers will remember as the grandiloquent old darkey once connected with a paper known as the *Edgefield Hive*) in the outskirts of his beloved hamlet. Observing an intelligent twinkle in his eye, we accosted him in one of his own set speeches: ‘Well, uncle DAVE, how does your corporosity sagatiate?’—‘First rate, young master, from top to toe – I just had a magnanimous bowlful of dat delicious old beverage, buttermilk.’ Who has not often felt his buttermilk as DAVE did.<sup>143</sup>

Dave carved the following verse in which he admitted his place as a slave in one of his early vessels:

*Dave belongs to Mr. Miles  
Wher the oven bakes & the pot biles  
31 July 1840<sup>144</sup>*

In this verse, Dave recognizes that according to the current system, he is the property of Lewis Miles. By merely writing the verse, however, he asserts that he is a literate artisan and a man of worth.<sup>145</sup> The couplet presents Dave as both a slave *and* an artist. The potter’s recognition of the external system that holds him to be property makes his rejection of it all the more explicit and powerful. Dave says to the white dominant structure, “To you, I am a slave,” but in his own mind, he was a human, an artist capable of creating and a literate man capable of thinking.

Personal reality construction is not about closing one’s eyes to other people’s viewpoints, but is instead about recognizing and overcoming external limitations in spite of it. As the years passed, and as Dave carved more verses, he may have mentioned experiences that he had by virtue of being slave, but he never said he belonged to anyone again.<sup>146</sup> In this early work, Dave was recognizing the structure he would later reject.

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Dave was crippled he had Henry Simkins, who was crippled in the arms, to drive the wheel for him.”).

143. *Id.* at 22.

144. *Id.* at 91.

145. *See* AASC, *supra* note 138.

146. *See* I MADE THIS JAR, *supra* note 130, at 90-91.

Dave's vessels are examples of overcoming external limitations by way of positive mindsets. Another inscription reads:

*I wonder where is all my relations  
Friendship to all and every nation<sup>147</sup>  
16 August 1857*



Dave Pot # 2

Slaves were under a constant threat of separation from their families, and Dave was no exception to this reality. Dave had lost some of his family when members of the Drake and Gibbs families moved west to Louisiana.<sup>148</sup> Dave refers to this harsh reality in the painful first line. The second line however, shows us that Dave had internalized his experience in a very positive way.

One possible interpretation of this inscription is that in the way that Dave's blood and relations had been taken to other places, so had his love, giving him a love and friendship with the world. Inwardly, Dave took what could have been an entirely debilitating, disillusioning, and disempowering experience and nonetheless constructed a positive personal reality with it. To him, family in Louisiana meant love there as well as at home.

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147. *Id.* at 91.

148. *Id.* at 23.

The earthenware jug (“Dave Pot #2”) dated June 28, 1854 is over 150 years old. The jug remains in fantastic condition.<sup>149</sup> The inscription on it reads, “L.M. says this handle will crack.”<sup>150</sup> L.M. refers to Lewis Miles, who owned both Dave and the factory where he worked. As you can see, the handle is still intact.<sup>151</sup> CRT maintains that the white dominant structure writes the script for minorities, and Lewis Miles should have written Dave’s script. In inscribing this jug the way he did, Dave was patently rejecting the reality offered to him by his owner. In that rejection, Dave created an alternate personal reality, one where he was a skilled and talented potter, one who knew the handle would not break, regardless of reality as perceived by the factory owner. The reality that started inside Dave’s head became an objective reality, as the handle is in fine condition so many years later.

Dave crafted the glazed stoneware piece referred to as “Dave Pot #3” in 1862.<sup>152</sup> He inscribed a verse on the inside of the jar that reads:

*I made this jar all of cross  
If you don't repent, you will be lost  
May 3 1862 LM Dave<sup>153</sup>*

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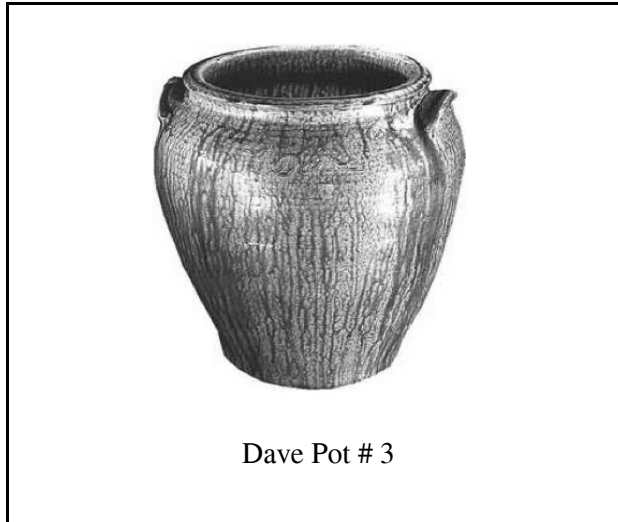
149. See Antiques Roadshow: Broadcast Highlights, Charleston, SC (2001), *Edgefield earthenware jug appraised by J. Garrison Stradling of The Stradlings in New York, New York* (2001), available at <http://www.pbs.org/wgbh/pages/roadshow/series/highlights/2001/charleston2.html> (last visited June 11, 2007) [hereinafter Antiques Roadshow].

150. *Id.*

151. See *id.* (the jug has an estimated value of \$6,000).

152. See Smithsonian Legacies Exhibition Catalog, *A Mirror of America: Jar made by David Drake, a slave artisan*, 1862 (2001), available at: <http://www.smithsonianlegacies.si.edu/objectdescription.cfm?ID=234> (last visited June 11, 2007).

153. See I MADE THIS JAR, *supra* note 130, at 91.



This verse reveals the dichotomy of the simultaneous oppression and empowerment of the slave experience. Dave was born into slavery, and consequently into a Christian religion. Yet here he is, carving into the sides of his pots, proclaiming his role as a creator: “*I made this jar.*” The cross could be viewed to represent something inside of him, his spirit and soul, from where he derived his power as a creator.

While Dave was rebelling against the dominant socio-legal structure that forbade slave literacy by inscribing his pots, he was also revealing his roots of subjugation in his text. Disconnected from the faith of his ancestors, Dave embraced and internalized the religion of his oppressors, possibly to help cope with the negative aspects of his experience. Dave’s signature suggests that he was acutely aware of his own distinct existence. This shows a level of self-awareness that CRT cannot explain. Had Dave thought of himself as a victim of his environment (as CRT suggests) he would not have made such inscriptions proclaiming his identity.

Weaving together Dave’s experience as a slave with his experience as an artist demonstrates that while external factors influenced his life, they did not dictate his internal reality. The verse, “*If you don’t repent, you will be lost,*” speaks outwardly, to the audience of the white purchaser of household wares, to the audience that might very well deny his humanity if given the opportunity. Compare the first verse, “*I made this jar all of cross,*” which speaks to Dave’s inner reality and salvation. This demonstrates the

empowering nature of personal reality construction; Dave's salvation empowered him to defy the laws and conventions of the time to be a literate, prolific artist, despite his structural identity as a slave.

This pot is the last known dated, inscribed work of Dave the potter, created after he had lived three decades working in the Edgefield workshops, and about a year before emancipation.<sup>154</sup> The proclamation of independence as a Creator ("I made this jar") was a fitting goodbye to his life as a slave.

If Dave were merely a cog, merely a victim, then he would not have flaunted the South Carolina laws that forbade literacy for slaves. This defiance undermined the authority of the white oppressive structure. Despite his position as a slave, Dave considered himself a friend of the world.<sup>155</sup> He never accepted a life as *merely* a slave, but instead lived *brilliantly* as a slave. CRT would emphasize the structure, stating that external forces made Dave who he was, and he would be just another slave instead of an empowered individual. Society may have considered David Drake a slave for the vast majority of his life, but the man was never truly subjugated.

David Drake's existence cannot be reconciled with structural determinism. If Dave were merely a subject, "invented" by whites, as Derrick Bell would have him, then Dave's challenge to the dominant structure would not have been possible. Instead of passively accepting the position invented for him, Dave was a powerful creator of his own reality. Critical Race Theory cannot explain this man's inherent power to reveal his humanity through his art and to defiantly proclaim, "I made this jar."

#### IV. CONCLUSION: RACE CONSCIOUSNESS THWARTS AN EMPOWERING REALITY

*I saw a leopard & a lions face  
then I felt, the need of grace  
7 August 1860<sup>156</sup>*

I have a moment of transcendence in which I see out of Dave's eyes instead of my own.<sup>157</sup> In my moment, he is looking upward at the night sky,

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154. *Id.*

155. *Id.* This mentality is reflected in his carved verse dated August 16, 1857, "I wonder where is all my relations, Friendship to all and every nation."

156. *Id.*

157. See IMMANUEL KANT, CRITIQUE OF PURE REASON (Cambridge Univ. Press 1998)(on transcendence).

thinking of his family, thinking of his absent leg, thinking of all the beauty and pain of his life as the same and inseparable, all without really thinking at all. He is feeling something that I myself have felt. He closes his eyes and breathes in deep the smell of the night. When he opens them again, they open onto the constellation Leo. A soft smile, a million memories. He exhales slowly, and his gaze wanders onto to the neighboring constellation Lynx. Dave remembers the strong voice of his mother saying he would need the eyes of a leopard to see it. A soft smile, a million memories. His eyes move just a bit further, locking onto the brightest star in Ursa Minor – the North Star. A million memories, his smile fades. He thinks of all his friends that have run off chasing that star and their freedom, and wonders how they fared.

How could I consider David Drake as merely a victim, merely a slave? Why would I ever want to emphasize his involuntary membership in a subjugated and invented class of people over his self-created human and artistic individuality?

The ruling class in colonial America invented race consciousness to create artificial divisions among the underclass. This race consciousness still exists today, and racism is a symptom of it. For as long as Race Critics reinforce race consciousness, they reinforce racism. It is not until we recognize that racism depends on race consciousness, that we can heal ourselves and our society of this scourge and disease. The analytic methodology of CRT is fundamentally flawed because it is dependent on the very cause of the racism it decries.

A better framework, modeled on the methods of powerful reality creators of the past, can give racial minorities psychological freedom from the construction of race. By taking responsibility, individuals can reject the preexisting narrative and turn to an internal source. This internal source offers infinite possibilities, and is fluid and responsive in a way the preexisting narrative could never be. The lives of ordinary people, those who allow external forces such as the dominant structure control their lives never have access to those infinite possibilities.

Ordinary people allow the dominant structure to make reality of the race consciousness designed with the purpose of disadvantaging them. When we create our own destiny, as David Drake did, we do not eliminate external forces. Instead, we decide how we internalize our experiences with those external forces in a way that furthers our personal goals. This philosophical approach can be particularly empowering for black people and other racial minorities.

CRT fails because its central plank, that white race norms structurally determine the lives of minorities, is categorically dependent on race consciousness, which is the sole support system for the racism that CRT textually denounces. Race Critics cannot account for David Drake's initiative to make his life one of wonder. He retained his sense of self-awareness and humanity as expressed through his pottery and verse, despite being entrenched in a brutal, state-sponsored system of human oppression. For as long as CRT relies on structural determinism, it will be unable to view triumphant blacks as anything more than outliers, and it will fail to present a model for behavior that can empower present day minorities.

The alternative and superior paradigm rejects race consciousness and embraces individual responsibility and personal reality construction. Instead of focusing on victims, this paradigm honors powerful reality creators like David Drake to inspire each of us to create our own destiny and consciously decide who we are. Only in this way can we make for ourselves a better experience, one that is humanizing, empowering, and altogether brilliant.