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# Law School Professors Comment on the Campus Boycott of Justice Clarence Thomas: Did They Do the Right Thing?

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Autumn 2002

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## Law School Professors Comment on the Campus Boycott of Justice Clarence Thomas

*When five black law school professors at the University of North Carolina at Chapel Hill declined an invitation to attend a lecture given by Supreme Court Justice Clarence Thomas, many observers applauded their decision. Others said that the black law professors were singling out Thomas because of his race while they afforded professional courtesies to conservative whites.*

**T**HIS PAST MARCH, Supreme Court Justice Clarence Thomas was invited to speak at the University of North Carolina School of Law in Chapel Hill. All five black professors at this leading law school boycotted the sessions in protest of Thomas' conservative positions on civil rights and racial issues.

JBHE asked a group of legal scholars for their opinions of the Chapel Hill boycott. We received the following replies:

### Discourse in the Garden of Good and Evil

*G. Marcus Cole is associate professor of law at Stanford Law School and national fellow at the Hoover Institution on War, Revolution, and Peace.*

**T**he actions of the protesting legal scholars betray a very common, unspoken, but outrageous conceit, namely, that they cannot possibly be wrong about the means of achieving racial justice, economic opportunity, and political empowerment for African Americans. If you disagree with us, according to this mindset, you are evil. Furthermore, as this thinking goes, we will tolerate and even respect opposing views from white justices, such as Scalia and O'Connor, but not from a black one. As George Schuyler recognized nearly a half-century ago, to be *Black and Conservative*, as his autobiography is entitled, is to be, in the minds of liberals, either feeble-minded, or traitorously mercenary, or both. According to this conceit, our experience is not authentically "black."

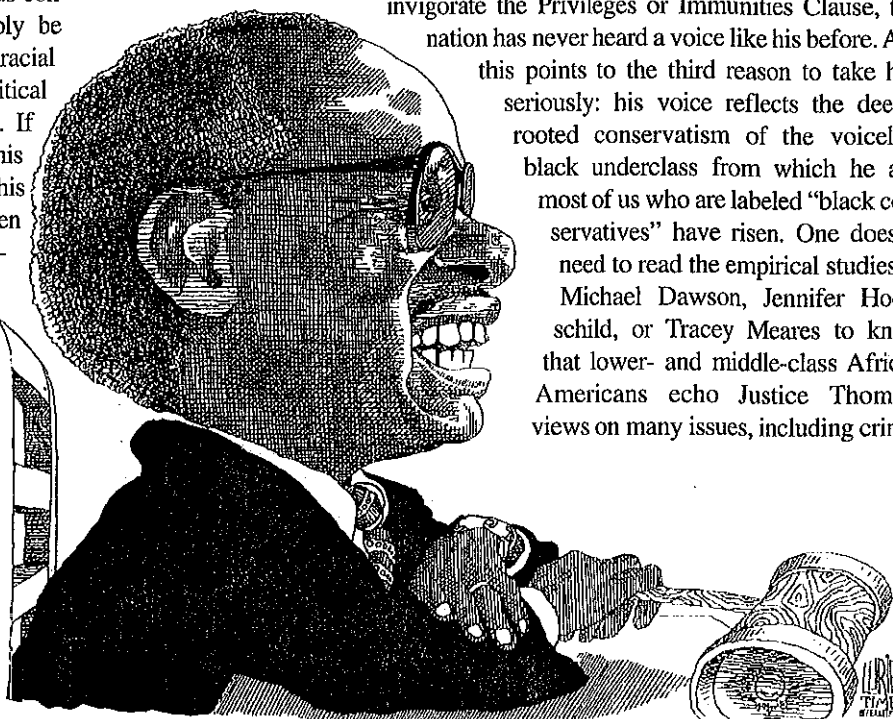
This conceit is as tragic as it is outrageous, because it ignores the history of our struggle through the twentieth

century. Our progress has been marked by edifying internal debate and engagement. Where would we be without the confrontation between the intellectualism of W.E.B. Du Bois and the industrialism of Booker T. Washington? How could the world have appreciated the power of King's message of non-violence without the countervailing threat of force from Malcolm X and the Black Panther Party? Debate tests and refines raw ideas. Academics, especially legal academics, should appreciate that fact. It is the very reason why our legal system is adversarial, and our elections are contested.

Even if debate is valuable, why should the black faculty at the University of North Carolina law school engage Justice Thomas? The reasons are three. First, as a Supreme Court Justice, his vision has salience within our lives. We must live, at times, with the way he views the world. Second, his vision is undeniably unique. From his concurrence in the recent school voucher decision (the first time that a Supreme Court opinion has quoted Frederick Douglass) to his efforts to re-

invigorate the Privileges or Immunities Clause, this nation has never heard a voice like his before. And

this points to the third reason to take him seriously: his voice reflects the deeply rooted conservatism of the voiceless black underclass from which he and most of us who are labeled "black conservatives" have risen. One doesn't need to read the empirical studies of Michael Dawson, Jennifer Hochschild, or Tracey Meares to know that lower- and middle-class African Americans echo Justice Thomas' views on many issues, including crime,



property rights, religion, and, yes, school vouchers. This conservatism is not news to anyone who has spent any time listening (respectfully) to the conversations of older black men in a barbershop, or church matrons gathered at a revival.

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*"Does Thomas deserve contempt for his conservative position when a white conservative justice deserves respectful engagement?"*

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The tragedy of such a boycott resides in its effects. It deprived the students of North Carolina of a rare opportunity to see Justice Thomas' vision tested and challenged by their professors. Why pass on such an opportunity? What is the harm of engaging in a respectful confrontation with the formidable, self-assured Justice Thomas? It is as though they are attempting to validate their arguments by plebiscite, hoping that unanimity will substitute for persuasiveness.

Sooner or later, the students at North Carolina will come face to face with the views and vision of Justice Thomas. His influence is in the real world, a world which engages him even when it does not embrace him. It is unfortunate that they will have to wait until they leave the cloisters of Chapel Hill before encountering the debate surrounding his ideas. Their professors have abdicated their responsibility to educate when afforded a precious opportunity, one for which our parents struggled.

#### **Protest the Politicians Who Put Thomas on the Court**

*Richard T. Ford, professor of law at Stanford Law School, replied:*

**M**y initial reaction to the boycott was: "Right On." I know several of the black law professors at UNC and I hold them all in very high regard. Moreover, I agree with much of what I take to be the substance of the critique of Justice Thomas that inspired the boycott.

But why a boycott? You note that one professor remarked, "We didn't want to lend cover to him." But surely it's no secret that Justice Thomas' views diverge from those of many black law professors: no message of support would be sent by the mere presence of the professors. I'm not sure how attending the sessions (and asking pointed questions of Justice Thomas during Q&A) would have lent him cover.

An explicit boycott certainly sent a message of disapproval, even of contempt, for Thomas. I'm of two minds about this message. On the one hand, public figures should expect pointed criticism, angry denunciations, and formal protests. And in my opinion, Thomas deserves it. Justice Thomas is, for many of us, a figure of not only disappointment but also of betrayal, because we expect a (the) black justice of the Supreme Court to carry on Justice Thurgood Marshall's role as the conscience

of the Court with respect to civil rights. Justice Thomas has not only failed to do that but, in the minds of many, has pantomimed that important role while in fact doing just the opposite.

Still, it's telling that the professor you quote noted that the black UNC law professors have welcomed other judicial conservatives such as Antonin Scalia — the clear mastermind of the Supreme Court's right wing. I would hope that black law professors would show Justice Thomas the same respect — and the same distance — that we would show his ideological soul mate, Justice Scalia. As much as I regret his presence on the bench, I can't countenance the view that because of his race Justice Thomas deserves contempt for his conservative positions while a white conservative such as Justice Scalia deserves respectful engagement.

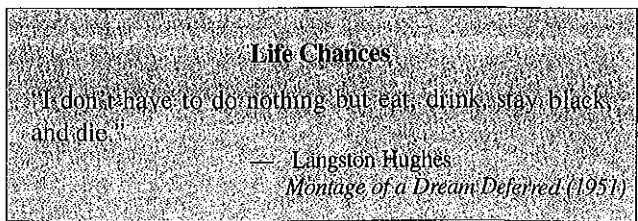
Instead of boycotting Thomas who, after all, is just another conservative justice who is advancing his views, we should reserve our vitriol for the politicians who cynically used the legacy of Justice Marshall to secure the appointment to the Supreme Court of a man committed to undoing much of that legacy. Justice Thomas' nomination to the bench could and should have been opposed on the merits; it was during his confirmation hearings that too many blacks lent Thomas cover and thereby rewarded the ideological right with a more conservative Supreme Court justice than any white person they could have hoped to appoint. So let's save the boycott for the next time former President Bush comes to campus. Meanwhile, as we suffer his tenure on the nation's highest court, let it remind us that the racial politics that reserved a "black seat" on the Supreme Court for Clarence Thomas has been mastered and exploited by the enemies of social justice.

#### **Respect the Position If Not the Man**

*Carol M. Swain is professor of law at Vanderbilt University. She is the author of the recently published book, The New White Nationalism in America: Its Challenge to Integration (Cambridge University Press, 2002):*

**T**he University of North Carolina's black faculty's decision to boycott Justice Clarence Thomas' speech brings to mind the words of the Prophet Hosea who cried: "My people are destroyed for lack of knowledge."

While the black faculty willingly, if not reluctantly, had attended past talks by Justices Sandra Day O'Connor and Antonin Scalia, they failed to accord similar respect to



Thomas, a fellow African American. For God's sake, respect the position if not the man.

Black leaders have themselves to blame for Clarence Thomas' presence on the highest court in the land. Had black leaders and opinion makers applied the same ideological and legal standards to his record as they routinely applied to white conservatives such as Robert Bork, they could have blocked his confirmation. Clarence Thomas was confirmed largely because black leaders applied a racial double standard to his record. Well-known black organizations dragged their feet about taking a position on whether or not he should be confirmed until it was too late to block the momentum. White Democratic senators looking for cues were forced to turn to their black constituents. Their black constituents supported Thomas. No one had provided them with a compelling reason not to do so. It is almost a sure bet that if black leaders had mobilized local black communities, the outcome might have been different.

In short, the University of North Carolina's black faculty made a mistake in boycotting Thomas' speech. Their collective boycott sets a poor example for students of all races. One purpose of law schools is to train individuals how to think clearly and how to engage in productive exchanges with persons holding differing views. It is most unfortunate that not a single member of the black faculty had the courage to demonstrate intellectual maturity on this matter. Thomas should be accorded the same respect as other members of the U.S. Supreme Court.

Clarence Thomas is now an associate justice of the United States Supreme Court, and however much I might disagree with some of his opinions, he has undeniably served competently for many years. He deserves the same respect in office that white justices routinely receive.

### Race, Representation, and the First Amendment

*Jerome McCristal Culp Jr., professor of law at Duke University School of Law, wrote:*

**W**e live in odd times. Clarence Thomas was invited to speak at the University of North Carolina Law School. The five black law professors at UNC decided not to attend the event. Instead, they participated in a teach-in before the event with students who were interested in understanding why they did not want to "honor" Clarence Thomas or the judicial philosophy that he has promulgated. They wrote a letter explain-

ing to the law school community exactly why they were not attending the Thomas lunch and talk. They did not tell students not to attend nor did they seek to keep anyone who could get into the closed proceedings from going. The letter they wrote to the law school community was leaked to the press.

Somehow these actions were seen by many as outside the bounds of appropriate behavior. The *Chicago Sun Times* criticized this protest in an article: "Intellectual Freedom Ends at University."

How can this mild protest draw such nasty and colorful criticism? (My favorite was the cartoon in the *Durham Morning Herald*, which showed the five black faculty acting like children.) The response to this protest cannot be about the size or nature of the protest. It was limited and did not invade anyone else's rights to listen to or participate in an event. The reason has more to do with what many people believe the role of black professors ought to be in the legal academy and what is appropriate protest for black people in the twenty-first century.

For generations the leaders of this country thought that they could prescribe appropriate leaders and protest for racial minorities. From the beginning of the modern

civil rights movement our national leaders have criticized the wisdom of black protest. As Martin Luther King noted in his *Letter From a Birmingham Jail*, black protest has never been seen as timely or appropriate by the establishment. This was true in 1955 in Montgomery, 1957 at Little Rock, and 1963 in Birmingham. In our country's history the largest and most powerful voices have always thought now was not the time for racial change. The actions of the UNC five is seen in that light as not being timely.

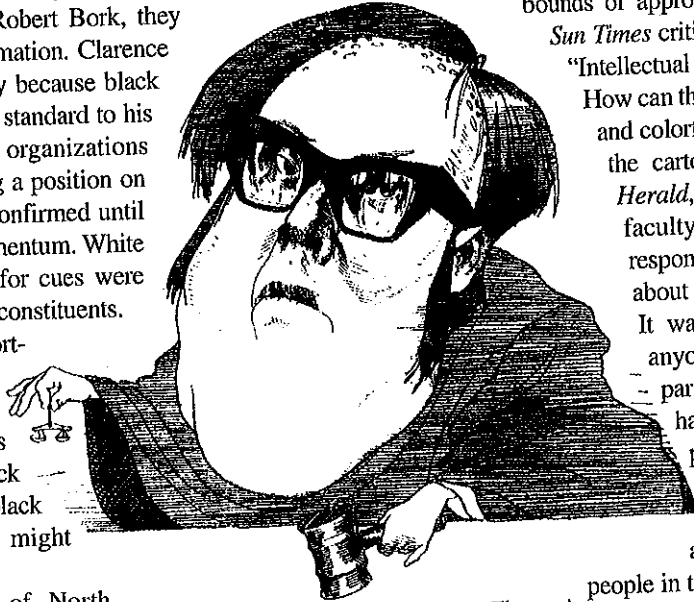
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*"For generations the leaders of this country thought they could prescribe appropriate leaders and protest for racial minorities."*

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The University of North Carolina was honoring Justice Thomas in the invitation it extended. Is it possible to attend the honorific celebration of the justice and not participate in his veneration? A reasonable answer is, certainly no. Protest is not the only honorable choice, but it certainly is as honorable as silently attending and supporting implicitly Justice Thomas' politics.

The establishment says to black people, "You are represent-



*Despite conservative views similar to Thomas' and a past that is marred by a record of support for racial segregation, William Rehnquist has not been the subject of campus boycotts.*

ed on the Supreme Court." My colleagues contest this representation when they just say no to Thomas' presence on their campus.

### Did They Do the Right Thing?

*Angela Mae Kupenda, associate professor of law at Mississippi College School of Law in Jackson, wrote:*

The black professors' only mistake occurred if they assumed that, like white professors, they would be found deserving of two core professorial rights: the right of academic freedom and the right to exercise individual moral responsibility. The harsh critics of the black professors' boycott of Justice Thomas' speech are trying to deny the professors these core professorial rights/duties that are ordinarily heaped upon white professors without reservation.

Are the black professors entitled to academic freedom? Not only are they entitled to academic freedom, they are obligated to exercise it. If academic freedom means anything, it means a law professor is at least entitled to assert his/her well-founded opinions regarding the validity of other viewpoints, especially the views or rulings of the judiciary. You see, practicing lawyers may not have this freedom, as they represent the positions of their clients and may hinder their clients' successes by publicly criticizing the views of judges. Law professors, thus, not only have an entitlement to academic freedom, they have an obligation of academic freedom. They have an obligation to question ideas, push the limits of the law, and take public stands as representatives, not of a paying client but of a "conscience" of the profession. Therefore, the five black professors were (a) entitled to disagree with the positions of Justice Thomas and (b) obligated to take a respectful public stance in disagreement. Like the boycotts of the civil rights movement, their public boycott of his speech was a public and respectful opposition.

Why then all the furor? Academic freedom is an easy obligation, and a highly protected right, when a law professor articulates the majority view in America. It is a harder obligation, and a less protected right, when one questions the status quo. It is a harder obligation in the face of others who try to purge black professors of their memory, and insight, in order to silence them or remold them as professors with colored skin but blinded eyes. It is even harder when law institutions want some "color" at high-profile occasions and pressure their few faculty of color to be present in complexion but absent in their own complexities. These professors resisted, though, any institutional and community pressure to conform, lest they would have lost (or at least misplaced) their academic freedom and would have faltered in their obligations to exercise this coveted freedom.

Finally, the five had individual moral responsibilities to act on conscience. Actions based on conscience will often lead to criticism. Rev. Dr. Martin Luther King Jr. was criticized for his

nonviolent and public boycotts. Those of us who are beneficiaries of these boycotts and blessed with academic freedom have a duty to exercise individual moral responsibility, even when it costs. This duty says that you don't climb a ladder and then pull it up behind you. You don't benefit from a life-giving struggle of others, without owning it and struggling for others. Blacks in positions of power, thus, have a duty to act on conscience even when others disagree.

So, in answer to the question, "Did they do the right thing?" Yes, they did. They chose to do the right thing, but, really, they had no choice.

### Offensive and Degrading Behavior

*Keith N. Hylton is a professor of law at Boston University School of Law. He replied:*

This is a sad story. I disagree with several of Justice Thomas' publicly expressed views, but I think he is entitled to his opinions, and to the extent they differ from mine they afford me a chance to consider a different perspective.

On matters of race, I assume Justice Thomas has the same goals and ultimate desires as the black professors at the University of North Carolina. The difference is in the details. He's looked at the social policies promoted by mainstream liberals and concluded that most of them fail to improve the welfare of poor blacks and whites. On this, I think the empirical evidence is largely on his side.

But the empirical evidence is beside the point. Black men and women should be free to adopt and publicly state whatever views they find persuasive, whether liberal or conservative. The notion that a black judge should be ostracized because he refuses to buy into mainstream liberal views is itself offensive and degrading to those who believe it. **JBBE**

### Don't Need No Man

"Now I tell you child, we Black women, we must be careful.  
Not too much out here for us you know?  
Sometimes, I believe I came out of the sea, the big ocean,  
while the waves were yelping and the sky screaming and  
I gave me a birth. You know, from water.  
Wasn't no man involved. Didn't need one. Only me and  
that yelping sea, bringing forth an opening in the sky in  
pain.  
You see, child, we Black women must be careful because I  
think sometimes we defy nature, and when we do that we  
have to be punished."

— from the poet Dolores Kendrick  
*Why the Woman Is Singing on the Corner*  
(Peter E. Randall, 2002)