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## FROM THE DEVINE GIFT TO THE DEVIL'S BARGAINS: ASIAN AMERICANS IN THE IDEOLOGY OF WHITE SUPREMACY<sup>†</sup>

VINAY HARPALANI\*

White supremacy is complex, evolving, and ever nuanced in all of its aspects, including its positioning of Asian Americans.<sup>1</sup> Through different lenses, Stacy Hawkins,<sup>2</sup> Robert Chang,<sup>3</sup> Matthew Shaw,<sup>4</sup> and Shakira Pleasant<sup>5</sup> challenge me to interrogate this positioning even further. My reply can only begin to do so, but this colloquy will also inspire my future writings. In delineating my thoughts, I also draw inspiration from my mentor, the late Derrick Bell,<sup>6</sup> whose insights have consistently informed my work.

Hawkins invites common ground between Black and Asian Americans by “centering the ideology of white supremacy.”<sup>7</sup> There are very basic points on which she and I agree: for example, that combating racial stereotypes of all groups is part of that common ground. But to make any real progress, I must focus on our disagreement. Hawkins asserts simply that the high representation

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\* Lee and Leon Karelitz Chair in Evidence and Procedure and Professor of Law, University of New Mexico School of Law. J.D., New York University School of Law, 2009; Ph.D., University of Pennsylvania, 2005. I am grateful to Stacy Hawkins, Robert Chang, Matthew Shaw, and Shakira Pleasant for their thoughtful responses to my Article. I also appreciate the diligent efforts of the Editors of the *Boston University Law Review*, particularly Lisa Richmond, for putting this colloquy together.

<sup>1</sup> See generally Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105 (1999) (describing “racial triangulation” of Asian Americans).

<sup>2</sup> Stacy L. Hawkins, *Finding Common Ground*, 103 B.U. L. REV. ONLINE 131 (2023).

<sup>3</sup> Robert S. Chang, *Asian Americans, Dog Whistles, and the Psychological Wages of “Honorary” Whiteness*, 103 B.U. L. REV. ONLINE 136 (2023).

<sup>4</sup> Matthew Patrick Shaw, *The Perils of Asian-American Erasure*, 103 B.U. L. REV. ONLINE 140 (2023).

<sup>5</sup> Shakira D. Pleasant, *A Black Man May Eliminate Race-Conscious Admissions in the United States*, 103 B.U. L. REV. ONLINE 147 (2023).

<sup>6</sup> I discuss my relationship with Bell in Vinay Harpalani, “*Gifted with a Second-Sight*”: Professor Derrick Bell the Teacher, in “COVENANT KEEPER”: DERRICK BELL’S ENDURING EDUCATION LEGACY 17 (Gloria Ladson-Billings & William F. Tate eds., 2016) [hereinafter Harpalani, *Gifted with a Second-Sight*].

<sup>7</sup> Hawkins, *supra* note 2, at 133.

of Asian Americans at elite institutions “belies any claim of discrimination.”<sup>8</sup> This neglects not only the very history I cover in my Article, but the complex mechanisms by which the ideology of White supremacy operates.<sup>9</sup>

In a 1987 essay entitled *The Chronicle of the DeVine Gift*, Bell illustrated how higher representation itself brings about discrimination to preserve White supremacy.<sup>10</sup> The protagonist, Geneva Crenshaw, lamented the fact that she was the only Black law professor at an elite law school. But with the help of a mysterious benefactor named DeVine, she was able to recruit five more faculty of color who were hired by the law school—for a total of six. Then came the Seventh Candidate—a law review editor at an elite school and a Supreme Court clerk—who was more outstanding than all of the prior ones. However, the Dean flatly told Crenshaw that the Seventh Candidate would not be hired because the law school “simply would not be the same school for our students and alumni with a predominantly minority faculty.”<sup>11</sup> It had to “retain [its] image as a white school.”<sup>12</sup> Angrily, Crenshaw informed the Seventh Candidate and encouraged him to sue the law school for what was clearly racial discrimination. But instead of agreeing, the Seventh Candidate analogized the situation to *negative action*: discrimination against Asian Americans in favor of White applicants, stating that “[w]hat the law school did when its status as a mainly white institution was threatened is precisely what elite colleges faced with a growing number of highly qualified Asian students are doing: changing the definition of merit.”<sup>13</sup>

Bell recognized long ago that White supremacy is not simple—that far from belying claims of discrimination, higher representation would lead to more discrimination and even be used to justify it. That holds for limits on affirmative action and for negative action to limit Asian American presence. Asian Americans are a threat to White supremacy precisely because of our academic success and high representation at elite institutions.<sup>14</sup> Indeed, limiting our representation as it grows is not only a logical step for those who want to maintain White supremacy, but a necessity.

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<sup>8</sup> *Id.* at 132 n.13.

<sup>9</sup> Despite our disagreements, Hawkins has been an invaluable supporter of my scholarship on Asian Americans, which she works to publicize widely. She didn’t have to take on this mantle, and I appreciate her efforts on my behalf.

<sup>10</sup> DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 140 (1987).

<sup>11</sup> *Id.* at 143.

<sup>12</sup> *Id.* at 144.

<sup>13</sup> *Id.* at 145; see also Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (defining negative action as “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison”).

<sup>14</sup> Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 254-56 (2022) [hereinafter Harpalani, *Elite University Admissions*].

Bell also astutely recognized that those invested in White supremacy include not only White conservatives who oppose affirmative action but also White liberals who generally support diversity efforts. The former group opposes racial diversity and equity writ large, and their investment in White supremacy is obvious. But the latter operates more subversively. Fueled by the soft bigotry of low expectations, White liberals are far less threatened by small increases in Black, Latina/o, and Native American presence on elite campuses than by the skyrocketing numbers of Asian Americans—a “peril of the mind.”<sup>15</sup> Most recently, they have embraced the elimination of standardized testing not just to increase representation of Black, Latina/o, and Native Americans but also to limit the admission of Asian Americans.<sup>16</sup> White supremacy requires that White people remain more powerful than Asian Americans. It requires limits on Asian American influence in society and presence on elite campuses. In the ideology of White supremacy, negative action is inevitable as Asian American representation increases. Understanding that is fundamental to the common ground that Hawkins seeks.

Of course, racial discrimination morphs constantly, becoming less overt and more indirect, and thus harder to detect over time. Although it noted the possibility of implicit bias against Asian Americans, the district court in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*<sup>17</sup> correctly concluded that the Plaintiffs had not proven intentional discrimination.<sup>18</sup> But there is plenty of racism that cannot be legally proven or is not legally actionable. And *Students for Fair Admissions, Inc.*’s (“SFFA”) Harvard litigation exploits these legal doctrines to the fullest.<sup>19</sup>

Chang laments the psychological wage that White supremacy puts on Asian Americans by offering us a privileged but still marginal status.<sup>20</sup> He analogizes to W.E.B. Du Bois’s insight that while less privileged White Americans do not

<sup>15</sup> *Id.* at 254-56.

<sup>16</sup> See generally Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759 (2022) [hereinafter Harpalani, *Testing the Limits*]. Hawkins also notes that I am “equivocal in [my] objection to standardized tests.” Hawkins, *supra* note 2, at 134. I have stated that “[i]nasmuch as college entrance exams are a barrier to the admission of underrepresented students, that barrier should be removed.” Harpalani, *Elite University Admissions*, *supra* note 14, at 306. But the issue is simply not as cut-and-dry as she frames it to be. See, e.g., Editorial, *Testing Still Has Role in Admissions*, PITT. POST-GAZETTE, May 7, 2021, at A8 (arguing standardized test scores are less correlated to household income than other application criteria). And the exclusion of Asian Americans from the conversation is wrong. See generally Harpalani, *Testing the Limits*, *supra*.

<sup>17</sup> 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (mem.).

<sup>18</sup> *Id.* at 203.

<sup>19</sup> Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, AM. CONST. SOC’Y (May 13, 2023) [hereinafter Harpalani, *Bait-and-Switch*], <https://www.acslaw.org/expertforum/asian-americans-and-the-bait-and-switch-attack-on-affirmative-action/> [https://perma.cc/X67R-EP7C].

<sup>20</sup> Chang, *supra* note 3, at 139.

profit economically from White supremacy, they gain the psychological benefit of feeling superior to Black Americans.<sup>21</sup> In parallel, the model minority stereotype exalts Asian Americans to make us feel superior to other people of color, albeit within an American racial structure that marginalizes all of us. SFFA's narrative on affirmative action and negative action offers Asian Americans a Devil's Bargain, which is itself a facet of White supremacy.

But why shouldn't Asian Americans go ahead and take this bargain? When it comes to elite admissions, what do Asian Americans have to gain by looking "beyond self interest"?<sup>22</sup> By posing such questions, Shaw takes a rare and valuable step. He actually tries to put himself in our shoes and imagine how we see the world. I have lamented to Chang and others that it is very difficult to get someone who is not Asian American to even think about our experiences, much less to consider our subjective appraisal of those experiences. I commend Shaw for doing so.

On one hand, many Asian Americans are looking "beyond self-interest." As Chang notes, polls show that seventy percent of Asian Americans support affirmative action, and that number is increasing.<sup>23</sup> In spite of being long neglected in American racial discourse, even by racial equity advocates as Shaw points out, many of us still seek common ground. And although affirmative action will likely be struck down, Asian Americans are rejecting the Devil's Bargain with SFFA and seeing it for the bait-and-switch that it really is.<sup>24</sup>

But Shaw pushes me to look forward.<sup>25</sup> Even more than affirmative action, controversies around public magnet school admissions, race-neutral means to attain diversity, and standardized testing will continue to pit Asian Americans against other people of color.<sup>26</sup> And unlike in the SFFA cases, Asian Americans are not just anonymous plaintiffs here. While the Pacific Legal Foundation is litigating *Coalition for TJ v. Fairfax County School Board*,<sup>27</sup> the Coalition for TJ itself is a visible, active group with Asian Americans at the forefront.<sup>28</sup> There are similar controversies across the nation, where the ostracism of Asian American families during the process of amending magnet school admissions policies is troubling.<sup>29</sup> There was almost a twenty percent drop in Asian American admittees to Thomas Jefferson High School for Science and

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<sup>21</sup> *Id.* at 138-39.

<sup>22</sup> Shaw, *supra* note 4, at 145 (quoting Harpalani, *Elite University Admissions*, *supra* note 14, at 308).

<sup>23</sup> Chang, *supra* note 3, at 137.

<sup>24</sup> See Harpalani, *Bait-and-Switch*, *supra* note 19.

<sup>25</sup> Shaw, *supra* note 4, at 145-46.

<sup>26</sup> See Harpalani, *Testing the Limits*, *supra* note 16, at 761.

<sup>27</sup> No. 22-1280, 2023 WL 3590055 (4th Cir. May 23, 2023).

<sup>28</sup> Harpalani, *Testing the Limits*, *supra* note 16, at 779-787.

<sup>29</sup> See generally *id.*

Technology after it adopted its new, prodiversity admissions policy.<sup>30</sup> The Devil's Bargain looks all the more tempting for the future.<sup>31</sup>

In this context, Shaw offers an even more pointed critique of my Article. He notes that my target audience includes racial equity advocates "who have continued to ignore, silence, and misunderstand the real and imagined dilemmas facing Asian America on issues related to affirmative action."<sup>32</sup> He says that I am "on the verge of substantively indicting us all to live up to the fullness of the coalition we too often tout as transformative for antiracism."<sup>33</sup> But he is blunt in saying that I don't "do it forcefully enough."<sup>34</sup>

Shaw is right. I have long feared that my project here would detract from the defense of affirmative action and play into SFFA's narrative. And this has also given me pause about critiquing racial equity advocates, including some Asian Americans, for the erasure of Asian Americans' concerns about negative action. But almost five decades ago, Bell faced a similar dilemma. In his classic article *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, Bell critiqued civil rights advocates for their unequivocal focus on school integration, which often resulted in the erasure of Black parents' concerns about their children's best interests.<sup>35</sup> Bell risked playing into the hands of those who opposed school desegregation. But he saw what he believed to be a Devil's Bargain and called it out as such.<sup>36</sup>

Erasure of Asian Americans' concerns about negative action is also a Devil's Bargain, even if the focus is on defending affirmative action. Racial equity advocates, including me, always foreground the need for multiracial coalition-building.<sup>37</sup> We rely on progressive Asian American organizations and language-dependent polls to tout Asian Americans' support for affirmative action.<sup>38</sup> We

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<sup>30</sup> *Id.* at 781.

<sup>31</sup> I also know from experience that many of the seventy percent of Asian Americans who support affirmative action still have serious concerns about negative action. In recent years, I have done close to fifty presentations related to my Article for various audiences. Many Asian American attendees have come up to me afterwards and told me that while they support affirmative action, they are grateful that I also talk about the importance of acknowledging and addressing negative action.

<sup>32</sup> Shaw, *supra* note 4, at 145.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>36</sup> Bell was well known for "confronting authority." See generally DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994). He even defined Critical Race Theory as "telling the truth, even in the face of criticism." See Harpalani, *Gifted with a Second-Sight*, *supra* note 6, at 16.

<sup>37</sup> Harpalani, *Elite University Admissions*, *supra* note 14, at 323-26.

<sup>38</sup> See *Polling Data*, AFFIRMATIVE ACTION DEBATE, <https://affirmativeactiondebate.org/polling-data/> [<https://perma.cc/6SSS-AASR>] (last visited May 23, 2023) (noting views on affirmative action "depend[] heavily on how the question is asked"). Americans overall respond favorably to the term "affirmative action," less favorably to the term "preferences,"

emphasize the fact that there are Asian American groups—such as Hmong and Filipino Americans—who are underrepresented at many elite institutions, and that Asian Americans are (sometimes) included in diversity initiatives.<sup>39</sup> We call for rejection of the model minority stereotype—highlighting the structural advantages that educated, first- and second-generation Asian Americans have in attaining academic success<sup>40</sup>—in an elitist educational system that we all partake in knowing that it is unfair. And within this system, there is plenty of evidence that Asian American success is viewed as a threat to White supremacy.<sup>41</sup> But racial equity advocates do not want to acknowledge the reality or even the possibility of negative action against Asian Americans, much less its inevitability in the logic of White supremacy. By failing to do so, we risk alienating Asian Americans and subverting the very multiracial coalition that we seek to build.

If we truly want to maintain and expand this coalition, racial equity advocates must do more than ask Asian Americans to look beyond self interest or point out that there is some common ground between all people of color. Erasure of any group's concerns has no place in such a coalition. As a first step, we must do the hard work to include, understand, and address different perspectives, including Asian Americans' legitimate concerns about negative action. There will be much more to do after that, as the conflicts over magnet school admissions and standardized testing will not be easy to resolve. But if we can't take that first step, any calls for a multiracial coalition ring hollow.

In this milieu, Pleasant's commentary centers the person who most captures the conundrums of multiracial coalition-building in the ideological context of White supremacy: Justice Clarence Thomas.<sup>42</sup> Pleasant and I have different views about whose opinions will control in the SFFA cases.<sup>43</sup> But I do expect Justice Thomas to write an opinion, which I will read with interest. Like SFFA, he has attacked affirmative action in part by referring to separate but troubling aspects of elite school admissions. In my classes, I often have my students read closely his opinion in *Grutter v. Bollinger*.<sup>44</sup> They mostly disagree with his overall conclusions, but the most radical and progressive students find themselves in frustrated agreement with his views on standardized testing,

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and unfavorably when language “suggest[s] that preferences would partially displace ‘merit.’” *Id.*

<sup>39</sup> Harpalani, *Elite University Admissions*, *supra* note 14, at 313, 318.

<sup>40</sup> *Id.* at 247-49.

<sup>41</sup> *Id.* at 254-56. *See generally* WILLOW LUNG-AMAM, *TRESPASSERS?: ASIAN AMERICANS AND THE BATTLE FOR SUBURBIA* (2017); NATASHA WARIKOO, *RACE AT THE TOP: ASIAN AMERICANS AND WHITES IN PURSUIT OF THE AMERICAN DREAM IN SUBURBAN SCHOOLS* (2022).

<sup>42</sup> Pleasant, *supra* note 5, at 148.

<sup>43</sup> *See generally* Vinay Harpalani, “*With All Deliberate Speed*”: *The Ironic Demise of (and Hope for) Affirmative Action*, 76 S.M.U. L. REV. F. 91 (2023) (arguing that Justice Amy Coney Barrett or Justice Brett Kavanaugh will likely write the controlling opinion).

<sup>44</sup> *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part).

legacy admissions, meritocracy, and racial tokenism. And while I would rather not have to deal with either SFFA or Justice Thomas, both of them force us to confront the complex, nuanced, and intricate ways in which White supremacy operates.